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THE  
ENGLISH AND EMPIRE DIGEST  
WITH  
COMPLETE AND EXHAUSTIVE  
ANNOTATIONS.

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VOLUME XXXI.



# THE ENGLISH AND EMPIRE DIGEST

WITH  
COMPLETE AND EXHAUSTIVE  
ANNOTATIONS

BEING  
A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED  
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL  
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE  
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING  
COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE  
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN  
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XXXI.

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**In this Volume English Cases reported up to 1st June, 1926, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.**



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### LATIN INFORMATION.

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*See* EASEMENTS AND PROFITS À PRENDRE; FISHERIES; GAME; LANDLORD  
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*See* BASTARDY; CONFLICT OF LAWS.

## LETTERS.

*See* CONTRACT; EVIDENCE; POST OFFICE.

## LETTERS PATENT.

*See* CONSTITUTIONAL LAW; PATENTS AND INVENTIONS; PEERAGES AND  
DIGNITIES.

## REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. O. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 ( <i>e.g.</i> , [1891] A. O.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1904—1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) ( <i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. O.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. O.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. W. O. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Ball Ct. Cas.	Ball Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.

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Baild. ... ..	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B. ... ..	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R. ... ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	Eng.
Bar. & Arn. ... ..	Barron and Arnold's Election Cases, 1 vol., 1843—1846	Eng.
Bar. & Aust. ... ..	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch. ... ..	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	Eng.
Barn. K. B. ... ..	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes ... ..	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt. ... ..	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat. ... ..	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	Ir.
Beav. ... ..	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal. ... ..	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw. ... ..	Beawes's Lex Mercatoria	Eng.
Bell, C. C. ... ..	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess. ... ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol. ... ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec. ... ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App. ... ..	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe ... ..	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	Eng.
Belt's Sup. ... ..	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben. ... ..	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
Benl. ... ..	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Ber. ... ..	New Brunswick Reports (Berton)	Can.
Bing. ... ..	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng.
Bing. N. C. ... ..	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	Eng.
Biss. & Sm. ... ..	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas. ... ..	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch. ... ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com. ... ..	Blackstone's Commentaries	Eng.
Bl. D. & Osb. ... ..	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli. ... ..	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S. ... ..	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	Eng.
Bluett ... ..	Bluett's Isle of Man Cases	I. of M.
Bom. ... ..	Bombay High Court Reports	Ind.
Bom. A. C. ... ..	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. Cr. Ca. ... ..	Bombay Reports, Crown Cases	Ind.
Bom. O. C. ... ..	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P. ... ..	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
Bos. & P. N. R. ... ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	Eng.
Bott. ... ..	Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827	Eng.
Bourke ... ..	Bourke's Reports	Ind.
Br. & Col. Pr. Cas. ... ..	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract. ... ..	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr. ... ..	Sir R. Brooke's Abridgement	Eng.
Bro. C. C. ... ..	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep. ... ..	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C. ... ..	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas. ... ..	J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Supp. to Mor. ... ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop. ... ..	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing. ... ..	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F. ... ..	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun ... ..	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845	Scot.
Brown. & Lush. ... ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	Eng.
Brownl. ... ..	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce ... ..	Bruce's Decisions, Court of Session (Scotland), 1714—1715	Scot.

Buch.	...	...	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	...	...	...	S. Af.
Buch. A. C.	...	...	Buchanan's Reports of Appeal Court (Cape)	...	...	...	S. Af.
Buchan.	...	...	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	...	...	...	Scot.
Buck	...	...	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	...	...	...	Eng.
Bull. N. P.	...	...	Buller's Nisi Prius (published, London, 1772)	...	...	...	Eng.
Bulst.	...	...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	...	...	...	Eng.
Bunb.	...	...	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	...	...	...	Eng.
Burr.	...	...	Burrow's Reports, King's Bench, 5 vols., 1756—1772	...	...	...	Eng.
Burr. S. C.	...	...	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	...	...	...	Eng.
Burrell	...	...	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	...	...	...	Eng.
J. A.	...	...	Court of Appeal Reports, 3 vols., 1867—1877	...	...	...	N.Z.
J. & P.	...	...	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	...	...	...	Eng.
J. B.	...	...	Common Bench Reports, 18 vols., 1845—1850	...	...	...	Eng.
J. B. N. S.	...	...	Common Bench Reports, New Series, 20 vols., 1856—1865	...	...	...	Eng.
J. B. R.	...	...	Canadian Bankruptcy Reports Annotated, 1920—(current)	...	...	...	Can.
J. C. Ct. Cas.	...	...	Central Criminal Court Cases (Sessions Papers), 1834—1913	...	...	...	Eng.
J. L. Ch.	...	...	Common Law Chambers	...	...	...	Can.
J. L. J.	...	...	Cape Law Journal	...	...	...	S. Af.
J. L. J. N. S.	...	...	Canada Law Journal, New Series, 1865—(current)	...	...	...	Can.
J. L. J. O. S.	...	...	Canada Law Journal, Old Series, 10 vols., 1855—1864	...	...	...	Can.
J. L. R.	...	...	Common Law Reports, 3 vols., 1853—1855	...	...	...	Eng.
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J. L. R.	...	...	Calcutta Law Reporter	...	...	...	Ind.
J. L. T.	...	...	Canadian Law Times	...	...	...	Can.
J. L. T. Occ. N.	...	...	Canadian Law Times, Occasional Notes	...	...	...	Can.
J. P.	...	...	Upper Canada Common Pleas	...	...	...	Can.
J. P. D.	...	...	Law Reports, Common Pleas Division, 5 vols., 1875—1880	...	...	...	Eng.
C. P. D.	...	...	Cape Provincial Division Reports	...	...	...	S. Af.
C. R. [date] A. C.	...	...	Canadian Reports, Appeal Cases	...	...	...	Can.
C. T. R.	...	...	Cape Times Reports of the Supreme Court of the Cape of Good Hope	...	...	...	S. Af.
C. W. N.	...	...	Calcutta Weekly Notes	...	...	...	Ind.
Cab. & El.	...	...	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	...	...	...	Eng.
Cald. Mag. Cas.	...	...	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	...	...	...	Eng.
Calth.	...	...	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	...	...	...	Eng.
Cam. Cas.	...	...	Cameron's Supreme Court Cases	...	...	...	Can.
Cam. Prac.	...	...	Cameron's Supreme Court Practice	...	...	...	Can.
Camp.	...	...	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	...	...	...	Eng.
Can. Com. Cas.	...	...	Commercial Law Reports of Canada	...	...	...	Can.
Can. Crim. Cas.	...	...	Canadian Criminal Cases, Annotated	...	...	...	Can.
Can. Gaz.	...	...	Canadian Gazette	...	...	...	Can.
Can. Ry. Cas.	...	...	Canadian Railway Cases	...	...	...	Can.
Car. & Kir.	...	...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	...	...	...	Eng.
Car. & M.	...	...	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	...	...	...	Eng.
Car. C. L.	...	...	Carrington's Treatise on Criminal Law	...	...	...	Can.
Card. Doc. Ann.	...	...	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	...	...	...	Eng.
Carl.	...	...	New Brunswick Reports (Carleton)	...	...	...	Can.
Carp. Pat. Oas.	...	...	Carpmael's Patent Cases, 2 vols., 1602—1842	...	...	...	Eng.
Cart.	...	...	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	...	...	...	Eng.
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Cas. Pract. K. B.	...	...	Cases of Practice, King's Bench, 1 vol., 1655—1775	...	...	...	Eng.
Cas. Sett.	...	...	Cases of Settlements and Removals, 1 vol., 1685—1727	...	...	...	Eng.
Cas. temp. Finch	...	...	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680	...	...	...	Eng.
Cas. temp. King	...	...	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733	...	...	...	Eng.
Cas. temp. Talb.	...	...	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737	...	...	...	Eng.
Cass. Dig.	...	...	Cassell's Digest	...	...	...	Can.
Ch. (preceded by date)	...	...	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)	...	...	...	Eng.
Ch. App.	...	...	Law Reports, Chancery Appeals, 10 vols., 1865—1875	...	...	...	Eng.
Ch. Cas. in Ch.	...	...	Choyce Cases in Chancery, 1557—1606	...	...	...	Eng.
Ch. Ch.	...	...	Upper Canada Chancery Chambers Reports	...	...	...	Can.
Ch. D.	...	...	Law Reports, Chancery Division, 45 vols., 1875—1890	...	...	...	Eng.
Ch. Rob.	...	...	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	...	...	...	Eng.
Char. Cham. Cas.	...	...	Charley's Chamber Cases, 2 vols., 1875—1876	...	...	...	Eng.
Char. Pr. Cas.	...	...	Charley's New Practice Reports, 3 vols., 1875—1876	...	...	...	Eng.
Chip.	...	...	New Brunswick Reports (Chipman)	...	...	...	Can.

# xvi      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Chit. ... ..	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822...	Eng.
Cl. & Fin. ... ..	Clark and Fennelly's Reports, House of Lords, 12 vols., 1831—1846	Eng.
Cl. & Sc. Dr. Cas. ... ..	Clark and Scully's Drainage Cases ... ..	Can.
Clay. ... ..	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick. ... ..	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph. ... ..	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A. ... ..	Cook's Lower Canada Admiralty Court Cases ... ..	Can.
Co. Ent. ... ..	Coke's Entries ... ..	Eng.
Co. Inst. ... ..	Coke's Institutes ... ..	Eng.
Co. L. J. ... ..	Colonial Law Journal ... ..	N.Z.
Co. Litt. ... ..	Coke on Littleton (1 Inst.) ... ..	Eng.
Co. Rep. ... ..	Coke's Reports, 13 parts, 1572—1616 ... ..	Eng.
Coch. ... ..	Nova Scotia Reports (Cochran) ... ..	Can.
Cockb. & Rowe ... ..	Cockburn and Rowe's Election Cases, 1 vol., 1833 ... ..	Eng.
Coll. ... ..	Collyer's Reports, Chancery, 2 vols., 1844—1846 ... ..	Eng.
Coll. Jurid. ... ..	Collectanea Juridica, 2 vols. ... ..	Eng.
Colles ... ..	Colles' Cases in Parliament, 1 vol., 1697—1713 ... ..	Eng.
Colt. ... ..	Coltman's Registration Cases, 1 vol., 1879—1885 ... ..	Eng.
Com. ... ..	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740 ... ..	Eng.
Com. Cas. ... ..	Commercial Cases, 1895—(current) ... ..	Eng.
Com. Dig. ... ..	Comyns' Digest ... ..	Eng.
Comb. ... ..	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law. ... ..	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843 ... ..	Ir.
Cong. Dig. ... ..	Congdon's Digest ... ..	Can.
Const ... ..	Const's edition of Bott's Poor Laws, 3 vols., 1807 ... ..	Eng.
Cooke & Al. ... ..	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834 ... ..	Ir.
Cooke, Pr. Cas. ... ..	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg. ... ..	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742 ... ..	Eng.
Coop. G. ... ..	G. Cooper's Reports, Chancery, 1 vol., 1792—1815 ... ..	Eng.
Coop. Pr. Cas. ... ..	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. temp. Brough. ... ..	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834 ... ..	Eng.
Coop. temp. Cott. ... ..	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases) ... ..	Eng.
Cor. ... ..	Coryton's Reports ... ..	Ind.
Corb. & D. ... ..	Corbett and Daniell's Election Cases, 1 vol., 1819 ... ..	Eng.
Correspondances Jud. ... ..	Correspondances Judiciaires ... ..	Can.
Couper ... ..	Couper's Justiciary Reports (Scotland), 5 vols., 1808—1885 ... ..	Scot.
Cout. ... ..	Coutlees' Unreported Cases ... ..	Can.
Cout. Dig. ... ..	Coutlees' Digest ... ..	Can.
Cowp. ... ..	Cowper's Reports, King's Bench, 2 vols., 1774—1778 ... ..	Eng.
Cox & Atk. ... ..	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	Eng.
Cox, C. C. ... ..	E. W. Cox's Criminal Law Cases, 1843—(current) ... ..	Eng.
Cox, Eq. Cas. ... ..	S. C. Cox's Equity Cases, 2 vols., 1745—1797 ... ..	Eng.
Cox, M. & H. ... ..	Cox, Macrae, and Hertalet's County Courts Cases and Appeals, 1 vol., 1846—1852 ... ..	Eng.
Cr. & J. ... ..	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M. ... ..	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. & Ph. ... ..	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 ... ..	Eng.
Cr. App. Rep. ... ..	Cohen's Criminal Appeal Reports, 1908—(current) ... ..	Eng.
Cr. M. & R. ... ..	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835 ... ..	Eng.
Craw. & D. ... ..	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
Craw. & D. Abr. C. ... ..	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas. ... ..	Cresswell's Insolvency Cases, 1 vol., 1827—1829 ... ..	Eng.
Cripps' Church Cas. ... ..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850 ... ..	Eng.
Cro. Car. ... ..	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641 ... ..	Eng.
Cro. Eliz. ... ..	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603 ... ..	Eng.
Cro. Jac. ... ..	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625 ... ..	Eng.
Cru. Dig. ... ..	Cruise's Digest of the Law of Real Property, 7 vols. ... ..	Eng.
Cunn. ... ..	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt. ... ..	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844 ... ..	Eng.
D. ... ..	Duxbury's Reports of the High Court of the South African Republic ... ..	S. Af.
D. C. A. ... ..	Dorlon's Queen's Bench Reports ... ..	Can.
D. L. R. ... ..	Dominion Law Reports ... ..	Can.

Dal. ... ..	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574 ...	Eng.
Dalr. ... ..	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720 ...	Scot.
Dan. ... ..	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 ...	Eng.
Dan. & Ll. ... ..	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829 ...	Eng.
Dav. & Mer. ... ..	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844 ...	Eng.
Dav. Ir. ... ..	Davy's (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611 ...	Ir.
Dav. Pat. Cas. ... ..	Davies' Patent Cases, 1 vol., 1785—1816 ...	Eng.
Day ... ..	Day's Election Cases, 1 vol., 1802—1803 ...	Eng.
Dea. & Sw. ... ..	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857 ...	Eng.
Deac. ... ..	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840 ...	Eng.
Deac. & Ch. ... ..	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835 ...	Eng.
Dears. & B. ... ..	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858 ...	Eng.
Dears. C. C. ... ..	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856 ...	Eng.
Deas & And. ... ..	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832 ...	Scot.
De G. ... ..	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848 ...	Eng.
De G. & J. ... ..	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm. ... ..	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J. ... ..	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862 ...	Eng.
De G. J. & Sm. ... ..	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865 ...	Eng.
De G. M. & G. ... ..	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857 ...	Eng.
Delane ... ..	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
Den. ... ..	Denison's Crown Cases Reserved, 2 vols., 1844—1852 ...	Eng.
Dick. ... ..	Dickens' Reports, Chancery, 2 vols., 1559—1798 ...	Eng.
Dirl. ... ..	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677 ...	Scot.
Dods. ... ..	Dodson's Reports, Admiralty, 2 vols., 1811—1822 ...	Eng.
Donnelly ... ..	Donnelly's Reports, Chancery, 1 vol., 1836—1837 ...	Eng.
Doug. El. Cas. ... ..	Douglas' Election Cases, 4 vols., 1774—1776 ...	Eng.
Doug. K. B. ... ..	Douglas' Reports, King's Bench, 4 vols., 1778—1785 ...	Eng.
Dow ... ..	Dow's Reports, House of Lords, 6 vols., 1812—1818 ...	Eng.
Dow & Cl. ... ..	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832 ...	Eng.
Dow. & L. ... ..	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849 ...	Eng.
Dow. & Ry. K. B. ... ..	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827 ...	Eng.
Dow. & Ry. M. C. ... ..	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827 ...	Eng.
Dow. & Ry. N. P. ... ..	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823 ...	Eng.
Dowl. ... ..	Dowling's Practice Reports, 9 vols., 1830—1841 ...	Eng.
Dowl. N. S. ... ..	Dowling's Practice Reports, New Series, 2 vols., 1841—1843 ...	Eng.
Dr. & Wal. ... ..	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841 ...	Ir.
Dr. & War. ... ..	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843 ...	Ir.
Dra. ... ..	Draper's King's Bench Reports ...	Can.
Drew. ... ..	Drewry's Reports, Chancery, 4 vols., 1852—1859 ...	Eng.
Drew. & Sm. ... ..	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 ...	Eng.
Drinkwater ... ..	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury temp. Nap. ... ..	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859 ...	Ir.
Drury temp. Sug. ... ..	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844 ...	Ir.
Dugd. Orig. ... ..	Dugdale's Origines Juridiciales ...	Eng.
Dunl. (Ct. of Sess.) ... ..	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862 ...	Scot.
Dunning ... ..	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Eng.
Durie ... ..	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642 ...	Scot.
Dyer ... ..	Dyer's Reports, King's Bench, 3 vols., 1513—1581 ...	Eng.
E. A. ... ..	Upper Canada Error and Appeal ...	Can.
E. B. ... ..	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858 ...	Eng.
E. E. ... ..	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861 ...	Eng.
E. & E. ... ..	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860 ...	Eng.
E. C. ... ..	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. L. ... ..	South African Law Reports, Eastern Districts Local Division ...	S. Af.
E. R. ... ..	Eastern Law Reporter ...	Can.
E. (or Eng. Rep.) ... ..	English Reports ...	Eng.
E. ... ..	Ontario Election Reports ...	Can.
E. & Y. ... ..	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825 ...	Eng.

xviii      **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

East	...	...	East's Reports, King's Bench, 16 vols., 1800—1812	...	Eng.
East, P. O.	...	...	East's Pleas of the Crown	...	Eng.
Ecc. & Ad.	...	...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	...	Eng.
Eden	...	...	Eden's Reports, Chancery, 2 vols., 1757—1766	...	Eng.
Edgar	...	...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	...	Scot.
Edw.	...	...	Edwards' Reports, Admiralty, 1 vol., 1808—1812	...	Eng.
Elchies	...	...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	...	Scot.
Emden's B. C.	...	...	Emden's Building Contracts, Building Leases and Building Statutes	...	Eng.
Eng. Pr. Cas.	...	...	Roscoe's English Prize Cases, 2 vols., 1745—1858	...	Eng.
Eq. Cas. Abr.	...	...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	...	Eng.
Eq. Rep.	...	...	Equity Reports, 3 vols., 1853—1855	...	Eng.
Esp.	...	...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	...	Eng.
Ex. D.	...	...	Law Reports, Exchequer Division, 5 vols., 1875—1880	...	Eng.
Exch.	...	...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	...	Eng.
Exch. C. R.	...	...	Exchequer Court Reports	...	Can.
F. (Ct. of Sess.)	...	...	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	...	Scot.
F.	...	...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	...	S. Af.
F. & F.	...	...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	...	Eng.
F. N. D.	...	...	Pinnemore's Notes and Digest of Natal Cases, 1863—1867	...	S. Af.
Fac. Coll.	...	...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	...	Scot.
Falc.	...	...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	...	Scot.
Falc. & Fitz.	...	...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	...	Eng.
Fenton	...	...	Fenton, Important Judgments	...	N.Z.
Ferg.	...	...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	...	Scot.
Fitz. Nat. Brev.	...	...	Fitzherbert's Natura Brevium	...	Eng.
Fitz-G.	...	...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	...	Eng.
Fl. & K.	...	...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	...	Ir.
Fonbl.	...	...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	...	Eng.
For.	...	...	Forrest's Reports, Exchequer, 1 vol., 1800—1801	...	Eng.
Forb.	...	...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	...	Scot.
Fort. De Laud.	...	...	Fortesque, De Laudibus Legum Angliæ	...	Eng.
Fortes. Rep.	...	...	Fortescue's Reports, fol., 1 vol., 1692—1736	...	Eng.
Post.	...	...	Foster's Crown Cases, 1 vol., 1708—1760	...	Eng.
Fount.	...	...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	...	Scot.
Fox & S. Ir.	...	...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	...	Ir.
Fox & S. Reg.	...	...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	...	Eng.
Fras.	...	...	Fraser (Simon), Election Cases, 2 vols., 1793	...	Eng.
Freem. Ch.	...	...	Freeman's Reports, Chancery, 1 vol., 1660—1706	...	Eng.
Freem. K. B.	...	...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	...	Eng.
G.	...	...	Gregorowski's Reports of the High Court of the Orange Free State from 1883	...	S. Af.
G. & R.	...	...	Nova Scotia Reports (Geldert & Russell)	...	Can.
G. I. Dig.	...	...	General Index Digest	...	Can.
G. W. D.	...	...	South African Law Reports, Griqualand West Local Division	...	S. Af.
G. W. L.	...	...	South African Law Reports, Griqualand West Local Division	...	S. Af.
Gal. & Dav.	...	...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	...	Eng.
Gale	...	...	Gale's Reports, Exchequer, 2 vols., 1835—1836	...	Eng.
Gaz. L. R.	...	...	New Zealand Gazette Law Reports	...	N.Z.
Geld. Dig.	...	...	Geldert's Digest	...	Can.
Gib. Cod.	...	...	Gibson's Codex Juris Ecclesiastici Anglicani	...	Eng.
Giff.	...	...	Giffard's Reports, Chancery, 5 vols., 1857—1865	...	Eng.
Gilb.	...	...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	...	Eng.
Gilb. C. P.	...	...	Gilbert's History and Practice of the Court of Common Pleas	...	Eng.
Gilb. Ch.	...	...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	...	Eng.
Gilm. & F.	...	...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	...	Scot.
Gl. & J.	...	...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	...	Eng.
Glanv.	...	...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	...	Eng.
Glanv. El. Cas.	...	...	Glanville's Election Cases, 1 vol., 1623—1624	...	Eng.
Glascock	...	...	Glascock's Reports (Ireland), 1 vol., 1891—1892	...	Ir.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xix

db. ...	...	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
ouldsb. ...	...	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
ow ...	...	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
iffin's Patent Cases	...	Upper Canada Chancery (Grant)	Can.
will. ...	...	Griffin's Patent Cases, 1884—1887	Eng.
	...	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
	...	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
& C. ...	...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
& N. ...	...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
& Tw. ...	...	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	Eng.
& W. ...	...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
B. R. (preceded by date)	...	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 ( <i>e.g.</i> , [1915] H. B. R.)	Eng.
C. ...	...	Reports of the High Court of Griqualand West	S. Af.
E. C. ...	...	Hodgin's Election Reports	Can.
L. Cas. ...	...	Clark's Reports, House of Lords, 11 vols., 1847—1866	Eng.
ag. Adm. ...	...	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
ag. Con. ...	...	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
ag. Ecc. ...	...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	Eng.
alles ...	...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
ale, C. L. ...	...	Hale's Common Law	Eng.
ale, P. C. ...	...	Hale's Pleas of the Crown, 2 vols.	Eng.
an. ...	...	New Brunswick Reports (Hannay)	Can.
ar. & Ruth. ...	...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	Eng.
ar. & W. ...	...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
arc. ...	...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
ard. ...	...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
are ...	...	Hare's Reports, Chancery, 11 vols., 1841—1853	Eng.
awk. P. C. ...	...	Hawkins's Pleas of the Crown, 2 vols.	Eng.
ay ...	...	Hay's Reports	Ind.
ay & Marr. ...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
aycs ...	...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
ayes & Jo. ...	...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
em. & M. ...	...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
et. ...	...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
ob. ...	...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	Eng.
odg. ...	...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	Eng.
og. ...	...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	Ir.
olt, Adm. ...	...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
olt, Eq. ...	...	W. Holt's Equity Reports, 2 vols., 1845...	Eng.
olt, K. B. ...	...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
olt, N. P. ...	...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
ome, Ct. of Sess. ...	...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
ong Kong L. R. ...	...	Hong Kong Reports	Hong Kong
op. & Colt. ...	...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
op. & Ph. ...	...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
orn & H. ...	...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
ov. Supp. ...	...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
ow. C. ...	...	Howard's Chancery Practice	Ir.
ow. C. S. ...	...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	Ir.
ow. E. E. ...	...	Howard's Equity Exchequer	Ir.
ow. P. L. ...	...	Howard on the Popery Laws	Ir.
ud. & B. ...	...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
udson's B. C. ...	...	Hudson on Building Contracts, 2 vols.	Eng.
ume ...	...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
ut. ...	...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng.
y. Bl. ...	...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
yde ...	...	Hyde's Reports	Ind.
C. L. R. ...	...	Irish Common Law Reports, 17 vols., 1849—1866	Ir.
Ch. R. ...	...	Irish Chancery Reports, 17 vols., 1850—1867	Ir.
Eq. R. ...	...	Irish Equity Reports, 13 vols., 1838—1851	Ir.

## xx      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

I. L. R. ... ..	Irish Law Reports, 13 vols., 1838—1851	Ir.
I. L. R. (Vol.) All. ... ..	Indian Law Reports, Allahabad	Ind.
I. L. R. (Vol.) Bom. ... ..	Indian Law Reports, Bombay	Ind.
I. L. R. (Vol.) Calc. ... ..	Indian Law Reports, Calcutta	Ind.
I. L. R. (Vol.) Lah. ... ..	Indian Law Reports, Lahore	Ind.
I. L. R. (Vol.) Mad. ... ..	Indian Law Reports, Madras	Ind.
I. L. R. (Vol.) Pat. ... ..	Indian Law Reports, Patna	Ind.
I. L. R. (Vol.) Ran. ... ..	Indian Law Reports, Rangoon	Ind.
I. L. T. ... ..	Irish Law Times, 1867—(current)	Ir.
I. L. T. Jo. ... ..	Irish Law Times Journal, 1867—(current)	Ir.
I. R. (preceded by date) ... ..	Irish Reports, since 1893 ( <i>e.g.</i> , [1894] 1 I. R.)	Ir.
I. R. (Vol.) C. L. ... ..	Irish Reports, Common Law, 11 vols., 1866—1877	Ir.
I. R. Eq. ... ..	Irish Reports, Equity, 11 vols., 1866—1877	Ir.
I. R., R. & L. ... ..	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	Ir.
Ind. Awards ... ..	Industrial Awards Recommendations	N.Z.
Ind. Jur. N. S. ... ..	Indian Jurist, New Series	Ind.
Ind. Jur. O. S. ... ..	Indian Jurist, Old Series	Ind.
Ir. Cir. Rep. ... ..	Reports of Irish Circuit Cases, 1 vol., 1841—1843	Ir.
Ir. Jur. ... ..	Irish Jurist, 18 vols., 1849—1866	Ir.
Ir. L. Rec. 1st ser. ... ..	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	Ir.
Ir. L. Rec. N. S. ... ..	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	Ir.
Irv. ... ..	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	Scot.
J. Bridg. ... ..	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	Eng.
J. D. R. ... ..	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	S. Af.
J. P. ... ..	Justice of the Peace, 1837—(current)	Eng.
J. P. Jo. ... ..	Justice of the Peace (Weekly Notes of Cases)	Eng.
J. R. ... ..	Jurist Reports	N.Z.
J. R. N. S. ... ..	Jurist Reports, New Series	N.Z.
J. Shaw, Just. ... ..	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	Scot.
Jac. ... ..	Jacob's Reports, Chancery, 1 vol., 1821—1823	Eng.
Jac. & W. ... ..	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	Eng.
James ... ..	Nova Scotia Reports (James)	Can.
Jebb & B. ... ..	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	Ir.
Jebb & S. ... ..	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	Ir.
Jebb, C. C. ... ..	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	Ir.
Jebb, Cr. & Pr. Cas. ... ..	Jebb's Crown and Presentment Cases	Ir.
Jenk. ... ..	Jenkins' Reports, 1 vol., 1220—1623	Eng.
Jo. & Car. ... ..	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	Eng.
Jo. & Lat. ... ..	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	Ir.
Jo. Ex. Ir. ... ..	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	Ir.
John. ... ..	Johnson's Reports, Chancery, 1 vol., 1858—1860	Eng.
John. & H. ... ..	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	Eng.
Jur. ... ..	Jurist Reports, 18 vols., 1837—1854	Eng.
Jur. N. S. ... ..	Jurist Reports, New Series, 12 vols., 1855—1867	Eng.
K. ... ..	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	S. Af.
K. & G. ... ..	Keane and Grant's Registration Cases, 1 vol., 1854—1862	Eng.
K. & J. ... ..	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	Eng.
K. B. (preceded by date) ... ..	Law Reports, King's Bench Division, since 1900 ( <i>e.g.</i> , [1901] 2 K. B.)	Eng.
Kames, Dict. Dec. ... ..	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	Scot.
Kames, Rem. Dec. ... ..	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	Scot.
Kames, Sel. Dec. ... ..	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	Scot.
Kay ... ..	Kay's Reports, Chancery, 1 vol., 1853—1854	Eng.
Kebl. ... ..	Keble's Reports, fol., 3 vols., 1661—1677	Eng.
Keen ... ..	Keen's Reports, Rolls Court, 2 vols., 1836—1838	Eng.
Keil. ... ..	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	Eng.
Kel. ... ..	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	Eng.
Kel. W. ... ..	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	Eng.
Keny. ... ..	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	Eng.
Keny. Ch. ... ..	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	Eng.
Kerr ... ..	New Brunswick Reports (Kerr)	Can.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Kilkerran ... ..	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	
Kn. & Omb. ... ..	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	Scot.
Knapp ... ..	Knapp's Reports, Privy Council, 3 vols., 1829—1838	Eng.
Knox ... ..	Knox's Reports	Eng.
Konst. & W. Rat. App.	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Aus.
Konst. Rat. App. ...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	Eng.
L. & G. temp. Plunk. ...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Eng.
L. & G. temp. Sugd. ...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb. ... ..	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	Ir.
L. C. & M. Gaz. ... ..	Local Courts and Municipal Gazette	Eng.
L. C. J. ... ..	Lower Canada Jurist	Can.
L. C. L. J. ... ..	Lower Canada Law Journal	Can.
L. C. R. ... ..	Lower Canada Reports	Can.
L. G. R. ... ..	Local Government Reports, 1902—(current)	Can.
L. J. Adm. ... ..	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy. ... ..	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C. ... ..	Law Journal (County Courts Reporter), 1912—(current)	Eng.
L. J. C. P. ... ..	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch. ... ..	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl. ... ..	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex. ... ..	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq. ... ..	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B. ...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C. ... ..	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C. ... ..	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S. ... ..	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P. ... ..	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M. ... ..	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C. ... ..	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A. ... ..	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo. ... ..	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R. ... ..	Leader Law Reports	S. Af.
L. M. & P. ... ..	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N. ... ..	Legal News	Can.
L. R. A. & E. ... ..	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R. ... ..	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	Eng.
L. R. C. P. ... ..	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq. ... ..	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch. ... ..	Law Reports, Exchequer, 10 vols., 1865—1875	Eng.
L. R. H. L. ... ..	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App. ... ..	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir. ... ..	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D. ... ..	Law Reports, Probate and Divorce, 3 vols., 1865—1875	Eng.
L. R. P. C. ... ..	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B. ... ..	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B. ... ..	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div. ... ..	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1866—1875	Eng.
L. T. ... ..	Law Times Reports, 1859—(current)	Eng.
L. T. Jo. ... ..	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S. ... ..	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th. ... ..	La Themis	Can.
Lane ... ..	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat. ... ..	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Laws. Reg. Cas. ... ..	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym. ... ..	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca. ... ..	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Leach ... ..	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee ... ..	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
Lee temp. Hard. ... ..	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.

Leg. Rep.	...	Legal Reporter	...	Ir.
Legge	...	Legge's Reports	...	Aus.
Leon.	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	...	Eng.
Lev.	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1698	...	Eng.
Lew. C. C.	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	Eng.
Ley	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	Eng.
Lib. Ass.	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	Eng.
Lilly	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	Eng.
Litt.	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	Eng.
Lloyd, L. R.	...	Lloyd's List Law Reports, 1919—(current)	...	Eng.
Lloyd, Pr. Cas.	...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	...	Eng.
Lofft	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	Eng.
Long. & T.	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	...	Ir.
Lords Journals	...	Journals of the House of Lords	...	Eng.
Lud. E. C.	...	Luder's Election Cases, 3 vols., 1784—1787	...	Eng.
Lumley, P. L. C.	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	Eng.
Lush.	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	Eng.
Lut.	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	Eng.
Lut. Reg. Cas.	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	Eng.
Lynd.	...	Lyndwood, Provinciale, fol., 1 vol.	...	Eng.
M.	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	S. Af.
M. & S.	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	Eng.
M. & W.	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	Eng.
M. C. R.	...	Montreal Condensed Reports	...	Can.
M. H. C. R.	...	Madras High Court Reports	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	Montreal Law Reports, King's Bench or Queen's Bench	...	Can.
M. L. R. (Vol.) S. C.	...	Montreal Law Reports, Superior Court	...	Can.
M. M. Cas.	...	Martin's Reports of Mining Cases	...	Can.
Mac.	...	Macassey's New Zealand Reports	...	N.Z.
Mac. & G.	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	...	Eng.
Mac. & H.	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	Eng.
M'Cle.	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	Eng.
M'Cle. & Yo.	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	...	Eng.
Macfarlane	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	Scot.
Macl. & Rob.	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	Scot.
Macph. (Ct. of Sess.)	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	...	Scot.
Macq.	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	...	Scot.
Macr.	...	Macrory's Patent Cases, 2 parts, 1847—1856	...	Eng.
Mad.	...	Madras High Court Reports	...	Ind.
Madd.	...	Maddock's Reports, Chancery, 6 vols., 1815—1821	...	Eng.
Madd. & G.	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	Eng.
Madox	...	Madox's Formulæ Anglicanum	...	Eng.
Madox, Exch.	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	Eng.
Mag.	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	Eng.
Man. & G.	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	Eng.
Man. & Ry. K. B.	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	Eng.
Man. & Ry. M. C.	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	Eng.
Man. L. J.	...	Manitoba Law Journal	...	Can.
Man. L. R.	...	Manitoba Law Reports	...	Can.
Man. R. temp. Wood	...	Manitoba Reports temp. Wood	...	Can.
Mans.	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	Eng.
Mar. L. C.	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	Eng.
March	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	...	Eng.
Marr.	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	Eng.
Marsh.	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	Eng.
Marsh.	...	Marshall's Reports	...	Ind.
Mayn.	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	Eng.
Meg.	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	Eng.

Men. ...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
Mer. ...	Merivale's Reports, Chancery, 3 vols., 1815—1817	Eng.
Milw. ...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	Ir.
Mod. Rep. ...	Modern Reports, 12 vols., 1669—1755	Eng.
Mol. ...	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831	Ir.
Mont. ...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	Eng.
Mont. & A. ...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	Eng.
Mont. & B. ...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch. ...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M. ...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De G. ...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P. ...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S. ...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App. ...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. C. C. ...	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S. ...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M. ...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R. ...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C. ...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P. ...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B. ...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict. ...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr. ...	Morrell's Reports, Bankruptcy, 19 vols., 1884—1893	Eng.
Mos. ...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep. ...	Municipal Reports	Can.
Murd. Epit. ...	Murdoch's Epitome	Can.
Murp. & H. ...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr. ...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr. ...	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K. ...	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. (preceded by date) ...	Northern Ireland Law Reports, 1925—(current) ( <i>e.g.</i> , [1925] N.)	Ir.
N. A. C. ...	Native Appeal Cases	S. Af.
N. & S. ...	Nichols and Stop's Reports (Tasmania)	Tasmania
N. B. Dig. ...	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep. ...	New Brunswick Equity Reports	Can.
N. B. R. ...	New Brunswick Reports	Can.
N. B. R. (All.) ...	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.) ...	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.) ...	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.) ...	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.) ...	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr) ...	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.) ...	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.) ...	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.) ...	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.) ...	New Brunswick Reports (Trueman)	Can.
N. L. R. ...	Natal Law Reports	S. Af.
N. P. D. ...	South African Law Reports, Natal Provincial Division	S. Af.
N. S. R. ...	Nova Scotia Reports	Can.
N. S. R. (Coch.) ...	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & O.) ...	Nova Scotia Reports (Geldert and Oxley)	Can.
N. S. R. (G. & R.) ...	Nova Scotia Reports (Geldert and Russell)	Can.
N. S. R. (James) ...	Nova Scotia Reports (James)	Can.
N. S. R. (Old.) ...	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.) ...	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.) ...	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.) ...	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad. ...	New South Wales Reports, Admiralty	Aus.
N. S. W. B. ...	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas. ...	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq. ...	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtrn. Cas. ...	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R. ...	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts. ...	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R. (Eq.) ...	New South Wales Supreme Court Reports (Equity)	Aus.
N. S. W. S. C. R. (L.) ...	New South Wales Supreme Court Reports (Law)	Aus.
N. S. W. S. C. R. N. S. ...	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N. ...	New South Wales Weekly Notes	Aus.
N. W. ...	North-Western Provinces High Court Reports	Ind.
N. W. T. R. ...	North-West Territories Reports	Can.
N. Z. Jur. ...	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law ...	New Zealand Jurist Mining Law	N.Z.

# xxiv      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

N. Z. Jur. N. S. ...	...	New Zealand Jurist, New Series ... ..	N.Z.
N. Z. L. R. ...	...	New Zealand Law Reports, 1883—(current) ... ..	N.Z.
N. Z. L. R. C. A. ...	...	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887 ... ..	N.Z.
Nels. ... ..	...	Nelson's Reports, Chancery, 1 vol., 1625—1693 ... ..	Eng.
Nev. & M. K. B. ...	...	Neville and Manning's Reports, King's Bench, 6 vols., 1832—1836 ... ..	Eng.
Nev. & M. M. C. ...	...	Neville and Manning's Magistrates' Cases, 3 vols., 1832—1836 ... ..	Eng.
Nev. & P. K. B. ...	...	Neville and Perry's Reports, King's Bench, 3 vols., 1836—1838 ... ..	Eng.
Nev. & P. M. C. ...	...	Neville and Perry's Magistrates' Cases, 1 vol., 1836—1837 ... ..	Eng.
New Mag. Cas. ...	...	New Magistrates' Cases (Bittleston, Wise and Farnell), 5 vols., 1844—1850 ... ..	Eng.
New Pract. Cas. ...	...	New Practice Cases (Bittleston and others), 3 vols., 1844—1848 ... ..	Eng.
New Rep. ... ..	...	New Reports, 6 vols., 1802—1865 ... ..	Eng.
New Sess. Cas. ...	...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851 ... ..	Eng.
Nfld. L. R. ... ..	...	Newfoundland Reports ... ..	Nfld.
Nolan ... ..	...	Nolan's Magistrates' Cases, 1 vol., 1791—1793 ... ..	Eng.
Notes of Cases ...	...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850 ... ..	Eng.
Noy ... ..	...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649 ... ..	Eng.
O. B. & F. ... ..	...	Ollivier Bell and Fitzgerald's Reports ... ..	N.Z.
O. B. S. P. ... ..	...	Old Bailey Session Papers ... ..	Eng.
O. Bridg. ... ..	...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1600—1666 ... ..	Eng.
O. F. S. ... ..	...	Reports of the High Court of the Orange Free State, 1879—1883 ... ..	S. Af.
O. L. R. ... ..	...	Ontario Law Reports ... ..	Can.
O'M. & H. ... ..	...	O'Malley and Hardcastle's Election Cases, 1869—(current) ... ..	Eng.
O. P. D. ... ..	...	South African Law Reports, Orange Free State Provincial Division ... ..	S. Af.
O. R. ... ..	...	Ontario Reports ... ..	Can.
O. R. ... ..	...	Official Reports of the South African Republic, 1894—1899 ... ..	S. Af.
O. R. C. ... ..	...	Reports of the High Court of the Orange River Colony ... ..	S. Af.
O. S. ... ..	...	Upper Canada Queen's Bench, Old Series ... ..	Can.
O. W. N. ... ..	...	Ontario Weekly Notes ... ..	Can.
O. W. R. ... ..	...	Ontario Weekly Reporter ... ..	Can.
Old. ... ..	...	Nova Scotia Reports (Oldrights) ... ..	Can.
Ont. Dig. ... ..	...	Digest of Ontario Case Law, 4 vols., 1823—1900 ... ..	Can.
Owen ... ..	...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614 ... ..	Eng.
P. (preceded by date) ...	...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 ( <i>e.g.</i> , [1891] P.) ... ..	Eng.
P. & B. ... ..	...	New Brunswick Reports (Pugsley and Burbidge) ... ..	Can.
P. & T. ... ..	...	New Brunswick Law Reports (Pugsley and Trueman) ... ..	Can.
P. Cas. ... ..	...	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922 ... ..	Eng. & Col.
P. D. ... ..	...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890 ... ..	Eng.
P. E. I. ... ..	...	Prince Edward Island Reports ... ..	Can.
P. R. ... ..	...	Ontario Practice ... ..	Can.
P. Wms. ... ..	...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735 ... ..	Eng.
Palm. ... ..	...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629 ... ..	Eng.
Park. ... ..	...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717 ... ..	Eng.
Pat. App. ... ..	...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822 ... ..	Scot.
Pater. App. ... ..	...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873 ... ..	Scot.
Peake ... ..	...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794 ... ..	Eng.
Peake, Add. Cas. ...	...	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812 ... ..	Eng.
Peck. ... ..	...	Peckwell's Election Cases, 2 vols., 1803—1806 ... ..	Eng.
Pelham ... ..	...	Pelham (S. A.) Reports ... ..	Aus.
Per. & Dav. ... ..	...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841 ... ..	Eng.
Per. & Kn. ... ..	...	Perry and Knapp's Election Cases, 1 vol., 1833 ... ..	Eng.
Per. C. S. ... ..	...	Perrault's Conseil Supérieur ... ..	Can.
Per. P. ... ..	...	Perrault's Prévosté de Quebec, 1726—1756 ... ..	Can.
Ph. ... ..	...	Phillips' Reports, Chancery, 2 vols., 1841—1849 ... ..	Eng.
Phil. El. Cas. ... ..	...	Phillips' Election Cases, 1 vol., 1780 ... ..	Eng.
Phillim. ... ..	...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821 ... ..	Eng.
Phillim. Eccl. Jud. ...	...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875 ... ..	Eng.
Phip. ... ..	...	Phipson's Digest of Natal Reports, 1858—1859 ... ..	S. Af.
Pig. & R. ... ..	...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845 ... ..	Eng.
Pitc. ... ..	...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624 ... ..	Scot.
Plowd. ... ..	...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I. ... ..	Eng.
Poll. ... ..	...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682 ... ..	Eng.
Poph. ... ..	...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627 ... ..	Eng.
Pow. R. & D. ... ..	...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856 ... ..	Eng.

Pratt ... ..	Pratt's Supplement to Bott's Poor Laws, 1833 ... ..	Eng.
Prec. Ch. ... ..	Precedents in Chancery, fol., 1 vol., 1689—1722 ... ..	Eng.
Price ... ..	Price's Reports, Exchequer, 13 vols., 1814—1824 ... ..	Eng.
Price ... ..	Price's Mining Commissioners' Cases ... ..	Can.
Pug. ... ..	New Brunswick Reports (Pugsley) ... ..	Can.
Py. R. ... ..	Pykes' Lower Canada Reports ... ..	Can.
Q. B. ... ..	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852 ... ..	Eng.
Q. B. (preceded by date)	Law Reports, Queen's Bench Division, 1891—1901 ( <i>e.g.</i> , [1891] 1 Q. B.) ... ..	Eng.
Q. B. D. ... ..	Law Reports, Queen's Bench Division, 25 vols., 1875—1890 ... ..	Eng.
Q. J. P. ... ..	Queensland Justice of Peace Reports ... ..	Aus.
Q. L. J. ... ..	Queensland Law Journal and Reports, 11 vols., 1879—1901 ... ..	Aus.
Q. L. R. ... ..	Quebec Law Reports ... ..	Can.
Q. L. R. (Beor) ... ..	Queensland Law Reports by Beor, 1876—1878 ... ..	Aus.
Q. P. R. ... ..	Quebec Practice Reports ... ..	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current) ... ..	Can.
Q. R. (Vol.) S. C. ... ..	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current) ... ..	Can.
Q. S. C. R. ... ..	Queensland Supreme Court Reports, 5 vols., 1860—1881 ... ..	Aus.
Q. S. R. ... ..	Queensland State Reports ... ..	Aus.
Q. W. N. ... ..	Weekly Notes, Queensland ... ..	Aus.
R. ... ..	The Reports, 15 vols., 1893—1895 ... ..	Eng.
R. ... ..	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878 ... ..	S. Af.
R. (Ct. of Sess.) ... ..	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898 ... ..	Scot.
R. A. C. ... ..	Ramsay, Appeal Cases ... ..	Can.
R. & C. ... ..	Nova Scotia Reports (Russell & Chesley) ... ..	Can.
R. & G. ... ..	Nova Scotia Reports (Russell and Geldert) ... ..	Can.
R. C. ... ..	La Revue Critique de Législation et de Jurisprudence de Canada ... ..	Can.
R. de J. ... ..	Revue de Jurisprudence ... ..	Can.
R. de L. ... ..	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848 ... ..	Can.
R. E. D. ... ..	New South Wales, Reserved and Equity Decisions ... ..	Aus.
R. E. D. ... ..	Ritchie's Equity Decisions (Russell) ... ..	Can.
R. J. R. Q. ... ..	Quebec Revised Reports ... ..	Can.
R. L. N. S. ... ..	Revue Légale, New Series, 1895—(current) ... ..	Can.
R. L. O. S. ... ..	Revue Légale, Old Series, 21 vols., 1869—1892 ... ..	Can.
R. P. C. ... ..	Reports of Patent Cases, 1884—(current) ... ..	Eng.
R. R. ... ..	Revised Reports ... ..	Eng.
Rast. ... ..	Rastell's Entries ... ..	Eng.
Rayn. ... ..	Rayner's Tithe Cases, 3 vols., 1575—1782 ... ..	Eng.
Real Prop. Cas. ... ..	Real Property Cases, 2 vols., 1843—1847 ... ..	Eng.
Rep. Ch. ... ..	Reports in Chancery, fol., 3 vols., 1615—1710 ... ..	Eng.
Rep. in C. of A. ... ..	Reports in Courts of Appeal ... ..	N.Z.
Res. & Eq. Jud. ... ..	New South Wales Reserved and Equity Judgments ... ..	Aus.
Reserv. Cas. ... ..	Reserved Cases ... ..	Ir.
Rick. & M. ... ..	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889 ... ..	Eng.
Rick. & S. ... ..	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894 ... ..	Eng.
Ridg. L. & S. ... ..	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795 ... ..	Ir.
Ridg. Parl. Rep. ... ..	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796 ... ..	Ir.
Ridg. temp. H. ... ..	Ridgeway's Reports <i>temp.</i> Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746 ... ..	Eng.
Ritch. Eq. Rep. ... ..	Ritchie's Equity Reports ... ..	Can.
Rob. Eccl. ... ..	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853 ... ..	Eng.
Rob. L. & W. ... ..	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851 ... ..	Eng.
Robert. App. ... ..	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727 ... ..	Scot.
Robin. App. ... ..	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841 ... ..	Scot.
Roll. Abr. ... ..	Rolle's Abridgment of the Common Law, fol., 2 vols. ... ..	Eng.
Roll. Rep. ... ..	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625 ... ..	Eng.
Rom. ... ..	Romilly's Notes of Cases in Equity, 1 part, 1772—1787 ... ..	Eng.
Roscoe's B. C. ... ..	Roscoe, Digest of Building Cases ... ..	Eng.
Rose ... ..	Rose's Reports, Bankruptcy, 2 vols., 1810—1816 ... ..	Eng.
Ross, L. C. ... ..	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols. ... ..	Eng.
Rowe ... ..	Rowe's Reports (England and Ireland), 1 vol., 1798—1823 ... ..	Eng.
Rul. Cas. ... ..	Campbell's Ruling Cases, 25 vols. ... ..	Eng.
Russ. ... ..	Russell's Reports, Chancery, 5 vols., 1824—1829 ... ..	Eng.
Russ. & M. ... ..	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833 ... ..	Eng.

# xxvi      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Russ. & Ry. ... ..	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Russ. E. R. ... ..	Russell's Election Reports...	Can.
Ry. & Can. Cas. ... ..	Railway and Canal Cases, 7 vols., 1835—1854 ... ..	Eng.
Ry. & Can. Tr. Cas. ... ..	Railway and Canal Traffic Cases, 1855—(current) ... ..	Eng.
Ry. & M. ... ..	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1828 ... ..	Eng.
Ryde & K. Rat. App. ... ..	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904 ... ..	Eng.
Ryde, Rat. App. ... ..	Ryde's Rating Appeals, 3 vols., 1871—1893 ... ..	Eng.
S. ... ..	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J. ... ..	South African Law Journal ... ..	S. Af.
S. A. L. R. ... ..	South Australian Law Reports ... ..	Aus.
S. A. L. R. ... ..	South African Law Reports ... ..	S. Af.
S. A. R. ... ..	Reports of the High Court of the South African Republic, 1881—1892 ... ..	S. Af.
S. A. S. R. ... ..	South Australian State Reports, since 1921 ( <i>e.g.</i> , [1921] S. A. S. R.) ... ..	Aus.
S. C. ... ..	Reports of the Supreme Court of the Cape of Good Hope from 1880 ... ..	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 ( <i>e.g.</i> , [1906] S. C. (H. L.)) ... ..	Scot.
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C. (J.)) ... ..	Scot.
S. C. R. ... ..	Canada, Supreme Court Reports ... ..	Can.
S. L. T. ... ..	Scots Law Times, 1893 (current) ... ..	Scot.
S. Q. R. ... ..	Queensland State Reports ... ..	Aus.
S. R. ... ..	Reports of the High Court of Southern Rhodesia ... ..	S. Af.
S. R. C. ... ..	Stuart's Lower Canada Reports ... ..	Can.
S. R. N. S. W. ... ..	New South Wales, State Reports ... ..	Aus.
S. R. Q. ... ..	Queensland Reports, Supreme Court ... ..	Aus.
S. V. A. R. ... ..	Stuart's Vice-Admiralty Reports ... ..	Can.
S. W. A. ... ..	South-West Africa Law Reports ... ..	S.-W. Af.
Saint ... ..	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ... ..	Eng.
Salk. ... ..	Salkeld's Reports, King's Bench, 3 vols., 1689—1712 ... ..	Eng.
Sask. L. R. ... ..	Saskatchewan Law Reports ... ..	Can.
Sau. & Sc. ... ..	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840 ... ..	Ir.
Saund. ... ..	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ... ..	Eng.
Saund. & A. ... ..	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B. ... ..	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C. ... ..	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ... ..	Eng.
Saund. & M. ... ..	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858 ... ..	Eng.
Sav. ... ..	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ... ..	Eng.
Say. ... ..	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ... ..	Eng.
Sc. Jur. ... ..	Scottish Jurist, 46 vols., 1829—1873 ... ..	Scot.
Sc. L. R. ... ..	Scottish Law Reporter, 1865—1924 ... ..	Scot.
Sc. R. R. ... ..	Scots Revised Reports ... ..	Scot.
Sch. & Lef. ... ..	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806 ... ..	Ir.
Scott ... ..	Scott's Reports, Common Pleas, 8 vols., 1834—1840 ... ..	Eng.
Scott, N. R. ... ..	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ... ..	Eng.
Sea. & Sm. ... ..	Seale and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860 ... ..	Eng.
Sel. Cas. Ch. ... ..	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.) ... ..	Eng.
Selwyn's N. P. ... ..	Selwyn's Abridgement of the Law of Nisi Prius ... ..	Eng.
Sess. Cas. K. B. ... ..	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem. ... ..	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742 ... ..	Eng.
Sh. (Ct. of Sess.) ... ..	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838 ... ..	Scot.
Sh. & Macl. ... ..	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838 ... ..	Scot.
Sh. Dig. ... ..	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868 ... ..	Scot.
Sh. Just. ... ..	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App. ... ..	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct. ... ..	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch. ... ..	Sheppard's Touchstone of Common Assurances ... ..	Eng.
Show. ... ..	Shower's Reports, King's Bench, 2 vols., 1678—1695 ... ..	Eng.
Show. Parl. Cas. ... ..	Shower's Cases in Parliament, fol., 1 vol., 1694—1699 ... ..	Eng.
Sid. ... ..	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670 ... ..	Eng.

Sim. ...	...	Simons' Reports, Chancery, 17 vols., 1826—1852 ...	Eng.
Sim. & St. ...	...	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ...	Eng.
Sim. N. S. ...	...	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ...	Eng.
Skin. ...	...	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ...	Eng.
Sm. & Bat. ...	...	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825 ...	Ir.
Sm. & G. ...	...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ...	Eng.
Smith, K. B. ...	...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ...	Eng.
Smith, L. C. ...	...	Smith's Leading Cases, 2 vols. ...	Eng.
Smith, Reg. Cas. ...	...	C. L. Smith's Registration Cases, 1895—(current) ...	Eng.
Smythe ...	...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840 ...	Ir.
Sol. Jo. ...	...	Solicitors' Journal, 1856—(current) ...	Eng.
Spence ...	...	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks ...	...	Spinks' Prize Court Cases, 2 parts, 1854—1856 ...	Eng.
St. R. Qd. (preceded by date) ...	...	Queensland State Reports, since 1902 ( <i>e.g.</i> , [1902] St. R. Qd.)	Aus.
Stair Rep. ...	...	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681 ...	Scot.
Stark. ...	...	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823 ...	Eng.
State Tr. ...	...	State Trials, 34 vols., 1163—1820 ...	Eng.
State Tr. N. S. ...	...	State Trials, New Series, 8 vols., 1820—1858 ...	Eng.
Stewart ...	...	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton ...	...	Stockton's Vice-Admiralty Report and Digest ...	Can.
Story ...	...	Story's Commentaries on Equity Jurisprudence ...	Eng.
Stra. ...	...	Strange's Reports, 2 vols., 1716—1747 ...	Eng.
Stu. M. & P. ...	...	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ...	Scot.
Stuart ...	...	Sessions Cases (Stuart) ...	Scot.
Stuart, Adm. ...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S. ...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874 ...	Can.
Stuart, K. B. ...	...	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ...	Can.
Sty. ...	...	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw. ...	...	Swabey's Report, Admiralty, 1 vol., 1855—1859 ...	Eng.
Sw. & Tr. ...	...	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ...	Eng.
Swan. ...	...	Swanston's Reports, Chancery, 3 vols., 1818—1821 ...	Eng.
Swin. ...	...	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme ...	...	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M. ...	...	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851 ...	Eng.
T. H. ...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ...	S. Af.
T. Jo. ...	...	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ...	Eng.
T. L. ...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ...	S. Af.
T. L. R. ...	...	The Times Law Reports, 1884—(current) ...	Eng.
T. P. ...	...	Reports of the Supreme Court of the Transvaal, 1910—(current) ...	S. Af.
T. P. D. ...	...	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym. ...	...	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683 ...	Eng.
T. S. ...	...	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml. ...	...	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ...	Eng.
Tas. L. R. ...	...	Tasmanian Law Reports ...	Aus.
Taunt. ...	...	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas. ...	...	Tax Cases, 1875—(current) ...	Eng.
Tay. ...	...	Taylor's King's Bench Reports ...	Can.
Temp. Wood ...	...	Manitoba Reports <i>temp.</i> Wood ...	Can.
Term Rep. ...	...	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R. ...	...	Territories Law Reports ...	Can.
Thom. ...	...	Nova Scotia Reports (Thomson) ...	Can.
Toth. ...	...	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Town St. Tr. ...	...	Townsend, Modern State Trials ...	Eng.
Trem. P. C. ...	...	Tremaine Pleas of the Crown, 1 vol., 1667 ...	Eng.
Trist. ...	...	Tristram's Consistory Judgments, 1 vol., 1872—1890 ...	Eng.
Tru. ...	...	New Brunswick Reports (Trueman) ...	Can.
Tudor, L. C. Merc. Law. ...	...	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop. ...	...	Tudor's Leading Cases on Real Property ...	Eng.
Turn. & R. ...	...	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr. ...	...	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ...	Eng.
Tyr. & Gr. ...	...	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836 ...	Eng.
U. C. Jur. ...	...	Upper Canada Jurist ...	Can.
U. C. L. J. N. S. ...	...	Canada Law Journal, New Series, 1865—(current) ...	Can.

## xxviii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

U. C. L. J. O. S.	...	Canada Law Journal, Old Series, 10 vols., 1855—1864	...	Can.
U. C. R.	...	Upper Canada Reports, Queen's Bench	...	Can.
Udal	...	Fiji Law Reports (Udal)	...	Fiji.
V. L. R.	...	Victorian Law Reports	...	Aus.
V. R.	...	Victorian Reports	...	Aus.
V. R. (Adm.)	...	Victorian Reports (Admiralty)	...	Aus.
V. R. (Eq.)	...	Victorian Reports (Equity)	...	Aus.
V. R. (Law)	...	Victorian Reports (Law)	...	Aus.
Vaugh.	...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	...	Eng.
Vent.	...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	...	Eng.
Vern.	...	Vernon's Reports, Chancery, 2 vols., 1680—1719	...	Eng.
Vern. & Scr.	...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	...	Ir.
Ves.	...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	...	Eng.
Ves. & B.	...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	...	Eng.
Ves. Sen.	...	Vesey Sen.'s Reports, 2 vols., 1747—1756	...	Eng.
Vin. Abr.	...	Viner's Abridgment of Law and Equity, fol., 22 vols.	...	Eng.
Vin. Supp.	...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	...	Eng.
W.	...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	...	S. Af.
W. A. L. R.	...	West Australian Law Reports	...	Aus.
W. A'B. & W.	...	Webb, A'Beckett and Williams' Victorian Reports	...	Aus.
W. & W.	...	Wyatt and Webb	...	Aus.
W. C. C.	...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	...	Eng.
W. H. C.	...	South African Law Reports, Witwatersrand High Court	...	S. Af.
W. Jo.	...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	...	Eng.
W. L. D.	...	South African Law Reports, Witwatersrand Local Division	...	S. Af.
W. L. R.	...	Western Law Reporter	...	Can.
W. L. T.	...	Western Law Times	...	Can.
W. N. (preceded by date)	...	Law Reports, Weekly Notes, 1866—(current) ( <i>e.g.</i> , [1866] W. N.)	...	Eng.
W. N.	...	Calcutta Weekly Notes	...	Ind.
W. R.	...	Weekly Reporter, 54 vols., 1852—1906	...	Eng.
W. R.	...	Sutherland's Weekly Reporter	...	Ind.
W. R.	...	Weekly Reporter, reporting cases in the Cape Provincial Division	...	S. Af.
W. W. & A'B.	...	Wyatt, Webb and A'Beckett	...	Aus.
W. W. R.	...	Western Weekly Reports	...	Can.
Wallis by Lyne	...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	...	Ir.
Web. Pat. Cas.	...	Webster's Patent Cases, 2 vols., 1602—1855	...	Eng.
Welsh, Reg. Cas.	...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	...	Ir.
Went. Off. Ex.	...	Wentworth's Office and Duty of Executors	...	Eng.
West	...	West's Reports, House of Lords, 1 vol., 1839—1841	...	Eng.
West temp. Hard.	...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740	...	Eng.
West. Tithe Cas.	...	Western's London Tithe Cases, 1 vol., 1592—1822	...	Eng.
White	...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	...	Scot.
White & Tud. L. C.	...	White and Tudor's Leading Cases in Equity, 2 vols.	...	Eng.
Wight	...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	...	Eng.
Will. Woll. & Dav.	...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	...	Eng.
Will. Woll. & H.	...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	...	Eng.
Willes	...	Willes' Reports, Common Pleas, 1 vol., 1737—1758	...	Eng.
Wilm.	...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	...	Eng.
Wils.	...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	...	Eng.
Wils. & S.	...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	...	Scot.
Wils. Ch.	...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	...	Eng.
Wils. Ex.	...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	...	Eng.
Win.	...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	...	Eng.
Wm. Bl.	...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	...	Eng.
Wm. Rob.	...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	...	Eng.
Wms. Saund.	...	Williams' Notes to Saunders' Reports, 2 vols.	...	Eng.
Wolf. & B.	...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	...	Eng.
Wolf. & D.	...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	...	Eng.
Woll.	...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	...	Eng.
Wood	...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	...	Eng.
Y. A. D.	...	Young's Vice-Admiralty Reports	...	Can.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Y. & C. Ch. Cas.	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	...	Eng.
Y. & C. Ex.	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	...	Eng.
Y. & J.	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830	...	Eng.
Y. B.	...	Year Books	...	Eng.
Y. B. (Rolls Series)	...	Year Books (Rolls Series)	...	Eng.
Y. B. (Sel. Soc.)	...	Year Books (Selden Society)	...	Eng.
Yelv.	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	...	Eng.
You.	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	...	Eng.



# ABBREVIATIONS

## USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xiii.—xxix., *ante.*)

A.-G.	.	.	.	.	for Attorney-General.
Act.	.	.	.	.	„ Actiengesellschaft.
Admlty.	.	.	.	.	„ Admiralty.
Affd.	.	.	.	.	„ Affirmed.
Affg.	.	.	.	.	„ Affirming.
Akt.	.	.	.	.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.	.	.	.	.	„ Anonymous.
Apld.	.	.	.	.	„ Applied.
Appct.	.	.	.	.	„ Applicant.
Appln.	.	.	.	.	„ Application.
Appln.	.	.	.	.	„ Application to Register a Trade Mark.
Applt.	.	.	.	.	„ Appellant.
Apprvd.	.	.	.	.	„ Approved.
Arbn.	.	.	.	.	„ Arbitration.
Archbp.	.	.	.	.	„ Archbishop.
Art.	.	.	.	.	„ Article.
Ass. Tax Case	.	.	.	.	„ Assessed Tax Case.
Assce.	.	.	.	.	„ Assurance.
Assocn.	.	.	.	.	„ Association.
B. C.	.	.	.	.	„ Borough Council.
Bkpcy.	.	.	.	.	„ Bankruptcy.
Bkpt.	.	.	.	.	„ Bankrupt.
Bldg. Soc.	.	.	.	.	„ Building Society.
Bp.	.	.	.	.	„ Bishop.
C. A.	.	.	.	.	„ Court of Appeal.
C. & S. L. Ry. Co.	.	.	.	.	„ City & South London Railway Co.
C. C. A.	.	.	.	.	„ Court of Criminal Appeal.
C. C. R.	.	.	.	.	„ County Court Rules.
C. C. R.	.	.	.	.	„ Court of Crown Cases Reserved.
C. L. P. Act.	.	.	.	.	„ Common Law Procedure Act.
C. L. Ry. Co.	.	.	.	.	„ Central London Railway Co.
C. O. R.	.	.	.	.	„ Crown Office Rules.
C. S. U. C.	.	.	.	.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	.	.	.	.	„ <i>Capias ad satisfaciendum.</i>
Cale. Ry. Co.	.	.	.	.	„ Caledonian Railway Co.
Ch.	.	.	.	.	„ Chancery.
Ch. Div.	.	.	.	.	„ Chancery Division.
Co.	.	.	.	.	„ Company.
Co-op. Assocn.	.	.	.	.	„ Co-operative Supply Association.
Comrs.	.	.	.	.	„ Commissioners.
Consd.	.	.	.	.	„ Considered.
Corpn.	.	.	.	.	„ Corporation.
Ct.	.	.	.	.	„ Court.
Ct. of Ch.	.	.	.	.	„ Court of Chancery.
Ct. of Eq.	.	.	.	.	„ Court of Equity.
Ct. of R.	.	.	.	.	„ Court of Review.
D. C.	.	.	.	.	„ Divisional Court.
Dbtd.	.	.	.	.	„ Doubted.
Deft.	.	.	.	.	„ Defendant.

Distd. . . . .	for Distinguished.
Div. Ct. . . . .	„ Divisional Court.
Eccl. Comrs. . . . .	„ Ecclesiastical Commissioners.
Eccl. Ct. . . . .	„ Ecclesiastical Court.
Ex. Ch. . . . .	„ Exchequer Chamber.
<i>Ex p.</i> . . . . .	„ <i>Ex parte.</i>
Exch. . . . .	„ Exchequer.
Exor. . . . .	„ Executor.
Exorship. . . . .	„ Executorship.
Expld. . . . .	„ Explained.
Ext'd. . . . .	„ Extended.
Extrix. . . . .	„ Executrix.
<i>Fi. fa.</i> . . . . .	„ <i>Fieri facias.</i>
Folld. . . . .	„ Followed.
G. & S. W. Ry. Co. . . . .	„ Glasgow & South Western Railway Co.
G. C. Ry. Co. . . . .	„ Great Central Railway Co.
G. E. Ry. Co. . . . .	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co. . . . .	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co. . . . .	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co. . . . .	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland . . . . .	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co. . . . .	„ Great Western Railway Co.
Govt. . . . .	„ Government.
Grdns. . . . .	„ Guardians or Guardians of the Poor.
H. C. of A. . . . .	„ High Court of Australia.
H. L. . . . .	„ House of Lords.
I. R. Comrs . . . . .	„ Inland Revenue Commissioners.
Insce. . . . .	„ Insurance.
JJ. . . . .	„ Justices.
Jud. Act . . . . .	„ Judicature Act.
K. B. Div. . . . .	„ King's Bench Division.
L. & B. Ry. Co. . . . .	„ London & Brighton Railway Co.
L. & N. E. Ry. Co. . . . .	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co. . . . .	„ London & North Western Railway Co.
L. & S. W. Ry. Co. . . . .	„ London & South Western Railway Co.
L. & Y. Ry. Co. . . . .	„ Lancashire & Yorkshire Railway Co.
L. B. . . . .	„ Local Board.
L. B. & S. C. Ry. Co. . . . .	„ London, Brighton & South Coast Railway Co.
L. C. . . . .	„ Lord Chancellor.
L. C. & D. Ry. Co. . . . .	„ London, Chatham & Dover Railway Co.
L. C. C. . . . .	„ London County Council.
L. Elec. Ry. Co. . . . .	„ London Electric Railway Co.
L. G. Board . . . . .	„ Local Government Board.
L.J. . . . .	„ Lord Justice.
L.JJ. . . . .	„ Lords Justices.
L. M. & S. Ry. Co. . . . .	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co. . . . .	„ London, Tilbury & Southend Railway Co.
M. S. Act . . . . .	„ Merchant Shipping Act.
M. S. & L. Ry. Co. . . . .	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags. . . . .	„ Magistrates.
Mentd. . . . .	„ Mentioned.
Met. Dist. Ry. Co. . . . .	„ Metropolitan District Railway Co.
Met. Ry. Co. . . . .	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co. . . . .	„ Midland Great Western Railway Co.
Mid. Ry. Co. . . . .	„ Midland Railway Co.
Mtge. . . . .	„ Mortgage.
Mtgee. . . . .	„ Mortgagee.
Mtgor. . . . .	„ Mortgagor.
N. B. Ry. Co. . . . .	„ North British Railway Co.
N. E. Ry. Co. . . . .	„ North Eastern Railway Co.
N. F. . . . .	„ Not Followed.
N. P. . . . .	„ Nisi Prius.
Ord. . . . .	„ Order.
Overd. . . . .	„ Overruled.

# ABBREVIATIONS.

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P. C.	.	.	.	.	.	for Privy Council.
Petn.	.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	.	„ <i>Quære</i> .
R. C.	.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	.	„ Rural Sanitary Authority.
R. S. C.	.	.	.	.	.	„ Revised Statutes of Canada.
R. S. O.	.	.	.	.	.	„ Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	.	„ Registration of Trade Mark.
Regtr. of Trade Mks.	.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	.	„ Reversed.
Revsg.	.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	.	„ Rail. Co. or Railway Co.
S. C.	.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	.	„ South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	.	„ Same Point.
S.S.	.	.	.	.	.	„ Steamship.
Sched.	.	.	.	.	.	„ Schedule.
<i>Sci. fa.</i>	.	.	.	.	.	„ <i>Scire facias</i> .
Sect.	.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	.	„ Workmen's Compensation Act.



## MEANING OF TERMS

### USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.



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<i>Agricultural Holdings</i>	„ AGRICULTURE.	<i>Improvement of Land</i>	See GAME.
<i>Aliens</i>	„ ALIENS.		„ LAND IMPROVE-
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<i>Boundaries and Fences</i>	„ BOUNDARIES.	<i>Injunction</i>	„ INJUNCTION.
<i>Charity Lands</i>	„ CHARITIES.	<i>Land Values</i>	„ REVENUE.
<i>Commons</i>	„ COMMONS.	<i>Licensing, generally</i>	„ INTOXICATING
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<i>Distress</i>	„ DISTRESS.	<i>Mortgages</i>	„ MORTGAGE.
<i>Drainage</i>	„ AGRICULTURE;	<i>Powers</i>	„ POWERS.
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	AND DRAINS.		AND ANNUITIES.
<i>Easements</i>	„ EASEMENTS.	<i>Settled Land</i>	„ SETTLEMENTS.
<i>Ecclesiastical Corpora-</i>		<i>Small Holdings</i>	„ SMALL HOLDINGS.
<i>tions</i>	„ ECCLESIASTICAL	<i>Solicitors' Remuneration</i>	„ SOLICITORS.
	LAW.	<i>Sporting Rights</i>	„ GAME.
<i>Ecclesiastical Lease</i>	„ ECCLESIASTICAL	<i>Summary Jurisdiction,</i>	
	LAW.	<i>Courts of</i>	„ MAGISTRATES.
<i>Entry on Land</i>	„ TRESPASS.	<i>Title, Investigation of</i>	„ SALE OF LAND.
<i>Fisheries</i>	„ FISHERIES.	<i>Trespass</i>	„ TRESPASS.

## Part VII.—Premises Included in the Demise.

### SECT. 1.—DESCRIPTION.

#### SUB-SECT. 1.—PARCELS.

See DEEDS, Vol. XVII., p. 374, Nos. 1833–1836.

**1767. Necessity for sufficient description.]**—If a demise of lands want sufficient words to carry that which was meant to pass, it is not helped in equity.—*KENT v. KENT* (1591), Toth. 90: 21 E. R. 132.

**1768. Lease of land parcel of larger quantity—Right of lessee to select—Death before selection.]**—*MORRIS v. LEVESAY* (1594), 1 Roll. Abr. 725.

*Annotation:—Reid. Jones v. Cherney* (1680), Freem. K. B. 530.

**1769. ———.]**—A. makes a lease for years to B. of 40 acres, parcel of 60: the election may be made by B.'s exor.—*JONES v. CHERNEY* (1680), Freem. K. B. 530; 89 E. R. 397.

**1770. Grant of control of land—Not included in demise—Shown on plan referred to in lease.]**—A dwelling-house, with grounds & ornamental water, were demised together, with the control of a plantation, which was on the opposite side of the ornamental water, & belonged to the lessor, but was not demised to the lessee, for the purpose of preventing trespassers thereon, but so as not to interfere with the persons employed by the lessor, his heirs, or assigns. The lease referred to: a plan on which the plantation was represented:—*Held*: on the construction of the lease as explained by the plan, the lessor was not at liberty during the term to destroy the plantation, & an injunction was granted to restrain him from so doing.—*NICHOLSON v. ROSE* (1859), 4 De G. & J. 10; 45 E. R. 4, L. JJ.

**Boundaries.]**—See DEEDS, Vol. XVII., p. 374, No. 1837; BOUNDARIES, Vol. VII., pp. 263 *et seq.* **Plans.]**—See DEEDS, Vol. XVII., p. 375, Nos. 1838–1844.

**Description inconsistent with itself.]**—See DEEDS, Vol. XVII., pp. 277–283, Nos. 917–950.

*See, also, SALE OF LAND.*

#### SUB-SECT. 2.—GENERAL WORDS OF DESCRIPTION.

##### A. In General.

*See, Law of Property Act, 1925 (c. 20), ss. 02, 205 (i), (ii).*

*See DEEDS, Vol. XVII., pp. 375–377, Nos. 1845–1864.*

**Words qualifying extent of property granted or demised.]**—See DEEDS, Vol. XVII., pp. 378, 379, Nos. 1877–1885.

**Grant in general terms followed by restrictive words.]**—See DEEDS, Vol. XVII., pp. 283, 284, Nos. 956–965.

**Grant in precise terms followed by general words of description.]**—See DEEDS, Vol. XVII., p. 376, Nos. 1848, 1849.

##### B. Words conveying Appurtenances.

*See DEEDS, Vol. XVII., pp. 378, 379, Nos. 1865–1876.*

**1771. Meaning of appurtenances—“Usually occupied with.”**—*HILL v. GRANGE* (1555), 1 Plowd. 164; 2 Dyer, 130 b; 75 E. R. 253.

*Annotations:—Apld. Wood v. Payne* (1590), Cro. Eliz. 186. *Consd. Lofield's Case* (1612), 10 Co. Rep. 106 a; Clay &

#### PART VII. SECT. 1, SUB-SECT. 1.

**a. Privileges not specified con-**  
**ceded.]**—*ROSS v. HENDERSON* (1901),

#### 8 B. C. R. 5.—CAN.

**b. Lease of room—Bounded by**  
**outside wall—Includes both sides of**

**wall.]**—*TAMBLYN (G.), LTD. v. AUSTIN*  
(1920), 48 O. L. R. 97; 54 D. L. R.  
663; 18 O. W. N. 357.—CAN.

**Sect. 1.—Description: Sub-sect. 2, B.; sub-sect. 3, A. & B.]**

Barnet's Case (1613), Godb. 236. *Apld.* Ongley v. Chambers (1824), 1 Bing. 483. *Consd.* Hinchliffe v. Kinnoul (1838), 5 Bing. N. C. 1; Winter v. Porritt (1843), 9 Cl. & Fin. 606. *Apld.* Ferguson v. L. B. & S. C. Ry. (1863), 3 De G. J. & Sm. 653. *Consd.* Cuthbert v. Robinson (1882), 51 L. J. Ch. 238. *Apld.* Thomas v. Owen (1887), 20 Q. B. D. 225. *Consd.* Hansford v. Jago, [1921] 1 Ch. 322. *Refd.* Anon. (1561), Dal. 29, pl. 5; Tyrringham's Case (1584), 4 Co. Rep. 36 a; Luttrell's Case (1601), 4 Co. Rep. 84 B; Mallory's Case (1601), 5 Co. Rep. 111 B; Pain v. Malory (1601), Cro. Eliz. 832; Wade's Case (1601), 5 Co. Rep. 114 a; Finch's Case (1607), 6 Co. Rep. 63 a; Lowe's Case (1609), 9 Co. Rep. 122 B; Attie v. Hemmings (1612), 2 Bulst. 281; Rowles v. Mason (1612), 2 Brownl. 85, 192; Clun's Case (1613), 10 Co. Rep. 127 a; Stukely v. Butler (1614), Hob. 168; Burton v. Browne (1622), Palm. 319; Crabbe v. Tooker (1627), Poph. 204; Rockingham v. Oxenden (1711), 2 Salk. 578; Doe d. Meyrick v. Meyrick (1832), 2 Cr. & J. 223; Hopkins v. Helmore (1838), 3 Nev. & P. K. B. 453; Pannell v. Mill (1846), 3 C. B. 625; Waterpark v. Fennell (1859), 7 W. R. 634; Roe v. Siddons (1888), 22 Q. B. D. 224; Schwann v. Cotton, [1916] 2 Ch. 120. *Mentd.* Pepeys v. Creteror (1714-27), Gilb. Ch. 249; Startup v. Macdonald (1843), 6 Man. & G. 593.

**1772.** —[In 1728 land was let on a building lease which expired at Lady Day 1824. In 1819, *pltf.*, by virtue of a demise from an underlessee which expired in 1820 was in possession of a house erected on part of this land &, under that demise, exercised, as all his predecessors had done, for more than thirty years, a right of way over a passage on one side of his house, as necessary for the use & enjoyment thereof; particularly for repairing the eastern side: the underlessee's interest expired in 1822. *Deft.* was in possession of the soil of the passage by virtue of an assignment, in 1791 of the lease of 1728: in 1819 the party possessed of the reversion expectant on the lease of 1728 demised to *pltf.* the house of which he was in possession, as above, for fifty-seven years & a half to hold from Lady Day, 1824, together with all the appurtenances to the same belonging, subject to a covenant for repairs. In 1822 the reversioner demised the soil of the passage to *deft.* for sixty-one years, to hold from Lady Day 1824:—*Held*: under the demise of 1819 *pltf.* was entitled to a right of way over *deft.*'s passage.

There are strong authorities in the law books to show these words capable of a wider interpretation & of carrying more than is an appurtenant in the strictly legal sense of that word, where such interpretation is necessary in order to give that word some operation (TINDAL, C.J.).—HINCHLIFFE v. KINNOUL (EARL) (1838), 5 Bing. N. C. 1; 1 Arn. 342; 6 Scott, 650; 8 L. J. C. P. 105; 132 E. R. 1004.

*Annotations*:—*Consd.* Brown v. Alabaster (1887), 37 Ch. D. 490; Pwllbach Colliery Co. v. Woodman, [1915] A. C. 634. *Refd.* Powell v. Price (1847), 4 C. B. 105; Suffield v. Brown (1864), 4 De G. J. & Sm. 185.

—In wills.]—See WILLS.

**1773.** What is appurtenant to house or messuage—Lands occupied therewith.]—A messuage demised *cum pertinentiis* only but for that sundry lands had been occupied therewith for the same rent, & by the same words:—*Held*: those lands should pass also.—ANON. (1580), Cary, 18; 21 E. R. 10, L. C.

**1774.** —[Land shall pass as pertaining to a house which hath been occupied with it by the space of ten or twelve years, for by that time it has gained the name of parcel or belonging & shall pass with the house by that name in a will or lease (ANDERSON, C.J.).—HIGHAM v. BAKER (1583), Cro. Eliz. 15; 78 E. R. 281.

*Annotations*:—*Consd.* Phillips v. Phillips (1701), 1 P. Wms. 34. *Refd.* Smartle v. Scholler (1676), T. Jo. 98; Ongley v. Chambers (1824), 1 Bing. 483. *Mentd.* Holmes v.

Maynell (1680), 2 Show. 136; Luddington v. Kline (1696), 1 Ld. Raym. 203; Haysman v. Moon (1741), 7 Mod. Rep. 430.

**1775.** —[Side passage.]—HINCHLIFFE v. KINNOUL (EARL), No. 1772, *ante*.

**1776.** —[Estovers.]—Estovers granted to repair a house are appurtenant to it.—WINDSOR (DEAN & CHAPTER) v. HYDE (1601), 5 Co. Rep. 24 a; 77 E. R. 87; *sub nom.* HIDE v. WINDSOR (DEAN & CANONS), Moore, K. B. 399; *sub nom.* HYDE v. WINDSOR (DEAN & CANONS), Cro. Eliz. 552.

*Annotations*:—*Refd.* Bally v. Wells (1769), Wilm. 341; Adams v. Gibney (1830), 6 Bing. 656; Penfold v. Abbott (1862), 32 L. J. Q. B. 67; Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc. (1898), 68 L. J. Q. B. 114. *Mentd.* Tremere v. Morison (1834), 1 Bing. N. C. 89; Taylor v. Caldwell (1863), 3 B. & S. 826.

**1777.** —[Sheepwalk.]—Debt for rent upon a declaration that he had let land & a sheepwalk *cum pertinentiis*, is good.—HURLESTON v. WOODROFFE (1619), Cro. Jac. 519; 79 E. R. 444.

—[Commons appurtenant.]—See COMMONS, Vol. XI., pp. 8-11, Nos. 41-93.

—[Easements.]—See EASEMENTS, Vol. XIX., pp. 32-35, Nos. 150-178.

**SUB-SECT. 3.—PARTICULAR WORDS OF DESCRIPTION.**

**A. House or Messuage.**

**1778.** House—Fascia on wall of adjoining house.]—*Pltf.* was lessee of a house numbered 152 in A. Street, but which lay behind Nos. 151 & 153 in that street, & at the bottom of a ct. approached by a passage from A. Street, half of which passage was under the first floor of No. 151, & the other half under the first floor of No. 153. The passage was closed by a gate in the plane of the front of 151 & 153, which was hung on the wall of 153, but was admitted to be part of *pltf.*'s premises. All three houses belonged to the same landlord. Above the gate was a fascia of cement eight feet long, half of which was on the wall of 151, & the other half on that of 153. The fascia had existed from about 1845, & the number of *pltf.*'s house & the name & business of the occupier for the time being had always been painted on it. No. 153 was demised to *deft.* in 1874 without any express reservation of the fascia, & *pltf.* became lessee of No. 152 in 1876:—*Held*: the fascia must be held to be a parcel of the property demised to *pltf.*, & he was entitled to prevent *deft.* from interfering with it.—FRANCIS v. HAYWARD (1882), 22 Ch. D. 177; 52 L. J. Ch. 291; 48 L. T. 297; 47 J. P. 517; 31 W. R. 488, C. A.

*Annotation*:—*Mentd.* Swalston v. Finn & Metropolitan Board of Works (1883), 48 L. T. 634.

**1779.** —[Part of house demised to tenant of adjoining house—Whether staircase included.]—*Deft.*, the lessee of a house A., took a lease from *pltf.* of the second & third floors of the adjoining house B., & an opening in the wall between the two houses was made, the staircase down from the second floor of house B. being shut off by a partition. Before this lease had come to an end the assignees of the reversion of the lease of house A., took possession & closed up the opening between the two houses:—*Held*: *pltf.* was not then bound to allow *deft.* the use of the staircase.—CHAPPELL v. MASON (1894), 10 T. L. R. 404, C. A.

—[Land Clauses Consolidation Act, 1845 (c. 16), s. 92.]—See COMPULSORY PURCHASE, Vol. XI., pp. 179-181, Nos. 564-594.

**1780.** Upper floor of house—Outer walls included.]—Where the owner of a building let the upper floor on a representation that the tenant

should have the use of the outer walls for advertising purposes:—*Held*: the tenant had a right to the use of the outer walls so far as appropriate, & the landlord could not derogate from his own grant by putting up a sign outside the walls of the floor included in the letting.—*CARLISLE CAFÉ CO. v. MUSE BROTHERS & CO.* (1897), 67 L. J. Ch. 53; 77 L. T. 515; 46 W. R. 107; 42 Sol. Jo. 67.

*Annotations*:—*Folld.* Hope v. Cowan, [1913] 2 Ch. 312; Goldfoot v. Welch, [1914] 1 Ch. 213. *Refd.* Phelps v. London Corpn., [1916] 2 Ch. 255.

**1781.** ———.]—The demise of a floor or a room or an office bounded in part by an outside wall *primâ facie* includes both sides of that wall, unless there be an exception or a reservation or something in the context to exclude it.

Pltfs. demised an office situate on the first floor of pltfs.' leasehold premises to defts., who covenanted (*inter alia*) to keep the inside parts of the office in good & substantial repair. Pltfs. covenanted to keep in repair the external parts of the demised premises & to permit defts. to affix their trade signs, to be approved by pltfs., on the outside of that portion of the building in their occupation, & subject to this latter covenant, defts. covenanted not without first obtaining the written consent of pltfs. to attach or affix any sign, nameplate, or letters to the premises, & to remove all outside names & trade signs at the determination of the tenancy & to make good all damage caused to the outside walls of the building thereby. By the lease under which pltfs. themselves held they were bound to repair & maintain the walls of the building.

Defts., without obtaining the consent of pltfs., affixed flower boxes outside the three windows of their office. In an action by pltfs. to restrain this alleged trespass:—*Held*: there was nothing in defts.' lease to exclude the operation of the general rule, the demise included the outside of the outer wall of the office; & pltfs. were not entitled to an injunction.—*HOPE BROTHERS, LTD. v. COWAN*, [1913] 2 Ch. 312; 82 L. J. Ch. 439; 108 L. T. 945; 29 T. L. R. 520; 57 Sol. Jo. 559.

*Annotations*:—*Folld.* Goldfoot v. Welch, [1914] 1 Ch. 213. *Consd.* Phelps v. London Corpn., [1916] 2 Ch. 255.

**1782.** ———.]—A demise in writing of the "rooms situate on the first & second floors" of business premises:—*Held*: in the absence of context to the contrary, to include the external walls of the two floors.—*GOLDFOOT v. WELCH*, [1914] 1 Ch. 213; 83 L. J. Ch. 360; 109 L. T. 820. *Annotation*:—*Refd.* Phelps v. London Corpn., [1916] 2 Ch. 255.

**1783. Message—Whether equivalent to dwelling-house.**—In an action on the case, pltf. declared that he was possessed of a message & premises, with the appurtenances; the plea traversed this allegation, & at the trial it appeared that pltf. had the separate use & occupation of only one floor of a dwelling-house:—*Held*: the evidence did not negative the allegation that the plaintiff was possessed of a message.

Although the word message may import more than the word dwelling-house, it does not necessarily happen that it must do so (*TINDAL, C.J.*).—*FENN v. GRAFTON* (1836), 2 Bing. N. C. 617; 2 Hodg. 58; 3 Scott, 56; 132 E. R. 238.

#### B. Land and Building.

*See, now, Law of Property Act, 1925 (c. 20), ss. 62 (1), (2), 205 (1) (ix.).*

**1784. General rule—Demise of surface includes all above & all below.**—A. was the owner of two houses, & demised one to C. He afterwards found a subterranean chamber extending under both houses. He converted this into a cellar for his own use. He then mortgaged both houses to E. & G. with power of sale. Default was made, & the mtgees. sold. C. bought the house leased to him, described as being in "his occupation," & opened a way into the cellar, & partitioned off so much as was under his house. The mtgees. denied his right, but he refused completion unless he had this part of the cellar, as being in his occupation under his lease. The mtgees. filed a claim for specific performance; but the ct. dismissed it, holding that occupation under a lease means occupation of all that passes under the lease, whether in actual enjoyment or not, & whether known or not to exist at the time of the lease.

The demise being of the house & premises the question is what passed under that claim? I take it that a demise of the surface amounts to a demise of all that lies above & also of all below the surface (*TURNER, V.-C.*).—*WHITTINGTON v. CORDER* (1852), 20 L. T. O. S. 175; 16 Jur. 1034.

**1785. Land—Includes woods.**—*DOCKWRAY & BEAL'S CASE* (1614), Godb. 256; 78 E. R. 149.

**1786.** ——— *Includes houses.*—A. lets a garden-ground for years, & the lessee demises part of the term to an undertenant, who builds on it. By a grant of the garden-ground, the buildings thereon will also pass.—*BURTON v. BROWN* (1622), Cro. Jac. 648; Palm. 319; 79 E. R. 559.

**1787.** ——— *Whether includes chattel found beneath surface—Not in contemplation of parties.*—*ELWES v. BRIGG GAS CO.*, No. 2338, *post*.

**1788. Land in village—Whether mountain of same name included.**—In 1704 was granted a lease of certain land in the county of Tipperary. The land was described in the demise, as "Lands, etc., in Scartany, containing 94 acres; Garryroan, containing 104 acres; & the village of Scartnaglowrane, & part of Whitechurch & Tincurry, containing 148 acres, with all rights"; there was then a reservation of mines & of the liberty of fishing & fowling, in favour of the lessor, & of "the liberty of commonage & cutting of turf on the mountain of Tincurry" in favour of certain specified tenants of the lessor. The lease was a renewable lease, & had been renewed twice since that period, in the same terms. The mountain was equally known by the name of the Mountain of Scartnaglowrane or of Tincurry. There was a collection of houses generally called the village of Scartnaglowrane on one of its sides. This village of Tincurry was at some little distance from it. The houses of the former village, & the arable land attached to them, had from time to time been increased in number & extent at the pleasure of the lessee & his under tenants, who regularly paid him rent for the same, & their cattle alone grazed on the mountain. The lessee had always sported on the mountain:—*Held*: these facts had been properly admitted in evidence, to explain the words of the demise, & having been so, the judge ought to have left to the jury, & ought not to have decided of his own authority, the question whether the mountain of Scartnaglowrane passed under the demise.—*WATERPARK (LORD) v. FENNELL* (1859), 7 H. L. Cas. 650; 33 L. T. O. S.

#### PART VII. SECT. 1, SUB-SECT. 3.—B.

*c. Land.*—In the absence of any context to the contrary the word "land" includes what happens to be annexed to it.—*STILLER v. DURBAN CORPN.* (1918), 39 N. L. R. 350.—*S. AF.*

*Sect. 1.—Description: Sub-sect. 3, B., C., D., E. & F. Sects. 2, 3, 4, 5, 6, 7 & 8: Sub-sect. 1.]*

374; 23 J. P. 643; 5 Jur. N. S. 1135; 7 W. R. 634; 11 E. R. 250, H. L.

*Annotations:—Refd. Hastings Corp'n. v. Ivall (1874), L. R. 19 Eq. 558; Devonshire v. Pattinson (1887), 20 Q. B. D. 263; Van Diemen's Land Co. v. Table Cape Marine Board, [1906] A. C. 92; Watcham v. East Africa Protectorate, [1919] A. C. 533. Mentd. Pryor v. Petre, [1894] 2 Ch. 11.*

**1789. Building—Does not include hoarding.]—**In 1883 certain land which had been laid out for building was mortgaged, & in 1884 the mtgor., being still in possession, granted leases of parts of it to pltf., who had built houses on the premises. The mtgees., who were not parties to the leases, in 1886 & 1887 sold some of the land in the rear of the houses to defts., who turned it into a cricket ground, & erected a wooden hoarding on the boundary of their land & opposite pltf.'s window to prevent him overlooking the field:—*Held*: whether the building scheme was in abeyance or not, the hoarding was not a building contemplated by the scheme.—**WILSON v. QUEEN'S CLUB**, [1891] 3 Ch. 522; 60 L. J. Ch. 698; 65 L. T. 42; 40 W. R. 172.

*Annotations:—Consd. Boyce v. Paddington B. C., [1903] 1 Ch. 109. Mentd. Brown v. Peto, [1900] 2 Q. B. 653.*

#### *C. Tenements and Hereditaments.*

**1790. Tenement—General rule.]—**(1) A grant of "warren" may pass the soil; it may pass nothing but a franchise to be exercised over the soil. The phrase "a warren of conies" will only pass the franchise.

(2) A right of entering within the limits of a warren to kill rabbits may be properly described as a "tenement."

The Duchy of Cornwall was in the possession both of the soil of a manor, & of a warren of conies existing over certain parts of the manor. In Mar., 1799, the Duchy granted a lease to P., in which the subjects granted were thus described: "All that piece or parcel of woodland situate in B., etc. & all that close called, etc., & all that warren of conies, with all & singular the rights, members, & appurtenances whatsoever in B., etc., aforesaid; & that lodge or house thereupon built, etc.; & also that warren of conies, with all & singular the rights, members, & appurtenances whatsoever in R., etc., both of which said warrens of conies are called or known by the name of B. warren, & do extend themselves in & over the wastes or moors of B., P., & S., & A.," etc.:—*Held*: these words did not carry the soil, but only a right to the conies, & whatever was fairly incident to, or necessary for, the preserving & making profit of them.

I have no doubt that the word "tenements" in the Act must be taken in its fullest sense, & as Blackstone says "though in its vulgar acceptation it is only applied to houses & other buildings, yet in its original, proper, & legal sense, it signifies everything that may be holden, provided it be of a permanent nature, whether it be of a substantial & sensible, or of an unsubstantial ideal kind." That a rabbit warren which passes no interest in the soil, but merely gives a right of entering within the limits of the warren to kill rabbits, is a tenement was decided in the case of *R. v. Piddletrenthide Inhabitants* (1790), 3 Term Rep. 772 (LORD CHELMSFORD).—**BEAUCHAMP (EARL) v. WINN** (1873), L. R. 6 H. L. 223; 22 W. R. 193, H. L.

*Annotations:—As to (1) Consd. Robinson v. Duleep Singh (1879), 11 Ch. D. 798. Generally, Mentd. Daniell v. Sinclair (1881), 6 App. Cas. 181; Bettyes v. Maynard (1882), 46 L. T. 766; Barrow v. Isaacs, [1891] 1 Q. B.*

417; *Wilding v. Sanderson* (1897), 77 L. T. 57; *Stanley v. Nunceaton Corp'n.* (1913), 108 L. T. 986.

**1791. — Part of house.]—**Ejectment upon a demise of the fourth part of a house is good, though it say he entered *tenementa prædicta*.—**RAWSON v. MAYNARD** (1592), Cro. Eliz. 286; 78 E. R. 540.

**1792. — House & lands.]—**GOODRIGHT d. WELCH v. FLOOD (1769), 3 Wils. 23; 95 E. R. 912.

*Annotations:—Consd. Massey v. Rice* (1775), 1 Cowp. 346 *Refd. Doe d. Stewart v. Denton* (1785), 1 Term Rep. 11.

**1793. — Common in gross.]—**LONDON v. SOUTHWELL COLLEGIATE CHURCH (CHAPTER) (1618), Hob. 303; 80 E. R. 447.

*Annotations:—Mentd. R. v. Rochester (Bp.) & Clark* (1675), 2 Mod. Rep. 1; *Orby v. Mohun* (1706), Gilb. Ch. 45; *Barret v. Glubb* (1776), 3 Wm. Bl. 1052; *Mirehouse v. Rennell* (1833), 7 Bat. N. S. 241; *Crompton v. Jarratt* (1885), 30 Ch. D. 298.

**1794. — Advowson.]—**LONDON v. SOUTHWELL COLLEGIATE CHURCH (CHAPTER) (1618), Hob. 303; 80 E. R. 447.

*Annotations:—Refd. R. v. Rochester (Bp.) & Clark* (1675), 2 Mod. Rep. 1; *Barret v. Glubb* (1776), 3 Wm. Bl. 1052; *Crompton v. Jarratt* (1885), 30 Ch. D. 298. *Mentd. Orby v. Mohun* (1706), Gilb. Ch. 45; *Mirehouse v. Rennell* (1833), 7 Bl. N. S. 241.

—*See ECCLESIASTICAL LAW*, Vol. XIX., p. 380, Nos. 2020, 2021.

**1795. — Sporting rights of warren.]—**BEAUCHAMP (EARL) v. WINN, No. 1790, *ante*.

**Hereditaments—Advowson.]—***See ECCLESIASTICAL LAW*, Vol. XIX., pp. 379, 380, Nos. 2012–2015.

#### *D. Manors.*

*See, now, Law of Property Act, 1925 (c. 20), s. 62 (3).*

**1796. Lease of site & demesnes of manor.]—**ANON. (1537), Benl. 16; 73 E. R. 943.

**What passes under conveyance of manor.]—***See COPYHOLDS*, Vol. XIII., pp. 14, 15, Nos. 54–71.

#### *E. Warren.*

*See COMMONS*, Vol. XI., pp. 27, 28, Nos. 343–347.

#### *F. Water.*

**1797. "All streams that might be found in" property demised—Includes all wells in existence & subsequently found.]—**By lease, dated 1827, D. demised to W. a dwelling-house & fifteen closes of land, & granted all streams of water that might be found in four of those closes called the Clough, the Moorin Clough, the Brow, & the Marleds, excepting out of the demise all timber & other trees, etc., mines & minerals, etc., stone, gravel, sand & clay, etc., & all streams of water, except those above granted, then being or thereafter to be found in, or upon the premises demised, with power for D. his heirs & assigns, & his & their servants & workmen, from time to time, to enter upon the premises, & to crop, fall, search for & make marketable all or any of the before mentioned articles; to make any clay into bricks or tile on the premises, etc.; & to divert or alter the course of any river, brook, spring, or water. There was a plan annexed to the lease showing a stream of water on the north side of the demised premises & flowing through their whole extent from west to east. The Clough, the Moorin Clough, the Brow, and the Marleds, were situate on the banks of this stream. There was no other stream on the surface, but certain wells were in existence in those closes, & others were subsequently found:—*Held*: the wells & all water in the Clough, the Moorin Clough, the Brow, & the Marleds passed by the grant in question to W., & neither D. nor his lessees could work the mines

so as to cut off the springs in the closes in question.  
—**WHITEHEAD v. PARKS** (1858), 2 H. & N. 870; 27 L. J. Ex. 169; 157 E. R. 358.

**Annotations**.—**Refd.** Ballacorkish Silver, Lead, & Copper Mining Co. v. Harrison (1873), L. R. 5 P. C. 49. **Mentd.** Goodhart v. Hyett (1883), 25 Ch. D. 182.

**Riparian rights to water.**—**See WATER SUPPLY; WATERS & WATERCOURSES.**

**Easement of water.**—**See EASEMENTS**, Vol. XIX., pp. 145–163.

## SECT. 2.—EASEMENTS AND PROFITS À PRENDRE.

**Easements**, generally, *see* **EASEMENTS**, Vol. XIX., pp. 7 *et seq.*

**Profits à prendre** generally, *see* **EASEMENTS**, Vol. XIX., pp. 196 *et seq.*

**Express grant of easements—Construction of grant—Effect of general words.**—**See EASEMENTS**, Vol. XIX., pp. 32–35, Nos. 149–179.

**Effect of Conveyancing Act, 1881** (c. 41), s. 6.—**See EASEMENTS**, Vol. XIX., pp. 35–38, Nos. 180–196; Law of Property Act, 1925 (c. 20), s. 62, (1) (2).

**Easements arising by implication of law.**—**See EASEMENTS**, Vol. XIX., pp. 38–51, Nos. 201–284.

**Ways of necessity.**—**See EASEMENTS**, Vol. XIX., pp. 98–102, Nos. 608–643.

**Right of support.**—**See EASEMENTS**, Vol. XIX., pp. 163–173, Nos. 1139–1196, 1205–1220.

**Profits à prendre.**—**See EASEMENTS**, Vol. XIX., p. 198, No. 1505.

**Rights of common of pasture.**—**See COMMONS**, Vol. XI., p. 38, No. 533.

## SECT. 3.—FISHERIES.

*See, generally*, **FISHERIES**, Vol. XXV., pp. 4 *et seq.*

**What included in grant of fishery.**—**See FISHERIES**, Vol. XXV., pp. 18, 27, Nos. 151–153, 243.

**With what demise fishery passes.**—**See FISHERIES**, Vol. XXV., p. 19, Nos. 165–167.

## SECT. 4.—FIXTURES.

*See* Part XIV., *post*.

## SECT. 5.—GAME.

**Game** generally, *see* **GAME**, Vol. XXV., pp. 348 *et seq.*

**What is game.**—**See GAME**, Vol. XXV., p. 348, Nos. 1–9.

**Rights over game—Landlord.**—**See GAME**, Vol. XXV., pp. 352, 353, Nos. 39–43.

**Shooting tenant.**—**See GAME**, Vol. XXV., pp. 355–360, Nos. 64–107.

**Agricultural tenant.**—**See GAME**, Vol. XXV., pp. 360–362, Nos. 108–117.

## SECT. 6.—ROADS.

**1798. What is included—Land ad medium flum.**—It must not be assumed that a lease would not J.—VOL. XXXI.

convey an interest in the land to the centre of the road, as an ordinary conveyance does, unless it is expressly excluded (**BOVILL, C.J.**).—**TIDSWELL v. WHITWORTH** (1867), L. R. 2 C. P. 326; 36 L. J. C. P. 103; 15 L. T. 574; 15 W. R. 427.

**Annotations**.—**Mentd.** Bird v. Elwes (1868), 18 L. T. 727; Thompson v. Lapworth (1868), L. R. 3 C. P. 149; Jeffrey v. Neale (1871), L. R. 6 C. P. 240; Crosse v. Raw (1874), L. R. 9 Exch. 209; Rawlins v. Briggs (1878), 3 C. P. D. 368; Hartley v. Hudson (1879), 4 C. P. D. 367; Midgley v. Coppock (1879), 4 Ex. D. 309; Budd v. Marshall (1880), 5 C. P. D. 481; Wilkinson v. Collyer (1884), 13 Q. B. D. 1; Hill v. Edward (1885), 1 T. L. R. 253; Brett v. Rogers (1897), 1 Q. B. 525; West Hartlepool Corp'n. v. Robinson (1897), 77 L. T. 387; Farlow v. Stevenson, [1900] 1 Ch. 128; Foulger v. Ardington, [1902] 1 K. B. 700; Shepherd v. Barber (1902), 1 L. G. R. 157; Skinner v. Hunt, [1904] 2 K. B. 452; Greaves v. Whitmarsh, Watson (1906), 95 L. T. 425.

**In case of sale or lease of land.**—**See HIGHWAYS**, Vol. XXVI., pp. 321, 322, Nos. 537–550.

**Roadside waste.**—**See HIGHWAYS**, Vol. XXVI., pp. 323, 324, Nos. 560, 578.

## SECT. 7.—TREES, TIMBER AND UNDERWOOD.

**Definition of trees, timber, underwood, etc.**—**See AGRICULTURE**, Vol. II., pp. 61–63, Nos. 348–396.

**Property in trees & liabilities of owners.**—**See AGRICULTURE**, Vol. II., pp. 63–93, Nos. 397–733.

**Construction & effect of grants, leases, etc.—What passes under.**—**See AGRICULTURE**, Vol. II., pp. 94–96, Nos. 742–770.

**Effect of.**—**See AGRICULTURE**, Vol. II., p. 96, Nos. 771, 772.

## SECT. 8.—EXCEPTIONS AND RESERVATIONS.

### SUB-SECT. 1.—IN GENERAL.

*See, generally*, **DEEDS**, Vol. XVII., pp. 380–382, Nos. 1880–1905.

**1799. Exception—Withdrawn property excepted from demise.**—A lease of a manor *exceptis boscis, arboribus*, etc., with a covenant to take fire-bote *super prænissa prædicta*, shall only extend to the land demised.—**CAGE v. PEYTON & EVERET** (1593), Cro. Eliz. 125; 78 E. R. 382; *sub nom.* **CAGE & PAXLINS CASE**, 1 Leon. 116.

**Annotation**.—**Refd.** Iggulden v. May (1806), 7 East, 237.

**1800.** — — — — — That which is excepted in a lease, does not pass to the lessee at all; but where the lessor reserves a right to do certain acts in respect of the demised premises, he must, in pleading, set out the terms of the reservation, & of the instrument by which it was created.—**FANCY v. SCOTT** (1828), 2 Man. & Ry. K. B. 335; 6 L. J. O. S. K. B. 305.

**Annotation**.—**Refd.** Doe d. Douglas v. Lock (1835), 2 Ad. & El. 705.

**1801.** — — — — — “Hereinafter” construed as “hereinbefore.”—**BLEVERHASSET v. FULLER** (1595), Toth. 131; 21 E. R. 145.

**1802.** — — — — — Tortious entry on excepted land—Whether breach of condition to observe covenants.—If a lessor covenant to let certain lands, excepting such a close, a tortious entry by the lessee into the excepted close is not a breach of a condition to perform all covenants contained in the lease.—**RUSSEL (LADY) v. GULWEL** (1599), Cro. Eliz. 657; Moore, K. B. 553; 78 E. R. 896.

**Annotations**.—**Refd.** Lifford's Case (1614), 11 Co. Rep. 46 b; Bush v. Cole (1692), 12 Mod. Rep. 24; Seddon v. Senate (1810), 13 East, 63.

**Sect. 8.—Exceptions and reservations: Sub-sects. 1, 2, 3, 4, 5, 6 & 7.]**

**1803. — Whether repugnant to grant.]—**MILLER v. PRATT (1806), 3 Dyer, 264 b, n.; 73 E. R. 586.

**Annotation:—**Reid. Cudlip v. Rundell (1691), 1 Show. 310.

**1804. — —.]—**A. leases a fulling mill, together with a watercourse, & floodgates, to a trustee for ninety-nine years if either his daughter or wife should so long live, for their use, & in order to make provision for them; with an exception of free liberty for the lessor, his heir, etc., his servants & tenants, at all times, at pleasure, to divert the water from the mill, for watering all meadows which they should think proper, & to take up, & put down all proper sluices. Part of the profits of the mill consisted of water rents, for flooding meadows, for water which was wholly diverted from the mill:—**Held:** by the exception, the heir of the lessor was entitled to the water rents, the exception not being repugnant to the grant.—LAMBERT v. BENNETT (1805), 3 Smith, K. B. 84.

**1805. — What may be excepted—Not right of common.]—**A right of common cannot be reserved in an exception in a demise under the word "land." SMITH d. JERDON v. MILWARD (1782), 3 Doug. K. B. 70; 99 E. R. 543.

**1806. — May be made by parol demise.]—**There may be express exceptions out of a parol demise (LORD ABINGER, C.B.).—BRIDGLAND v. SHAPTER (1839), 5 M. & W. 375; 8 L. J. Ex. 246; 151 E. R. 159.

**Annotations:—**Mentd. Brecon Corpn. v. Edwards (1862), 1 H. & C. 51; Manchester Corpn. v. Lyons (1882), 47 L. T. 677.

**1807. Reservation—Must be in plain terms.]—**The owner of land under which there were several strata of coal, demised one of the upper strata to pltf., reserving to himself & his lessees the right of working any coal not included in that demise, & the same powers & privileges with respect to such last-mentioned coal as if that demise had not been made; provided always, that in exercising such powers & privileges the working of the coal then demised should not be prevented or unnecessarily interfered with, & that compensation should be made to pltf. for any necessary interference with the workings. The landowner afterwards demised some of the strata of coal underlying the coal demised to pltf. to the M. co. Pltf. brought an action for an injunction against the landowner & the co.:—**Held:** the proviso in the lease was unintelligible & could not determine the rights of the parties: & if a lessor wished to reserve rights in derogation of his grant, he must do so in plain terms; & on that ground pltf. was entitled to an injunction if he could prove that the works threatened by defts. would in all probability affect the security of his mine.—MUNDY v. RUTLAND (DUKE) (1883), 23 Ch. D. 81; 31 W. R. 510, C. A.

**Annotation:—**Mentd. Re Mundy's S. E. (1890), 63 L. T. 311.

**1808. — Whether property reserved included in demise.]—**If a lessee for years of two houses,

the one new & the other old, underlet the premises for seven years, "excepting & reserving the new house for the use of the lessor if he shall please to dwell therein, but not to be let to any other person, & at all times when he does not live there to be to the use of the lessee," this new house is not demised, & the lessee by occupying it, becomes merely a tenant at will, so that if a fire accidentally happen therein, the landlord cannot maintain an action against him for negligence.—CUDLIP v. RUNDLE (1691), Carth. 202; Comb. 177; Holt, K. B. 410; 4 Mod. Rep. 9; 12 Mod. Rep. 14; 3 Salk. 156; 1 Show. 310; 90 E. R. 721.

**Annotation:—**Consd. Bristow v. Wright (1781), 2 Doug. K. B. 665.

**1809. — —.]—**A. the owner of certain freehold houses & land with a yard adjoining thereto, demised, by parol, several of the houses. The tenants were in the habit of passing over the yard & using a common pump & privy there. There was no evidence whether the yard formed part of the demise or not. In trespass by one of the tenants against the landlord for excluding him from the yard, the judge left it to the jury to say whether the landlord at the time of the demise had reserved the yard:—**Held:** this was a misdirection, the question being whether he had demised it, & not whether he had reserved it.—HEBBERT v. THOMAS (1835), 1 Cr. M. & R. 861; 5 Tyr. 503; 149 E. R. 1329; *sub nom.* HERBERT v. THOMAS, 1 Gale, 53.

**1810. — Liberty of passage to excepted room.]—**COLE'S CASE, No. 2557, *post*.

**1811. — For whose benefit reservation operates**

**—Licencees of lessor.]—**A railway co. being possessed of a shipyard in which was a "slip" for docking vessels, by indenture demised the yard to B., subject to the following reservation: "Except & always reserved out of this demise the patent slip, as shown on a plan, & the machinery & apparatus connected therewith, & the site thereof, and the dues & payments payable for the use thereof, & except & always reserved unto the said co., their successors & assigns, officers, servants, & workmen, free access at all times to & from the said slip, for the purpose of working & using or repairing the same, or otherwise:—"**Held:** it was competent to the co. to grant "licences" to persons to use the slip, on payment to them of certain dues; & the right of access to & of using the slip was not limited to persons claiming to exercise it in the character of "assigns" of the co., in the strict sense.—MITCALFE v. WESTAWAY (1864), 17 C. B. N. S. 658; 34 L. J. C. P. 113; 11 L. T. 673; 10 Jur. N. S. 1202; 144 E. R. 264; *sub nom.* METCALFE v. WESTAWAY, 5 New Rep. 126; 13 W. R. 181.

**Annotation:—**Reid. Hammond v. Prentice, [1920] 1 Ch. 201.

**1812. — Third party.]—**Pltf. was the lessee of a farm subject to the reservation to a golf club of the use of golf links over the farm. By their lease the golf club was entitled to keep between each hole round the links a playing course not exceeding fifty yards in width clear from fern, long grass, or other material obstruction

#### PART VII. SECT. 8, SUB-SECT. 1.

**1803 i. Exception—Whether repugnant to grant.]—**COCHRANE v. McCLEARY (1869), 1 I. R. 4 C. L. 165.—IR.

**d. Admissibility of parol evidence—Where terms of lease contested.]—**Where a written lease of a farm excepted a part of it described as lot No. 2, parol evidence is inadmissible to show that it was agreed between the parties at the time of the

bargain that the tenant should also occupy lot No. 2.—MCILVENY v. McKILLIGAN (1868), 1 Han. 322.—CAN.

**e. — For as long as required by lessor.]—**By a lease of a close containing five acres, at a yearly rent of £10, payable thereout, the lessor purported to reserve one acre of the close for himself, for such time as he might require said acre for his own use, allowing to the lessee £2 out of said

rent, as long as the lessor should hold said acre:—**Held:** the clause did not operate as an exception of that acre.—MORONEY v. MACNAMARA (1872), 20 W. R. 905.—IR.

**f. — Included in grant—For better description.]—**ELLIS v. LORD PRIMATE (1865), 12 L. T. 830.—IR.

**g. — —.]—**McCLEARY v. COCHRANE (1869), 18 W. R. 262.—IR.

**h. Reservation—For whose benefit**

to the play:—*Held*: “long grass” in the lease to the golf club meant long grass from the point of view of the golfer, & a material obstruction to the game: & the golf club in cutting the grass with a mowing machine to the length of half an inch or three quarters of an inch had done no more than was reasonably necessary for the maintenance of the course.—*WOODWARD v. HEYWOOD* (1910), 27 T. L. R. 123, D. C.

**1813. — Right to sell part of land for “building sites” — Small-pox hospital.**—A reservation to the landlord, in an agreement under which land is let for farming purposes, of a right to sell portions of the land for “building sites” is confined to the sale of the land for the erection of dwelling-houses & the like, & does not extend to the sale to a local authority of a site for a small-pox hospital.—*ENGLISH v. TYNEMOUTH CORPN.* (1903), 67 J. P. 239; 1 L. G. R. 177, D. C.

#### SUB-SECT. 2.—EASEMENTS.

**Express reservations & exceptions.**—*See* EASEMENTS, Vol. XIX., pp. 25, 26, Nos. 107–114.

**Implied reservations in favour of grantor.**—*See* EASEMENTS, Vol. XIX., pp. 39–43, Nos. 206–229.

#### SUB-SECT. 3.—FISHERIES.

*See* FISHERIES, Vol. XXV., p. 20, Nos. 168–171.

#### SUB-SECT. 4.—GAME.

*See* GAME, Vol. XXV., pp. 353–355, Nos. 44–63.

#### SUB-SECT. 5.—MINES AND MINERALS.

*See* MINES.

#### SUB-SECT. 6.—WATERS AND WATERCOURSES.

*See, generally,* WATER SUPPLY; WATERS & WATERCOURSES.

**1814. General grant of watercourses—Reserving one specifically.**—A pattern lease contained a grant of waters & watercourses, excepting to the lessor “a watercourse flowing or descending from a head weir,” erected on the premises, “in & through a meadow,” “parcel of the premises,” “& from thence conveyed by a trough into a meadow,” “for watering & improving the same & other lands of” the lessor. At that time, the weir forced the water of a natural stream to flow along an artificial trough, so as to irrigate lands of the lessor below. After 1749, M., a lessee, erected a mill above the weir, & used some of the water, which returned to the natural stream below the weir, & could not be used for irrigating the lands below. Afterwards a tenant for life leased the premises, “together with so much of the water” as M. had “been accustomed to have,”

for working his mill, “also the use of the water descending from the head weir,” “except & reserving to the occupiers of the meadows watered by the course running from the head weir,” & thence by the trough, the right “to take the water for watering the meadows having the right thereto as heretofore accustomed”:—*Held*: the pattern lease did not except the channel over which the water flowed, but only subjected it to the easement; & therefore the last lease did not grant more land than the pattern lease.—*DOE d. EGREMONT (EARL) v. WILLIAMS & HOLE* (1848), 11 Q. B. 688; 17 L. J. Q. B. 154; 11 L. T. O. S. 27; 12 Jur. 455; 116 E. R. 631.

**1815. Reservation of passage for “water & soil” — Extent of right.**—In a lease of certain premises with their appurtenances the lessor reserved out of the demise “the free running of water & soil coming from any other buildings & lands contiguous to the premises hereby demised in & through the sewers & watercourses made or to be made within, through, or under the said premises:”—*Held*: (1) the reservation extended to water & soil coming from contiguous lands & buildings, whether that water or soil in the first instance actually arose on or from such contiguous lands or buildings or not; (2) it did not extend beyond water in its natural condition, & such matters as are the product of the ordinary use of land for habitation, & therefore it did not give to the occupier of certain tan-pits, who claimed under the lessor, a right of passage for the refuse of those pits.—*CHADWICK v. MARSDEN* (1867), L. R. 2 Exch. 285; 36 L. J. Ex. 177; 16 L. T. 666; 31 J. P. 535; 15 W. R. 961.

#### SUB-SECT. 7.—WAYS.

Rights of way generally, *see* EASEMENTS, Vol. XIX., pp. 93 *et seq.*

**1816. Reservation of power to divert road.**—Where a lessor had power by the lease to divert a road if he made a certain other alteration:—*Held*: he had power at any time to make the alteration, & divert the road, although he might have made the alteration for the purpose of entitling himself to divert the road, & in this respect a power under a deed differed from a power conferred by Act of Parliament.—*BUTT v. IMPERIAL GAS CO.* (1866), 2 Ch. App. 158; 16 L. T. 820; 31 J. P. 310; 15 W. R. 92, L. C.

**1817. Exception of passage & basement—Extent of lessor's rights.**—Defts. demised to pttf. a block of freehold business premises in Aldermanbury, in the City of London, excepting out of the demise “the way of passage & basement under the same” shown on the plan & leading from Aldermanbury through the ground floor & underneath the first floor of the demised building to property of defts. in rear of the block. The passage was entered from Aldermanbury through double doors, the floor was of concrete carried on iron girders & covered with mosaic and “Terrazzo,” the walls were faced with glazed bricks, & there was a fire-proof division between the passage & the first floor above it. Seventeen years after the grant of the lease defts. proceeded to demolish the floor of the passage & remove the “tie” girders in order

*reservation operates—Death of lessor.*—*GARDNER v. PERRY*, 23 C. L. T. 295.—*CAN.*

**k. — Building not lessor's property.**—The owner of an oil well lot,

on which was also situate a blacksmith's shop, which was known not to be the property of the owner of the land, agreed to lease the oil well & lot for a term of years without any express reservation of the blacksmith's

shop. The intended lessee insisted on obtaining a lease without any reservation of such shop, & filed a bill for that purpose. The bill was dismissed.—*MORRIS v. KEMP* (1867), 13 Cr. 487.—*CAN.*

**Sect. 8.—Exceptions and reservations: Sub-sects. 7 & 8. Part VIII. Sects. 1, 2, 3 & 4: Sub-sect. 1, A. & B.]**

to make a timber cartway from the entrance in Aldermanbury down to the level of the basement in the rear of the building for the purpose of carting building materials & debris to & from the Guildhall across their property in rear of the demised premises. In an action by pltf. to restrain these proceedings & the resultant nuisance from noise:—*Held*: (1) on the construction of the lease, the property in half the north wall & in the floor of the passage had been reserved to defts. & that they had not committed a trespass in removing the floor of the passage & the girders from the north wall; (2) defts. could use the passage for any purpose allowed by law not injuriously affecting the rest of the building, & there was no implied obligation upon them to keep & use the passage & basement in the condition in which they were at the date of the lease; (3) the stability of the north wall had not been affected by the acts of defts.; (4) there had been no breach of defts.' covenant for quiet enjoyment, & the annoyance, being temporary, did not constitute a cause of action.—*PHILPS v. LONDON CORPN.*, [1916] 2 Ch. 255; 85 L. J. Ch. 535; 114 L. T. 1200; 14 L. G. R. 746.

**SUB-SECT. 8.—WOODS AND TREES.**

See AGRICULTURE, Vol. II., pp. 97, 98, Nos. 773–790.

**1818. Exception of wood—Whether soil included.]—ANON.** (1554), Dal. 11; 123 E. R. 233.

**1819. — Rights of parties.]—(1) A. & B.** his wife, tenants for life, remainder to A. in tail, remainder to B. in tail, reversion to A. in fee, by indenture demised for years excepting timber trees, with liberty to carry them away; A. died, & afterwards the lessee redeemed for seven years to P. the husband of M., the daughter & heir of A.:—*Held*: P. could not cut down the timber trees.

(2) Where a lease is made without an exception of the timber trees, the immediate owner of the inheritance, by the assent of the lessee, may cut them down.

(3) If lessee cuts down the trees, excepted out of his lease, the lessor shall have trespass *vi et armis* against him.—*PERCY'S CASE* (1609), 13 Co. Rep. 60; Ley, 20; 77 E. R. 1470.

**1820. — With power to enter & cut—Right of lessor to assign.]—**If a lease be made, with exception of the trees, & a power reserved to the lessor to enter & cut them down, he may assign this power to another person; but if it be not properly pursued, the lessee may maintain trespass, both against the lessor & his assignee.—*WARREN v. ARTHUR* (1682), 2 Mod. Rep. 317; 86 E. R. 1097.

**1821. — On payment of compensation—Unlawful cutting by third party.]—**In a lease the lessor reserved a right to enter & cut timber, making reasonable satisfaction to the lessee for any damage occasioned thereby; covenant does not lie by such lessee for any wrongful act of cutting down by a third person, if without the consent or authority of the lessor, however he may countenance the act afterwards. But where it only appeared that the lessor had promised to make compensation afterwards for such wrongful act, if the wrong doer himself did not, it was not considered as an adoption of the act, nor as evidence of a prior consent to it, whereon to found an action on the covenant.—*GRIFFITHS v. BROME* (1794), 6 Term Rep. 66; 101 E. R. 438.

**1822. Exception of specific number of trees—From grant of profits of wood.]—**A lease was made of a manor with all gardens, orchards, yards, etc., & with all the profits of a wood, except to the lessor forty trees to take at his pleasure:—*Held*: the wood was not comprised within the lease, but the lessee should only have the profits, as pannage, herbage, etc.—*ANON.* (1579), 4 Leon. 8; 74 E. R. 691.

**1823. — Duty of lessor to elect—Within reasonable time.]—BILLINGSLEY (LADY) v. HERSEY** (1612), 2 Bulst. 5; 80 E. R. 912.

## Part VIII.—Nature, Creation, and Duration of Tenancies.

### SECT. 1.—LEASES.

See Part III., *ante*.

### SECT. 2.—UNDERLEASES.

See Part IV., *ante*.

### SECT. 3.—LICENCES.

See Part VI., *ante*; Law of Property Act, 1925 (c. 20), s. 143.

### SECT. 4.—TENANCY AT WILL.

#### SUB-SECT. 1.—HOW CREATED.

##### A. In General.

See Law of Property Act, 1925 (c. 20), s. 54 (1).

**1824. General rule—Lease for uncertain term—Without reservation of annual rent.]—ROE d. BREE v. LEES**, No. 1980, *post*.

**1825. — — —.]—**If an agreement be made, to let premises so long as both parties like, & reserving a compensation, accruing *de die in diem*, & not referable to a year, or any aliquot part of a year, it does not create a holding from year to year, but a tenancy at will, strictly so called. Though the tenant has expended money on the improvement of the premises, that does not give him a term to hold until he is indemnified.

A mere general letting is a letting at will, if the lessor accepts yearly rent or rent measured by any aliquot part of a year the cts. have said that is evidence of a taking for a year (*CHAMBER, J.*).

If two parties agree that the one shall let & the other shall hold so long as both parties please that is a holding at will & there is nothing to hinder parties from making such an agreement (*MANSFIELD, C.J.*).—*RICHARDSON v. LANGRIDGE* (1811), 4 Taunt. 128; 128 E. R. 277.

*Annotations*:—*Distd. Braythwayte v. Hitchcock* (1812), 10 M. & W. 494. *Consd. Doe d. Hull v. Wood* (1845), 14 M. & W. 682. *Refd. R. v. Halifax* (1855), 1 Jur. N. S. 181; *Bayley v. Fitzmaurice* (1857), 8 E. & B. 664.

**1826. — — — “At will & pleasure”—Reservation of annual rent.]—**Proviso in a deed: A.

agrees to become tenant to C. & D. of the premises, etc., "at their will & pleasure, at & after the rate of £25 4s. *per annum*, payable quarterly." A. remained in possession under this agreement for two years & paid a year's rent; after which the lessors distrained for four quarters' rent:—*Held*: A. was tenant at will, & not from year to year.—*DOE d. BASTOW v. COX* (1847), 11 Q. B. 122; 17 L. J. Q. B. 3; 10 L. T. O. S. 132; 11 Jur. 991; 116 E. R. 421.

1827. ———.]—*SPENCER v. HARRISON* (1879), 5 C. P. D. 97; Colt. 61; 49 L. J. Q. B. 188; 41 L. T. 676; 44 J. P. 235.

1828. *Necessity for contract—Mere silence insufficient.*—(1) To constitute a tenancy at will, there must be a contract, the lessor must be bound as well as the lessee (*BRAMWELL, B.*).

(2) Mere silence on the part of *pltf.* did not constitute or make evidence of a tenancy at will. . . It is clear that Littleton & his commentator alike suppose an affirmative consent & not a mere negative or silent consent (*BRAMWELL, B.*).—*LEY v. PETER* (1858), 3 H. & N. 101; 27 L. J. Ex. 239; 30 L. T. O. S. 367; 6 W. R. 437; 157 E. R. 403.

1829. *Lease at will of lessor.*—*ANON.* (circa 1527), Bro. N. C. 175; 73 E. R. 923.

1830. ——— & lessee.]—*SPENCER v. HARRISON* (1879), 5 C. P. D. 97; Colt. 61; 49 L. J. Q. B. 188; 41 L. T. 676; 44 J. P. 235.

1831. *Grant by lessee for years.*—If a lessee for years of a messuage grants *totum messuagium suum* the grantee has but at will, but if he grant all his interest & estate in such a messuage then the whole lease passes.—(*GRIFFIN'S CASE* (1589), 2 Leon. 78; 74 E. R. 372.

1832. ———.]—If a tennor grants the land generally, the grantee is but a tenant at will; if he devises the land all his term passes (*HOLT, C.J.*).—*GERMAIN v. ORCHARD* (1691), *Holt, K. B.* 331; *Freem. K. B.* 500; 1 Salk. 316; 3 Salk. 222; 90 E. R. 1083, Ex. Ch.; *on appeal, sub nom. JERMYN v. ORCHARD* (1695), *Show. Parl. Cas.* 199, H. L.

*Annotations*:—*Mentd.* Goodtitle d. Dodwell v. Gibbs (1826), 5 B. & C. 709; Boddington v. Robinson (1875), L. R. 10 Exch. 270.

1833. *Grant or authority to enter—To take profits.*—A grant or authority to come upon any lands; if it is to take the profits, it is a lease at will (*per Cur.*).—*R. v. WINTER* (1705), 2 Salk. 587; 91 E. R. 493; *sub nom. ANON.*, 3 Salk. 223.

1834. *By acknowledgment of tenant—Signature to assessment.*—(1) A., in 1817, let B. into possession of a farm as tenant at will, & in 1827, A. entered upon the land without B.'s consent, & cut & carried away stone therefrom:—*Held*: this entry amounted to a determination of the estate at will.

(2) In 1829, B. being one of the assessors for the land tax in the parish, signed an assessment, in which he was named as the occupier of the farm, & A. as the proprietor:—*Held*: this was evidence whence the jury might infer that a new tenancy at will had been created between the parties.—*TURNER v. DOE d. BENNETT* (1842), 9 M. & W. 643; 11 L. J. Ex. 453; 152 E. R. 271, Ex. Ch.; *previous proceedings, sub nom. DOE d. BENNETT v. TURNER* (1840), 7 M. & W. 226.

*Annotations*:—*As to* (1) *Refd.* *Pinhorn v. Souster* (1853), 21 L. T. O. S. 92; *Lynes v. Snaith*, [1899] 1 Q. B. 486. *As to* (2) *Consd.* *Ley v. Peter* (1858), 3 H. & N. 101. *Refd.* *Doe d. Goody v. Carter* (1847), 9 Q. B. 863; *Randall v. Stevens* (1853), 2 E. & B. 641; *Jarman v. Hale* (1899), 68 L. J. Q. B. 681.

#### B. By Permissive Occupation.

1835. *Occupation by cestui que trust—Tenant at will of trustee.*—*FREEMAN v. BARNES* (1670), 1 Sid. 458; 2 Keb. 597, 650; 1 Lev. 270; 1 Vent. 80; 82 E. R. 1215; *sub nom. BARNES v. FREEMAN*, *Cart.* 195.

*Annotations*:—*Refd.* *Garrard v. Tuck* (1849), 8 C. B. 231. *Mentd.* *Wallwyn v. Llandaff* (Bp.) (1764), 2 Wils. 233; *Hall v. Doe d. Surtees* (1822), 1 Dow. & Ry. K. B. 340.

1836. ———.]—A *cestui que trust* who enters into possession of land, becomes, at law, tenant at will to the trustee; where, therefore, the equitable owner of an estate, a term in which has been assigned to attend the inheritance, is in possession, the right of entry under Real Property Limitation Act, 1833 (c. 27), s. 2 accrues only upon the determination of the tenancy at will resulting from such possession.—*GARRARD v. TUCK* (1849), 8 C. B. 231; 18 L. J. C. P. 338; 14 L. T. O. S. 547; 13 Jur. 871; 137 E. R. 498; *on appeal*, 8 C. B. 254, Ex. Ch.

*Annotations*:—*Distd.* *Melling v. Leak* (1855), 16 C. B. 652. *Refd.* *Drummond v. Sant* (1871), L. R. 6 Q. B. 763. *Mentd.* *Alloyne v. R.* (1855), 5 B. & C. 399; *Knight v. Bowyer* (1858), 2 De G. & J. 421; *Bateman v. Boynton* (1866), 14 W. R. 598; *Locking v. Parker* (1872), 8 Ch. App. 35, n.

1837. ———.]—*Cestui que trust actual occupant.*—A *cestui que trust*, who is let into possession of the trust estate by the trustee, becomes his tenant at will, and the right of entry under Real Property Limitation Act, 1833 (c. 27), s. 2 accrues only on the determination of such tenancy at will. But this doctrine applies only to the case where the *cestui que trust* is the actual occupant. If he is merely allowed to receive the rents, or otherwise deal with the estate in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees who choose to allow him to act for them in the management of the estate. In the latter case, if the actual occupier is permitted to occupy for more than the twenty years prescribed by Real Property Limitation Act,

#### PART VIII. SECT. 4, SUB-SECT. 1.—A.

1833 i. *Grant or authority to enter—To take profits.*—*FLETCHER v. LYONS*, [1919] 3 W. W. R. 381; 48 D. L. R. 365.—*CAN.*

1833 ii. ———.]—*O'CONNELL v. O'CALLAGHAN* (1841), 3 I. Eq. R. 199; Long. & T. 157.—*IR.*

1. *Verbal agreement—Term exceeding three years.*—Verbal leases for a longer term than three years have the force & effect of leases at will only.—*INNOTT (HARTARY'S ADMINISTRATOR) v. PENDERGAST & FOX* (*McGRATH'S EXECUTORS*) (1823), 1 Nfld. L. R. 349.—*NFLD.*

m. ———.]—A verbal agreement to lease premises for three years from a future date is void under Stat. of Frauds, & although by entry & payment of rent to the *mtgr.* in possession, the party would become a

tenant from year to year as to him, he would be nothing more than a tenant at will to the *mtgr.* or a person claiming through him.—*BREWING v. BERRYMAN* (1873), 2 Pug. 115.—*CAN.*

n. ———.]—*Use & occupation—Pending sale.*—An oral agreement was made between *pltf.* & *def.* that *def.* should have the use of the land until a purchaser was found, he to pay the taxes, as rent. In the meantime. No other rent was bargained for or agreed to be paid, & none was paid:—*Held*: *def.* was a mere tenant at will.—*EAST v. CLARKE* (1915), 33 O. L. R. 621.—*CAN.*

o. *Lands sold by sheriff—Debtor in possession.*—*DOE d. ARMOUR v. McEWEN* (1831), 3 O. S. 493.—*CAN.*

p. *Lease at will of lessee.*—A lease by which the lessees are to hold for such time as they require or wish, is

a tenancy at the will of the lessee which in law is a tenancy at the will of the lessor also.—*MANICKA MUDALIAR v. CHINNAPPA MUDALIAR* (1912), I. L. R. 36 Mad. 557.—*IND.*

q. *Grant for maintenance.*—*Def.* admitted that the villages formerly belonged to *pltf.*'s predecessor, but were given over to them for their maintenance:—*Held*: *def.*'s tenancy was a mere tenancy at will.—*GOVERNMENT v. LALL MOHUN NAUTH* (1863), 2 Hay, 136.—*IND.*

#### PART VIII. SECT. 4, SUB-SECT. 1.—B.

r. *Occupation rent free—As caretaker.*—*RYAN v. RYAN* (1881), 5 S. C. R. 387.—*CAN.*

t. ———.]—T. put C. in possession of land to hold for him & keep trespassers off, with liberty to cut the grass & firewood upon it:—*Held*:

**Sect. 4.—Tenancy at will: Sub-sect. 1, B. & C.]**

1833 (c. 27), without paying rent, the result is that the trustees lose their title exactly as in any ordinary case of landlord & tenant.

M. had been led into possession by the trustees, a tenancy at will would have been established, which would not have been determined by his letting in C. as his under-tenant unless the trustees had had notice of such underletting, of which there was no evidence, for though the general rule is that a tenancy at will is not assignable, because the transfer determines the tenancy, yet the rule is subject to the qualification that a tenant at will cannot determine his tenancy by transferring his interest to a third party without notice to his landlord (CRESSWELL, J.).—*MELLING v. LEAK* (1855), 16 C. B. 652; 3 C. L. R. 1017; 24 L. J. C. P. 187; 1 Jur. N. S. 759; 3 W. R. 595; 139 E. R. 915.

*Annotations:—*Reid. *Drummond v. Sant* (1871), L. R. 6 Q. B. 763; *Spencer v. Harrison* (1879), 5 C. P. D. 97. *Ment*, *Christchurch Cathedral Church, Oxford v. Buckingham & Chandos* (1864), 17 C. B. N. S. 391.

**1838. Reservation of part of premises—For lessor's use.—Right of lessee to occupy.]—***CUDLIP v. RUNDLE*, No. 1808, *ante*.

**1839. — Parol variation of written agreement.]—**If there be a written agreement between landlord & tenant, that for certain premises the tenant shall pay £170 a year, & afterwards an arrangement is made by parol that £30 a year shall be allowed out of it, because the landlord is to occupy a certain part for a time, such parol arrangement does not vary the agreement so as to reduce the rent payable under it; & therefore an allegation is correct which states it to be £170.

Ptff. is tenant of the whole to W. & permits W. to occupy a part, that is, at the utmost, a tenancy at will; & ptff. may have it determined at his pleasure (BEST, C.J.).—*HILTON v. GOODHIND* (1827), 2 C. & P. 591, N. P.

**1840. Occupation rent free.]—**Dwelling-house, if the owner of a house suffer a person to live in it rent free, it may be stated to be that person's house; such person is tenant at will.—*R. v. COLLETT* (1823), Russ. & Ry. 498, C. C. R.

**1841. — Owner occasionally living with occupier.]—**W. seised in fee of a house & land, died in 1798, leaving a widow, & his son J. a minor above fourteen years of age. The widow, with whom J. lived, continued to occupy the house & land. In 1798, J. being still a minor, the widow married deft. who continued thenceforward to occupy the house & land. In 1805 J. left the premises, but occasionally resided there afterwards for two or three weeks at a time, with deft. & his wife. The wife died in 1811. In 1842 J. mortgaged the premises in fee to the lessor of ptff. for money which was paid to deft., deft. himself being present at the execution of the deed & privy to its contents, & receiving the money from J.:—*Held*: in ejectment by the mtgee. the jury were warranted in presuming that deft. occupied as tenant at will to J.—*DOE d. GROVES v. GROVES* (1847), 10 Q. B. 486; 16 L. J. Q. B. 297; 9 L. T. O. S. 72; 11 Jur. 558; 116 E. R. 185.

**1842. — As manager of society.]—**A voluntary assocn. was formed for the purpose of printing & publishing the writings of S., & certain

regulations were agreed to, & amongst others, that the affairs of the society should be conducted by a committee of twelve members elected at the annual meetings & the treasurer, & that the committee might appoint a salaried agent or manager. In 1854, the society having determined to establish a library, etc. & to take premises for that purpose & for that of a shop, the committee advertised for a librarian, etc., & subsequently appointed W. to the office, & resolved that he should have the premises rent & taxes free & 35 per cent. on certain profits & that he should be allowed to carry on a retail business in New Church works & general literature for his own benefit. On July 5, 1860, the committee resolved that W. be manager at a salary of £75 & six months' notice of separation on either side. In 1855 the residue of the term in the house and premises became vested in four of the committee in trust for the society. The ground floor was converted into a shop, etc., the first floor into a library, etc., & W. was permitted to occupy the upper rooms as a residence. W., having become the publisher of spiritualistic works which the committee considered would be injurious to the society, they in July, 1860, desired W. to discontinue the publication of such works. On Aug. 2 he wrote to the committee refusing to do so, on the ground that he became their manager on the understanding that he was to be allowed to carry on an independent business. The committee then gave six months' notice to terminate his engagement. On Oct. 4 the notice was withdrawn W. having agreed to comply with the wishes of the committee. On Oct. 13 a requisition signed by several members of the society was sent to the committee, calling on them to summon a special general meeting to take into consideration their resolutions of July as to the publication of the works objected to, & also as to the propriety of altering the laws of the society. The committee declined to call a meeting, but on Nov. 8 they met, & passed resolutions dismissing W. from his office without notice, & requiring possession, which they immediately obtained by force of the house & premises. On Nov. 12, & 13 general meetings, as alleged of the society took place, & resolutions were passed approving of W.'s conduct, disapproving of that of the committee, & making alterations in the laws, & authorising W. to obtain possession, which he shortly afterwards did by force of the house & premises. Eleven of the committee, including the four trustees then filed a bill for relief; & on motion, the ct. granted an injunction restraining W. from acting as manager, selling the books, recovering the moneys, & from publishing any spiritualistic works at the house of the society, & from disturbing ptffs. or their agents in the possession of the house, etc., & from carrying on his business therein, on the ground that the legal estate was vested in the trustees, & that W. was merely a tenant at will, but without prejudice to any question as to the right of W. to recover damages.—*SPURGIN v. WHITE* (1860), 2 Giff. 473; 3 L. T. 609; 7 Jur. N. S. 15; 9 W. R. 266; 60 E. R. 198.

*Annotation:—**Appld. Collison v. Warren*, [1901] 1 Ch. 812.

**1843. — Charitable motive.]—**(1) Where a person occupies rent free certain land with the consent of the owner, the fact that the owner's

C. was a tenant at will, & such tenancy terminated at his death.—*DOE d. PETERS v. MCGLOYN* (1858), 4 All. 189.—CAN.

a. — Agreement to restore on

demand.]—R. being possessed of a house allowed K. to occupy it without paying rent, on condition that K. would keep it in repair & restore it to R. on demand:—*Held*: K. occupied the house as tenant at will of R.—*RAD-*

*HARHAI v. SHAMA* (1867), 4 Bom. A. C. 155.—IND.

b. *Payment & acceptance of rent* — *On terms of yearly tenancy—After expiration.]—*Where the landlord, before he accepted any rent after expiry of

motive for consenting to the occupation is charitable does not make the possession of the occupier the constructive possession of the owner nor the occupier himself the owner's guest. The occupier is tenant at will of the owner, & if the occupation continues uninterrupted for thirteen years, the right of the owner to the land will be barred under Real Property Limitation Act, 1833 (c. 27), s. 7 as amended by the Real Property Limitation Act, 1874 (c. 57).

(2) The mere entry by the owner to do repairs under these circumstances will not, if it is not against the will of the occupier, amount to a taking of possession so as to prevent the operation of the statute.—*JYNES v. SNAITH*, [1899] 1 Q. B. 486; 68 L. J. Q. B. 275; 80 L. T. 122; 47 W. R. 411; 15 T. L. R. 184; 43 Sol. Jo. 246, D. C.

**1844. Occupation after death of tenant from year to year—Unless intention otherwise shown.**—*DOE d. HULL v. WOOD*, No. 2010, *post*.

**1845. Entry in expectation of tenancy from year to year.**—*BLACKWELL v. BADGER & WORRELL*, (1845), 5 L. T. O. S. 176.

**1846. Surrender of existing tenancy—Agreement to quit at one month's notice.**—*S.* having for some years held a piece of ground under the East India Co., which they proposed to take for the purpose of public improvement, a negotiation took place for *S.* surrendering the land & re-acquiring it on condition of giving up possession on one month's notice. At the time of proposing the surrender, *S.* believed the improvement in question was a new road, which would greatly benefit his adjacent property, & such was also at first the intention of the co. It seemed, however, the co. varied the nature of the improvement ultimately contemplated. *S.* afterwards, without any definite notice of the improvement, surrendered the land & executed an agreement reciting the transaction & referring generally to the improvement as "a public improvement," without further describing it, & agreeing to quit at a month's notice:—*Held*: the co. were entitled at law to bring an ejectment for the land, & *S.* had no defence; but his remedy, if any, was in equity.

The lessors of *pltf.* had become the absolute owners of the land, & upon the proposed assumption they would have let *S.* into possession under an agreement that they would not disturb him until after a month from a contingent uncertain event [the commencement of certain improvements] what was the nature of this interest? Did it create any tenancy between the parties? If so, of what description? It certainly was not a tenancy for years, nor from year to year, nor for a year certain, nor for a month, nor for any other certain time. In the course of the agreement or appts. it was suggested that the agreement passed a freehold interest; & certainly from the indefinite character of the interest given it seems best to answer this description. . . . Now an interest of this nature could not be created by parol, or by a mere writing such as the instrument of Oct. 11, 1852 which therefore could only operate as an agreement. *S.* having been admitted or holding under this agreement, & the same sort of possession being continued by appts. he & they

after him could not be treated as trespassers but were in as tenants at will; of course such a tenancy was terminated by the mere bringing of an ejectment (*per cur.*).—*DOSSEE v. DOE d. EAST INDIA CO.* (1859), 1 L. T. 345; *sub nom.* ANUNDOMOHEY *DOSSEE v. EAST INDIA CO.*, 8 W. R. 245, P. C.

**1847. Occupation dependent on employment.**—It appears that appts. & other workmen are only entitled to occupy the houses during the time of their service at the colliery; the occupation terminates at the time the service terminates. Still, appts. are tenants, though not tenants for any fixed time. They occupy as tenants at will as long as they reside in the houses by the arrangement between themselves & their masters (*MELLOR, J.*).—*SMITH v. SEGILL OVERSEERS* (1875), 1 L. R. 10 Q. B. 422; 44 L. J. M. C. 114; 32 L. T. 850; 40 J. P. 228; 23 W. R. 745.

*Annotations*:—*Mentd. Barton v. Birmingham Town Clerk* (1878), 2 Hop. & Colt. 393; *A.-G. v. Croydon Corpn.* (1889), 42 Ch. D. 178; *Marsh v. Estcourt* (1889), Fox & S. Reg. 157; *Oxford University v. Oxford Corpn.* (No. 1) (1902), Ryde & K. Rat. App. 87.

**1848. Express tenancy by letter—Until arrangement arrived at.**—(1) A colliery lease, which empowered the lessees to carry foreign coal over the surface, provided that all disputes relating to the lease should be referred to arbn. Shortly before the expiration of the term the lessees by letter requested the lessors to grant an extension of the lease on the existing terms for six months, & the lessors wrote in reply that the lessees might consider themselves tenants at will of both mine & way-leave pending further arrangements. The lessors having brought an action against the lessees in respect of their exercise of the way-leave during the tenancy at will, the lessees applied for a stay of proceedings under Arbitration Act, 1889 (c. 49), s. 4:—*Held*: upon the construction of the letters, that the terms of the lease, including the arbn. clause, applied to the tenancy at will, so far as applicable to such a tenancy, & the proceedings ought to be stayed.

(2) Where on the expiration of a lease the lessee is expressly authorised to continue in possession as tenant at will, in the absence of evidence of a contrary intention, the terms & conditions of the original lease apply to the tenancy at will so far as they are consistent with such tenancy.—*MORGAN v. HATHISON (WILLIAM), LTD.*, [1907] 2 Ch. 137; 76 L. J. Ch. 548; 97 L. T. 445, C. A.

*Annotations*:—*As to (2) Consd. Cole v. Kelly*, [1920] 2 K. B. 106. *Reid. Croft v. Blay*, [1919] 2 Ch. 313; *Itc Leeds & Batley Breweries & Bradbury's Lease*, *Bradbury v. Grimble*, [1920] 2 Ch. 518. *Generally, Mentd. A.-G. v. Cory, Kennard v. Cory* (1918), 31 T. L. R. 621.

### C. By Tenant Holding Over.

**Creation of tenancy from year to year.**—*See* Sect. 6, sub-sect. 2, B. (b), *post*.

**1849. Payment & acceptance of rent.**—If lessee for years hold over & pay his rent quarterly, that makes a tenant at will.

In debt for rent upon a lease at will of houses in London, upon a trial at the Bar touching the title of B., it was agreed that if tenant for years holds over his term, & continue to pay his rent quarterly as before, that this payment & acceptance of the

lease, expressly told the tenant that he would not consent to any tenancy from year to year, so as to require any notice of termination to be given, but that they should remain in the same position as they were on the expiry of the lease, to which the tenant assented—the rent, however, to be the same as that reserved in the lease, & to be paid in like manner:—

*Held*: the tenant was not a tenant from year to year but a tenant at will.—*DRINGTON v. DOUGLAS* (1903), 23 C. L. T. 286; 6 O. L. R. 266; 2 O. W. R. 734.—*CAN.*

### PART VIII. SECT. 4, SUB-SECT. 1.—C.

**1849 i. Payment & acceptance of rent.**—Where a tenant, after the determina-

tion of a lease for a specific term, held possession for five months, paying by agreement £75 for the first three & the same amount for the last two months, & afterwards occupied without any specific agreement:—*Held*: no definite tenancy was created by the last overholding.—*MCINNIS v. STINSON* (1858), 8 C. P. 34.—*CAN.*

*c. Possession after conveyance.*—

**Sect. 4.—Tenancy at will: Sub-sect. 1, C., D., E., F., G. & H.; sub-sect. 2, A.]**

rent amounts to a lease at will.—**BOWE'S CASE** (1646), Ayleyn, 4; 82 E. R. 884.

**Annotation:—Mentd.** Legg v. Strudwick (1708), 2 Salk. 414.

**1850. —.]—**Acceptance of rent after the term ended, makes a tenancy at will.—**TAYLOR v. SEED** (1696), Comb. 383; 90 E. R. 543.

**1851. —.]—**If a tenant whose lease is expired, is permitted to continue in possession, pending a treaty for a further lease, he is not a tenant from year to year; but so strictly at will, that he may be turned out of possession without notice. *Aliter*, if he has continued in possession a year, or rent has been received.—**DOE d. HOLLINGSWORTH v. STENNETT** (1799), 2 Esp. 717, N. P.

**Annotations:—Refd.** Dougal v. McCarthy (1893), 68 L. T. 699; Morgan v. Harrison, [1907] 2 Ch. 137. **Mentd.** Persso v. Kinneen (1859), 1 L. T. 77.

**1852. Where extension contemplated upon entering—No agreement.]—****BEDFORD v. JOHNSON** (1659), 2 Sid. 153; 82 E. R. 1307.

**1853. Possession pending treaty for further lease.]—****DOE d. HOLLINGSWORTH v. STENNETT**, No. 1851, *ante*.

**1854. Upon express terms of letter.]—****MORGAN v. HARRISON (WILLIAM), LTD.**, No. 1848, *ante*.

#### *D. By Intending Purchaser Entering.*

**1855. General rule.]—****DOE d. MELLERSH v. REDMAN**, No. 1887, *post*.

**1856. Question for jury.]—**In 1816 A. let B. into possession of lands under an agreement for purchase, which was never completed. B. continued in possession till his death in 1822, without having paid rent. He devised all his real estate to C., his widow, who entered into possession of the premises. Rent was demanded of her in 1827, which she promised to pay, but did not.

In ejectment for the premises brought in 1842 by parties claiming under A., it was left to the jury to say whether a tenancy at will had been created between A. & C., the article being otherwise barred by Real Property Limitation Act, 1833 (c. 27), s. 7:—**Held**: a proper direction.—**DOE d. STANWAY v. ROCK** (1842), 4 Man. & G. 30; 11 L. J. C. P. 194; 6 Jur. 266; 134 E. R. 13; *previous proceedings*, Car. & M. 549, N. P.

**Annotations:—Refd.** Drummond v. Sant (1871), L. R. 6 Q. B. 763; Sands to Thompson (1883), 22 Ch. D. 614.

**1857. Where sale not completed.]—**A., having agreed to buy certain lands of B., had paid part of the purchase-money, & was let into possession. B. had not executed any conveyance:—**Held**: this was a mere tenancy at will in A., & if B. had made a demand of possession, to determine the tenancy at will, he might recover the lands by

ejectment.—**DOE d. HIATT v. MILLER** (1833), 5 C. & P. 595, N. P.

**1858. —.]—**(1) A party who has been let into possession of land on a contract of sale which has not been completed, is a tenant at will to the vendor.

(2) A feoffment, with livery of seisin made on the land determines a tenancy at will, though the tenant be not present, nor assenting to the feoffment; & the feoffee may maintain trespass against the tenant at will who has entered on his possession.—**BALL v. CULLIMORE** (1835), 2 Cr. M. & R. 120; 1 Gale, 96; 5 Tyr. 753; 4 L. J. Ex. 137; 150 E. R. 51.

**Annotation:—As to (2) Refd.** Hogan v. Hand (1861), 14 Moo. P. C. C. 310.

**1859. —.]—**A. in the year 1819 agreed to purchase lands of B. for £670, & paid a deposit of £10. The agreement did not contain any stipulation that A. should be let into possession, but in fact he was so at Michaelmas in the year 1819. A. continued in possession, & neither paid any more of the purchase-money nor any rent or interest, & in 1822 A. cut down timber, & in 1824 levied a fine with proclamations, & mortgaged the property, & after that died, leaving the property, subject to the mtge., to his daughters:—**Held**: these facts were no bar to B. in ejectment brought within twenty years after, Michaelmas, 1839, as A. coming in under an intended purchase was in equity the owner of the land, with a liability to pay the purchase-money, & his cutting trees was consistent with his holding in that character, & not adversely to the rights of the vendor, to whom at law he was tenant at will.—**DOE d. COUNSELL v. CAPERTON** (1839), 9 C. & P. 112.

**1860. — On specified date.]—**Where a party was let into possession of land under an agreement of purchase, he paying interest after the rate of 5 per cent. *per annum* on the purchase-money until the completion of the purchase, which was to be in three months; & the purchase not being then completed, he continued in possession on the same terms:—**Held**: this was only a tenancy at will, which might be determined without notice to quit.—**DOE d. TOMES v. CHAMBERLAINE** (1830), 5 M. & W. 14; 9 L. J. Ex. 38; 151 E. R. 7.

**Annotation:—Refd.** Ley v. Peter (1858), 3 H. & N. 101.

**1861. — Devisee of intended purchaser in possession.]—****DOE d. STANWAY v. ROCK**, No. 1878, *post*.

**1862. — Landlord cannot distrain.]—****WHITELEY v. WOODHOUSE** (1849), 14 L. T. O. S. 177.

**1863. —.]—**Pending a negotiation for an assignment of a lease A. was, as the jury found,

deft. gave an absolute conveyance of certain property to plff. Later deft. claimed that this conveyance was intended to be a mtge.:—**Held**: it was not a mtge. & deft. remained in possession as a tenant at will, & landlord had right to possession.—**GIRROIR v. RONAN** (1909), 7 E. L. R. 153.—**CAN.**

**d. Distinguished from tenancy by sufferance.]—**Where a tenant holds over after the expiration of his lease without further agreement, such holding over, though by English law styled a tenancy by sufferance, is wrongful. Slight evidence, however, will suffice to change his position into that of a tenant at will.—**KANTHEPPA RADDI v. SHESHAPPA** (1897), 1 L. R. 22 Bom. 893.—**IND.**

#### **PART VIII. SECT. 4, SUB-SECT. 1.—D.**

**1855 i. General rule.]—**A person tak-

ing possession of land under an agreement to purchase, which specified no time for the continuance of the possession in the event of the purchase not being completed, becomes a tenant at will.—**DOE v. DENNY** (1854), 3 All. 50.—**CAN.**

**1855 ii. —.]—**A. entered into possession of certain premises under an agreement with B. for sale:—**Held**: A., by taking possession under the agreement, only became tenant at will to B.—**FARRELLY v. ROBINS** (1869), 1 L. R. 3 C. L. 284.—**IR.**

**1857 i. Where sale not completed.]—**F. went into possession of lands under an agreement to purchase from B., but before the agreement was fully completed it was put an end to by the consent of both parties. F. continued in possession for a time, & while so in possession, leased the land to deft. T.

B. entered with the declared intention of terminating the estate of F., & after entering, leased the land to W.:—**Held**: after the rescission of the agreement to purchase, F. was a mere tenant at will, or by sufferance, & the entry by B. put an end to the tenancy.—**WOODWORTH v. THOMAS** (1892), 25 N. S. R. 42.—**CAN.**

**1857 ii. —.]—**When a purchaser enters under a contract of sale, the tenancy at will arising therefrom is determined by a rescission of the contract, without any demand of possession.—**MARKEY v. COOTE** (1876), 1 L. R. 10 C. L. 149.—**IR.**

**e. Agreement for payment by instalments.]—**W. went into possession of a lot of land under an instrument in writing whereby it was agreed that the purchase-money was to be paid in four equal instalments. It was also

let into the possession of the premises as tenant of some kind. The negotiation going off, B., the landlord, demanded the key & wrote to A. telling him that he never intended to let him into possession at all, & A. refusing to go out, B. entered & forcibly expelled him & his family, in the doing of which pltf. & his wife were assaulted:—*Held*: although pltf. was entitled to recover damages for the assaults, he was not entitled to damages for the expulsion, his tenancy being at the most a tenancy at will, & that having been properly determined.—*POLLEN v. BREWER* (1859), 7 C. B. N. S. 371; 1 L. T. 9; 6 Jur. N. S. 509; 141 E. R. 860.

*Annotation*:—*Consd.* *Beddall v. Maitland* (1881), 17 Ch. D. 174.

**1864. Compulsory purchase—Entry pending arbitration.**—A railway co., having by its Act of Parliament powers to take lands compulsorily, entered, by the consent of a landowner, upon certain of the lands, & an agreement was made between the landowner & the co. to refer the question of the amount of compensation to an arbitrator. After the award was made, but before payment of any money or any tender of a conveyance of the lands, the land owner gave the co. notice to quit the lands, & brought an action of ejectment:—*Held*: the action was not maintainable.

Under the special Act defts. had a right to get possession of the property by proceeding in a certain manner. Instead of that, all the parties interested agree to refer to an arbitrator. Meanwhile defts. take possession, & probably make valuable improvements. They cannot be treated as mere tenants at will, or at any time be made to become trespassers by a demand of possession (*LORD CAMPBELL, C.J.*).—*DOE d. HUDSON v. LEEDS & BRADFORD RY. CO.* (1851), 16 Q. B. 796; 20 L. J. Q. B. 486; 17 L. T. O. S. 50; 15 Jur. 946; 117 E. R. 1086.

*Annotations*:—*Expld.* *Wing v. Tottenham & Junction Ry.* (1868), 3 Ch. App. 740. *Refd.* *Knapp v. J. C. & D. Ry.* (1863), 2 H. & C. 212.

#### *E. By Intending Lessee Entering.*

See Part II., Sect. 5, sub-sect. 1, A., *ante*.

#### *F. By Entry under Void Lease.*

See Law of Property Act, 1925 (c. 20), ss. 54, 55.

**1865. General rule.**—He who enters under a void lease & pays rent is not a disseisor, but tenant at will.—*DENN d. WARREN v. FEARNSIDE* (1747), 1 Wils. 176; 95 E. R. 558.

Compare Part III., Sect. 10, sub-sect. 2, A. (a), *ante*.

#### *G. Occupation of Chapel Premises.*

**Minister appointed by chapel trustees—Tenant at will of trustees.**—See ECCLESIASTICAL LAW, Vol. XIX., p. 536, Nos. 3961–3963.

#### *H. Under Mortgage.*

See MORTGAGE.

### SUB-SECT. 2.—HOW DETERMINED.

#### *A. In General.*

**1866. At pleasure of either party.**—A tenancy at will, where the title of the lessor continues, is

determinable at the pleasure of the lessee as well as at that of the lessor.—*CARPENTER v. COLLINS* (1805), 1 Brownl. 88; *Mooré, K. B.* 774; *Yelv.* 73; 123 E. R. 883.

*Annotation*:—*Expld.* *Pinhorn v. Souster* (1853), 8 Exch. 763.

**1867.**—[.]—Lease at will may be determined by either party.—*ANON.* (1701), 12 Mod. Rep. 610; 88 E. R. 1555.

**1868.**—[.]—*LEIGHTON v. THEED* (1701), 1 Ld. Raym. 707; 2 Salk. 413; 91 E. R. 1371; *sub nom.* *LAYTON v. FIELD*, Holt, K. B. 415; 3 Salk. 222.

See, also, No. 1830, *ante*.

**1869. Marriage of feme lessor.**—(1) A lease at will rendering rent is not determined by the marriage of the *feme* lessor.

(2) If a lease at will be made to three rendering rent & one dies, it is no determination of the lease.

(3) If husband & wife lease land at will, rendering rent, & the husband dies; it is no countermand of the will.—*HENSTEAD'S CASE* (1594), 5 Co. Rep. 10 a; 77 E. R. 63.

*Annotation*:—As to (1) & (3) *Refd.* *Manby v. Scot* (1663), 1 Keb. 482.

**1870. Agreement by tenant to purchase.**—To sustain the plea of purchase for valuable consideration without notice, deft. must aver, that the vendor was, or pretended to be, seised; & that he was in possession; which would be satisfied by the possession of his tenant. On the other hand, if pltf. had no lease, but merely this equitable agreement [to purchase by the tenant], & had taken possession under that, the subsequent purchaser could not have made out the averment, that pltf. was in possession. Such an agreement would have determined a tenancy at will (*LORD ELDON, C.*).—*DANIELS v. DAVISON* (1809), 10 Ves. 249; 33 E. R. 978, 1 L. C.; *subsequent proceedings* (1811), 17 Ves. 433, 1 L. C.

*Annotations*:—*Consd.* *Miles v. Langley* (1831), 2 Russ. & M. 626. *Expld.* *Bailey v. Richardson* (1852), 9 Hare, 734.

*Consd.* *James v. Lichfield* (1869), L. R. 9 Eq. 51; *Cavander v. Bulteel* (1873), 9 Ch. App. 79; *Caballero v. Henty* (1874), 9 Ch. App. 417. *Refd.* *Bozon v. Williams* (1829), 3 Y. & J. 150; *Jones v. Smith* (1841), 1 Hare, 43; *Branton v. Neale* (1844), 9 Jur. 338; *Barnhart v. Greenhields* (1853), 9 Moo. L. C. 18; *Curroll v. Keays, Keays v. Curroll* (1873), 22 W. R. 243; *Phillips v. Miller* (1875), L. R. 10 C. P. 420; *Lewis v. Stephenson* (1898), 67 L. J. Q. B. 296; *Hunt v. Luck*, [1901] 1 Ch. 45; *Green v. Rheinberg* (1911), 104 L. J. 149; *Reeva v. Pop*, [1914] 2 K. B. 284; *Ashburton v. Nocton*, [1915] 1 Ch. 274. *Mentd.* *Penny v. Watts* (1850), 13 Jur. 459; *Holmes v. Powell* (1856), 8 De G. M. & G. 572; *Knight v. Bowyer* (1858), 2 De G. & J. 421; *Welchman v. Coventry Union Bank* (1860), 8 W. R. 729; *Bevor v. Luck*, *Bevor v. Lawson* (1867), L. R. 4 Eq. 537; *Hughes v. Senior* (1870), 18 W. R. 1122; *Ellis v. Wright* (1897), 76 L. T. 522.

**1871. Bankruptcy of landlord.**—(1) Where a party having created a tenancy at will afterwards becomes insolvent, the vesting order & notice thereof to the tenant at will operate as a determination of the tenancy.

(2) The law . . . is, that if an assignment or conveyance of the reversion takes place behind the back of the tenant, it does not affect him until he has notice of it; but if he has knowledge from the assignee of the reversion, or has himself acquired the same information, it is a determination of the will. . . . The tenant is not to be treated as a trespasser until he has had notice of the determination of the will, not formal notice, but knowledge of it (*PARKE, B.*).—*DOE d. DAVIES*

agreed that W. was to be tenant at will, & that he should remain in possession until default in the payment of any of the instalments:—*Held*: W. was not a tenant at will.—*WINSLOW v. NUGENT* (1903), 36 N. B. R. 356.—*CAN.*

**PART VIII. SECT. 4, SUB-SECT. 1.—F. 1. Unregistered lease.**—*JOSEPHSON v. MAROX* (1912), 12 S. R. N. S. W. 249; 29 N. S. W. W. N. 78.—*AUS.*

**PART VIII. SECT. 4, SUB-SECT. 2.—A. g. After one year.**—The effect of

R. S. O. c. 133, s. 5 (7), is that it is for the purposes of the statute only that the tenancy at will is to be deemed determined at the expiration of a year.—*McCOWAN v. ARMSTRONG* (1902), 22 C. L. T. 55; 3 O. L. R. 100.—*CAN.*

**Sect. 4.—Tenancy at will: Sub-sect. 2, A., B. & C.**  
**(a) i. & ii., & (b) i.]**

*v. THOMAS* (1851), 6 Exch. 854; 20 L. J. Ex. 367; 155 E. R. 792.

**1872. Occupation dependent on employment—Termination of employment.]—SMITH v. SEGILL OVERSEERS**, No. 1847, *ante*.

**B. Death of Landlord or Tenant.**

**1873. General rule—Death of either party.]—**

Generally the death of either party determines a tenancy at will (LORD RILDON, C.).—*JAMES v. DEAN* (1805), 11 Ves. 383; 32 E. R. 1135, L. C.; *subsequent proceedings* (1808), 15 Ves. 236, L. C.

*Annotations:—Mentd. Re Blaw, Blaw v. Blaw*, [1903] 2 Ch. 40. *Mentd. Slatter v. Noton* (1809), 16 Ves. 197; *Randall v. Russell* (1817), 3 Mer. 190; *Plowden v. Hyde* (1852), 2 Sim. N. S. 171; *Archbold v. Scully* (1861), 9 H. L. Cas. 360; *Jacob v. Jacob* (1898), 78 L. T. 451; *Lloyd-Jones v. Clark-Lloyd*, [1919] 1 Ch. 424.

**1874. ——— Death of landlord—Tenant pur autre vie.]—**Tenant *pur autre vie* lets at will; if the *cestui que vie* die during the possession of the tenant at will, he shall hold the estate by occupancy.—*SKELLITON v. HAY* (1619), Cro. Jac. 554; 79 E. R. 475.

*Annotations:—Mentd. Geary v. Bearcroft* (1666), Cart. 57; *Holden v. Smallbrooke* (1668), Vaugh. 187.

**1875. ———.]—BOYER v. FEWER** (1619), Palm. 42; 81 E. R. 969.

**1876. ———.]—**The granting of a lease to a third person by the lessor of a tenant at will is a determination of the tenancy at will, but it does not give the lessor such a right of entry as is contemplated by Real Property Limitation Act, 1833 (c. 27), s. 2, when the lessor's title is that of a reversioner expectant on a term of years.—*HOGAN v. HAND* (1861), 14 Moo. P. C. C. 310; 4 L. T. 505; 9 W. R. 673; 15 E. R. 322, P. C.

**1877. ——— Death of tenant.]—**On the death of a tenant at will, his heir-at-law entered into possession, & continued to occupy until an action of ejectment was brought by the devisees of the owner of the land:—*Held*: the action was maintainable, without a notice to quit or demand of possession.—*DOE d. BURGESS v. THOMPSON* (1836), 5 Ad. & El. 532; 2 Har. & W. 451; 1 Nev. & P. K. B. 215; 6 L. J. Q. B. 57; 111 E. R. 1206.

*Annotation:—Mentd. Doe d. Linsay v. Edwards* (1836), 6 Nev. & M. K. B. 633.

**1878. ———.]—**The proviso as to *cestuis que trust* contained in Real Property Limitation Act, 1833 (c. 27), s. 7, applies only to cases of declared & express trusts, & not to the case of a person holding under an agreement to purchase.

If a person who has agreed to purchase real property be let into possession, he is a tenant at will, & such tenancy at will is determined by his death: & if after his death his widow, who is also devisee of his real estate, continue in possession, this is not a continuance of his tenancy at will, so as to prevent the operation of that statute, & therefore in such a case, where the person thus let into possession died more than twenty years before the ejectment brought by the representatives of the intended vendor, it was held that it was too late, unless a new tenancy could be shown in the widow, the first year of whose tenancy was within twenty years before the ejectment; & if such

new tenancy were shown, no demand of possession would be necessary, as such new tenancy would be determined by the death of the widow, which occurred before the ejectment.—*DOE d. STANWAY v. ROCK* (1842), Car. & M. 549, N. P.; *subsequent proceedings*, 4 Man. & G. 30.

*Annotations:—Expld. Drummond v. Sant* (1871), L. R. Q. B. 763. *Refd. Sands to Thompson* (1883), 22 Ch. D. 614.

**1879. ———.]—T.**, being tenant at will at a yearly rent, died leaving rent in arrear, the next day the lessor distrained on the premises, which were then occupied by T.'s servants; his widow came into occupation the day after & subsequently took out administration to her husband:—*Held*: the distress was not justified under Landlord & Tenant Act, 1709 (c. 18), ss. 6, 7, as it was not made "during the possession of the tenant from whom the rent became due."—*TURNER v. BARNES* (1862), 2 B. & S. 435; 31 L. J. Q. B. 170; 6 J. T. 418; 20 J. P. 628; 9 Jur. N. S. 199; 10 W. R. 561; 121 E. R. 1135.

*Annotation:—Refd. Scobie v. Collins*, [1895] 1 Q. B. 375.

**1880. ———.]—**A mtge. contained the usual attornment clause, & the mtgor., who was in occupation of the mtgd. property, attorned tenant to the mtgees., & during his life paid the interest on the mtge. The mtgor. died intestate, & his heir-at-law entered into possession of the mtgd. property, & for a time paid the interest under the mtge., but subsequently became bkpt. The mtgees. having distrained for arrears of interest, on the ground that they were entitled to do so as landlords under the attornment clause:—*Held*: as the original tenancy was determined by the death of the mtgor., & a new tenancy was not created between the mtgees. & the heir-at-law by mere payment of interest, the distress was illegal, & the trustee in bkpcy. was entitled to the proceeds of the distress.—*SCOBIE v. COLLINS*, [1895] 1 Q. B. 375; 64 L. J. Q. B. 10; 71 L. T. 775; 1 Mans. 491; 15 R. 6.

**1881. Exception to rule—Death of one of several landlords.]—HENSTEAD'S CASE**, No. 1869, *ante*.

**1882. ——— Death of one of several tenants.]—HENSTEAD'S CASE**, No. 1869, *ante*.

**1883. Whether intention to determine must be shown—By representative of deceased party.]—**A tenancy at will may continue to subsist after the death of one of the parties, unless the heir or legal representative shall do something to manifest his intention to determine the tenancy (*KELLY, C.B.*).—*MORTON v. WOODS* (1869), L. R. 4 Q. B. 293; 9 B. & S. 632; 38 L. J. Q. B. 81; 17 W. R. 414, Ex. Ch.

*Annotations:—Expld. Re Threlfall, Ex p. Queen's Benefit Bldg. Soc.* (1880), 16 Ch. D. 274. *Mentd. Re Potter, Ex p. Parke* (1874), De Colyar's County Court Cases 235; *Burchell v. Clark* (1876), 25 W. R. 334; *Re Bowes, Ex p. Jackson* (1880), 14 Ch. D. 725; *Re Kitchin, Ex p. Punnett* (1880), 16 Ch. D. 226; *Re Knight, Ex p. Voisey* (1882), 52 L. J. Ch. 121; *Hartcup v. Bell* (1883), Cab. & El. 19; *Kearsley v. Phillips* (1883), 11 Q. B. D. 621; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608.

**C. By Landlord.**

**(a) Expressly.**

**i. Demand for Possession.**

**1884. Necessity for—General rule.]—RIGHT d. LEWIS v. BEARD**, No. 1913, *post*.

**PART VIII. SECT. 4, SUB-SECT. 2—B.**

**h. Death of landlord.]—GREEN v. HIGGINS** (1873), 1 P. E. L. 466.—CAN.

**k. Death of tenant.]—**A lease of land, whereby the lessee is given the power of holding the land as long as he pleases, is determined by the death

of the lessee.—*VAMAN SHIRIPAD v. MAKI* (1879), I. L. R. 4 Bom. 424.—IND.

**PART VIII. SECT. 4, SUB-SECT. 2—C. (a) i.**

**1884 i. Necessity for—General rule.]—COLONIAL BANK v. ROACHE** (1870),

1 V. R. (Law.) 165.—AUS.

**1884 ii. ———.]—**Where debt. goes into possession of land as tenant at will he is entitled to a demand of possession before he can be ejected.—*McKINNON'S LESSEE v. McDONALD* (1853), James, 7.—CAN.

**1885.** ———.]—The vendor of a term, before the whole of the purchase-money is paid, agrees with the purchaser that the latter shall have the possession of the premises till a given day, paying the reserved rent in the meantime, & that if he does not pay the residue of the purchase-money on that day, he shall forfeit the instalments already paid & shall not be entitled to an assignment of the lease. The purchaser being thus put into possession, if the residue of the purchase-money is not paid at the day appointed, the vendor may maintain an ejectment without any notice to quit or demand of possession.—*DOE d. LEESON v. SAYER* (1811), 3 Camp. 8, N. P.

**1886.** ———.]—Where an agreement was made between A. & B. that the former should sell certain premises to B., if it turned out that he had a title to them, & that B. should have the possession from the date of that agreement:—*Held*: an ejectment could not be maintained by A. against B., without a demand of possession, although the object of the action was to try the title to the premises.—*DOE d. NEWBY v. JACKSON* (1823), 1 B. & C. 448; 2 Dow. & Ry. K. B. 514; 107 E. R. 166.

*Annotations*:—*Mentd.* *Doe d. Milburn v. Edgar* (1836), 2 Bing. N. C. 498; *Horsely Estate v. Steiger*, [1898] 2 Q. B. 239.

**1887.** ———.]—One who is in possession under an agreement to purchase, is a tenant at will; & he cannot be ousted by ejectment, until the tenancy be determined by demand of possession or otherwise. But any act of waste by the tenant, for instance, the grubbing up a hedge which separated two fields, determines the tenancy; & the tenancy being determined, ejectment may be maintained without a demand of possession.

In general there must of course be a demand of possession to determine a tenancy at will (*LITTLEDALE, J.*).—*DOE d. MELLISH v. REDMAN* (1829), 8 L. J. O. S. K. B. 151.

**1888.** ———.]—*DOE d. HIATT v. MILLER*, No. 1857, *ante*.

**1889. What amounts to demand—Whether formal language necessary.**—“Unless you pay what you owe me, I shall take immediate measures to recover possession of the property,” addressed to a tenant at will, by the party entitled in fee:—*Held*: a sufficient determination of the will.

Anything which amounts to a demand of possession, although not expressed in precise & formal language, is sufficient to indicate the determination of the landlord's will (*TINDAL, C.J.*).—*DOE d. PRICE v. PRICE* (1832), 9 Bing. 356; 2 Moo. & S. 461; 131 E. R. 649.

**1890. — Notice stating terms—Recovery threatened on non-compliance—Tenant failing to comply.**—*DOE d. PRICE v. PRICE*, No. 1889, *ante*.

**1891. — Demand from wife of tenant—On premises.**—A., lessor at will, B., lessee at will, C.,

underlessee at will. A demand of the possession made upon the premises from the wife of C. is sufficient to entitle A. to maintain ejectment. *Qu.*: whether a demand made off the premises, from the wife of C. would be sufficient.—*ROE d. BLAIR v. STREET* (1834), 2 Ad. & El. 329; 4 Nev. & M. K. B. 42; 111 E. R. 127; *sub nom.* *DOE d. BLAIR v. FAIRFAX*, 3 L. J. K. B. 123.

*Annotations*:—*Refd.* *Nicholson v. Tanham* (1870), 18 W. R. 523. *Mentd.* *Doe d. Davenport v. Rhodes* (1843), 11 M. & W. 600; *Doe d. Bowman v. Lewis* (1844), 13 M. & W. 241.

**1892. — Off premises.**—*ROE d. BLAIR v. STREET*, No. 1891, *ante*.

**1893. — Demand for key.**—*POLLEN v. BREWER*, No. 1863, *ante*.

**1894. — Intimation that tenant in against landlord's will.**—*POLLEN v. BREWER*, No. 1863, *ante*.

**1895. — Dismissal of employee—Employee tenant at will.**—*SPURGIN v. WHITE*, No. 1842, *ante*.

## ii. Notice to Quit.

See Part XXIII., Sect. 2, sub-sect. 3, C., *post*.

## (b) Impliedly.

### i. Acts done on Premises.

**1896. Acts amounting to trespass.**—*TURNER v. DOE d. BENNETT*, No. 1834, *ante*.

**1897. Entry.**—*BALL v. CULLMORE*, No. 1858, *ante*.

**1898.** ———.]—Pitfs. having from 1781 held either as tenants at will or at most as tenants from year to year of the land, such tenancy was determined by admittance of fresh trustees for M. in 1835 whereby a fresh tenancy at will was created which was within twenty-one years of its inception, in 1840, determined by the lord's entry & resumption of possession.—*HODGSON v. HOOPER* (1860), 3 B. & E. 149; 29 L. J. Q. B. 222; 3 L. T. 149; 24 J. P. 435; 6 Jur. N. S. 911; 8 W. R. 637; 121 E. R. 398.

**1899. — Without consent of tenant.**—If an alien artificer takes possession of a dwelling-house under an agreement in writing, which provides for the granting of a future lease, the instrument being illegal under 32 Hen. 8, c. 16, the lessor may enter at any time & eject the tenant, although the instrument do not amount to a lease.

*Qu.*: whether the bare entry on the premises of a tenant at will, during his absence, & without his leave, by the lessor, is sufficient to determine the will.

What is there to determine the will? Something express is required, as appears by *Com. Dig. Estates* (H. 6); a mere entry on the demise by the landlord is equivocal (*LITTLEDALE, J.*).—*LAPIERRE v. M'INTOSH* (1839), 9 Ad. & El. 857; 1 Per. &

**1884 iii.** ———.]—*DOE v. LITTLE* (1853), 2 All. 558.—*CAN.*

**1884 iv.** ———.]—*Re GRANT & ROBERTSON* (1904), 24 C. L. T. 366; 8 O. L. R. 297; 3 O. W. R. 846.—*CAN.*

**1884 v.** ———.]—Where the tenant was a tenant at will:—*Held*: a demand of possession, or some act of the landlord equivalent thereto, was requisite before bringing an ejectment.—*PERSSE v. KINNEEN* (1859), 1 L. T. 77.—*IR.*

**1884 vi.** ———.]—*COURTOWN (EARL) v. BUTLER* (1866), 15 L. T. 75.—*IR.*

**1. What amounts to demand—Written demand unsigned.**—In proceeding for an order for possession the demand in writing served by the landlord was

unsigned, but was otherwise sufficient in form. When it was served, its purport was verbally explained to the tenants, & they were told that it was from the landlord's agent, & one of them then went to see about it:—*Held*: sufficient.—*Re SUTHERLAND & PORTIGAL* (1899), 10 C. L. T. 257; 12 Man. L. R. 543.—*CAN.*

## PART VIII. SECT. 4, SUB-SECT. 2.—C. (b) 1.

**1896 i. Acts amounting to trespass.**—A tenancy at will is determined by the entry of the landlord upon the land & cutting down & carrying away wood, & making surveys without the consent of the tenant.—*DOE d. LYON v. SLAVIN*

(1846), 3 Kerr, 258.—*CAN.*

**1896 ii.** ———.]—Any act upon the land by the landlord for which he would otherwise be liable in trespass at the suit of the tenants, amounts to a determination of a tenancy at will.—*DOE d. BOTSFORD v. TIDD* (1863), N. B. Dig. 740.—*CAN.*

**1896 iii.** ———.]—A tenant at will cannot maintain an action against his landlord for entering upon the premises & pulling down a chimney, such an act merely amounting to a determination of the tenancy.—*BREWING v. BERRYMAN* (1873), 2 Pug. 115.—*CAN.*

**m. — With consent of tenant—To do repairs.**—*DOE d. BOTSFORD v. TIDD* (1863), 5 All. 569.—*CAN.*

**Sect. 4.—Tenancy at will: Sub-sect. 2, C. (b) i., ii. & iii., & D.]**

**Dav. 629; 8 L. J. Q. B. 112; 3 Jur. 123; 112 E. R. 1439.**

**1900.** ———. ———.]—Deft. being in adverse possession of a hut & piece of land, the lord of the manor entered in the absence of deft., but in the presence of his family said he took possession in his own right, & he caused a stone to be taken from the hut, & a portion of the fence to be removed:—*Held*: these acts were not sufficient to disturb deft.'s possession, under Real Property Limitation Act, 1833 (c. 27), s. 10.—**DOE d. BAKER v. COOMBS** (1850), 9 C. B. 714; 19 L. J. C. P. 306; 15 L. T. O. S. 90; 137 E. R. 1073.

*Annotation*:—**Consd. Worssam v. Vanderbrande** (1868), 17 W. R. 53.

**1901.** ———. ———.]—**TURNER v. DOE d. BENNETT**, No. 1834, *ante*.

**1902.** ———. **With consent of tenant—To do repairs.**]—**LYNES v. SNAITH**, No. 1843, *ante*.

**1903.** ———. **To cut trees.**]—A person using land as a garden for more than twenty years, under permission from the owner to do so, in order to keep it from trespassers, the owner from time to time coming on the land & giving directions as to cutting of trees, etc.:—*Held*: (1) he had not got a title so as to enable him to sue a claimant under the owner for a forcible entry.

(2) Every time the owner put his foot on the land it was so far in his possession, that the statute would begin to run from the time when he was last upon it (**ERLE, C.J.**).—**ALLEN v. ENGLAND** (1862), 3 F. & F. 49.

**1904.** ———.]—In 1830, A. inclosed about six acres of waste land & built a cottage thereon, & was allowed to remain in possession without acknowledgment or payment of rent down to the year 1845, when the steward of the owner of the fee served him with a declaration & notice in ejectment; whereupon A. consented to give up four acres of land, on his being allowed to continue in possession of the cottage & the other two acres until his death. A. died in 1861:—*Held*: that which took place in 1845 amounted to an actual entry, & operated as a determination of the original tenancy at will & the creation of a new tenancy, & consequently the period of limitation prescribed by Real Property Limitation Act, 1833 (c. 27), was to be reckoned from that time.—**LOCKE v. MATTHEWS** (1863), 13 C. B. N. S. 753; 32 L. J. C. P. 98; 7 L. T. 824; 9 Jur. N. S. 875; 11 W. R. 343; 143 E. R. 298; *sub nom.* **LOCKE v. MATTHEWS**, 1 New Rep. 322.

*Annotations*:—**Distd. Thorp v. Facey** (1866), Har. & Ruth. 678. **Refd. Day v. Day** (1871), L. R. 3 P. C. 751; **Jarman v. Hale**, [1899] 1 Q. B. 994.

**1905. Notice of acts relied upon—Necessity for.**]—**BATE v. CULLIMORE**, No. 1858, *ante*.

**1906.** ———. **Presumption of tenant's knowledge.**]—A tenant at will cannot determine the will without either giving notice to the landlord or transferring the will to some other person, of which transfer the landlord must have knowledge & choose to take notice.

It is requisite that the landlord should give the tenant notice that he determines the tenancy, if the act relied upon be done off the premises; where the act is done on the land, it is presumed that the tenant is there & knows of it (**PARKE, B.**).—**PINHORN v. SOUSTER** (1853), 8 Exch. 763; 1

C. L. R. 99; 22 L. J. Ex. 266; 21 L. T. O. S. 92; 16 Jur. 1001; 1 W. R. 336; 155 E. R. 1560.

*Annotations*:—**Refd. Mellor v. Leak** (1855), 16 C. B. 652. **Mentd. Re Lord** (1854), 1 K. & J. 90; **Brown v. Metropolitan Counties, etc., Soc.** (1859), 1 E. & E. 832; **Jolly v. Arbutnot** (1859), 4 De G. & J. 224; **Turner v. Barnes** (1862), 2 B. & S. 435; **Hampson v. Fellows** (1868), 37 L. J. Ch. 694; **Gibbs v. Cruikshank** (1873), 28 L. T. 104; **Re Potter, Ex p. Parko** (1874), 43 L. J. Ecyl. 139; **Re Threlfall, Ex p. Queen's Benefit Bldg. Soc.** (1880), 16 Ch. D. 274; **Re Betts, Ex p. Harrison** (1881), 18 Ch. D. 127; **Kearsley v. Phillips** (1883), 11 Q. B. D. 621.

— **Acts done off premises.**]—*See* Sub-sect. 2, C. (b) ii., *post*.

**ii. Acts done off Premises.**

**1907. Execution of conveyance—To landlord of tenant at will—Tenancy at will before completion.**]

—A., some time before 1824, being under contract to purchase, let B., his son, into possession of the premises contracted for as tenant at will. The conveyance to A. was executed in 1824, & A. mortgaged the premises in 1829. B. occupied the premises from the time he was let into possession till 1831, when he died, & his widow, deft., occupied them till the day of the demise in the declaration Jan. 8, 1845. The jury finding that B.'s tenancy at will commenced more than twenty-one years before the day of the demise in the declarations:—*Held*: (1) the conveyance to A. did not determine the tenancy at will of B; (2) the mtge. by A. did not determine such tenancy even if it could be supposed to exist, with reference to the Statute of Limitations, after the expiration of one year from its commencement, & an action of ejectment against deft. was barred by Real Property Limitation Act, 1833 (c. 27), ss. 2, 7.—**DOE d. GOODY v. CARTER** (1847), 9 Q. B. 863; 18 L. J. Q. B. 305; 8 L. T. O. S. 409; 11 Jur. 285; 115 E. R. 1505.

*Annotations*:—*As to* (2) **Refd. Doe d. Carter v. Barnard** (1849), 18 L. J. Q. B. 306; **Doe d. Palmer v. Kyro** (1851), 17 Q. B. 366; **Randall v. Stevens** (1853), 2 E. & B. 641; **Wimbledon & Putney Commons Conservators v. Nicol** (1894), 10 T. L. R. 247.

**1908. Execution of mortgage.**]—**DOE d. GOODY v. CARTER**, No. 1907, *ante*.

**1909.** ———.]—A tenancy at will is determined by a legal mtge. of the premises by the owner, & knowledge of the mtge. by the tenant at will.

After the mtge. a new tenancy at will may be created between the parties so as to cause Real Property Limitation Act, 1833 (c. 27), to begin to run.—**JARMAN v. HALE**, [1899] 1 Q. B. 994; 68 L. J. Q. B. 681, D. C.

**1910. Assignment of mortgage.**]—An indenture of mtge., after the usual power of sale by public auction or private contract in the event of the non-payment of the mtge. money, contained a proviso & covenant by the mtgee. that no sale, or public notice or advertisement for any sale, should be made or given, nor any means be taken for obtaining possession, until the expiration of twelve calendar months after notice in writing of such intention should have been given to the mtgor. It also contained a covenant by the mtgor. for quiet enjoyment by the mtgor., as tenant at will to the mtgee., on the payment of a certain yearly rent by two equal half-yearly payments, but no livery of seisin was made to the mtgor.:—*Held*: under this deed the mtgor. was tenant at will only to the mtgee., & no tenancy from year to year was thereby created.

The interest of deft. in this case was . . . a tenancy at will; & that will having been determined by the assignment, to which mtgor. himself

**PART VIII. SECT. 4, SUB-SECT. 2.—**  
**C. (b) ii.**

**n. Conveyance of land—By land-**

*lord to third person.*]—*Seemle*: a conveyance of the land by the landlord to a third person, duly registered, is a

determination of a tenancy at will.—**DOE d. VERNOR v. McDONALD** (1867), N. B. Dig. 740.—**CAN.**

was a party, this ejectment was well brought (POLLOCK, C.B.).—DOE d. DIXIE v. DAVIES (1851), 7 Exch. 89; 21 L. J. Ex. 60; 18 L. T. O. S. 304; 16 Jur. 44; 155 E. R. 868.

**1911. Assignment of reversion.]**—DOE d. DAVIES v. THOMAS, No. 1871, *ante*.

**1912. Lease to third party.]**—Lease at will; lessor makes a present lease to another, but agrees that he shall not enter till after the day the rent upon the first lease is due; the lease at will is determined.—DISDALE v. ILES (1873), 2 Lev. 88; 83 E. R. 403; *sub nom.* DUNSDALE v. ISLES, 3 Keb. 166; *sub nom.* DINSDALE v. ISLES, 3 Keb. 207; T. Raym. 224; *sub nom.* HINCHMAN v. ILES, 1 Vent. 247; *sub nom.* TURLESTON v. RIVES, 1 Freem. K. B. 106.

*Annotations:*—**Refd.** Doe d. Davies v. Thomas (1851), 6 Exch. 854; Hogan v. Hand (1861), 14 Moo. P. C. C. 310. **Mentd.** Jervis v. Tomkinson (1856), 1 H. & N. 195.

**1913. — Fictitious lease.]**—One who is put in possession upon an agreement for the purchase of land, cannot be ousted by ejectment before his lawful possession is determined by demand of possession or otherwise; & even considering such lawful possession as a tenancy at will, deft.'s confession, by entering into the common rule, of a lease by the lessor to the nominal plff. is not a constructive determination of the will whereon to maintain the ejectment.—RIGHT d. LEWIS v. BEARD (1811), 13 East, 210; 104 E. R. 350.

*Annotations:*—**Refd.** Doe d. Parker v. Boulton (1817), 6 M. & S. 148; Bull v. Cullimore (1835), 5 Tyr. 753. **Mentd.** Doe d. Gray v. Stanion (1836), 1 M. & W. 699; Doe d. Bord v. Burton (1851), 16 Q. B. 807.

**1914. — Invalid lease.]**—WALLIS v. DELMAR, No. 1918, *post*.

**1915. — Tenancy determined as against lessor —Right of entry.]**—HOGAN v. HAND, No. 1870, *ante*.

**1916. Agreement for lease to tenant—Draft lease indorsed by both parties.]**—After tenant at will entered into possession there was an agreement for a lease of the premises, but no lease was ever prepared; on the back of the draft there was an indorsement made & signed between the parties; rent had been paid, & a receipt given for a quarter's rent, & a distress also had been put in by the landlord upon the tenant:—**Held:** not sufficient to alter the original tenancy at will into a tenancy from year to year.—DOE d. BENSON v. FROST (1851), 17 L. T. O. S. 145; 15 J. P. Jo. 387.

*Annotation:*—**Refd.** Doe d. Davies v. Thomas (1851), 6 Exch. 854.

**1917. — Tenancy not terminable till end of term agreed for.]**—WARREN v. MURRAY, No. 2335, *post*.

**1918. Landlord letting another into possession.]**—Deft. occupied land, under parish officers, & had paid rent; they gave an invalid notice to quit at the end of the first year, & by a lease, signed only by two of them, demised to plff. for a term of years, to commence from the end of deft.'s tenancy. Under this lease plff. entered; but deft. refused to give up certain plants he had himself planted, & subsequently entered & took them away:—**Held:** he was liable in trespass; though the lease was invalid, there was evidence that plff. entered under the authority of all the parish officers; & therefore deft.'s tenancy, being either a tenancy at will or on sufferance, was lawfully determined, & his entry wrongful.—WALLIS v. DELMAR (1860), 29 L. J. Ex. 276.

**1919. Notice of acts determining tenancy—**

**Necessity for.]**—DOE d. DAVIES v. THOMAS, No. 1871, *ante*.

**1920. — — —.]**—PINHORN v. SOUSTER, No. 1906, *ante*.

**1921. — Knowledge of tenant.]**—DOE d. DIXIE v. DAVIES, No. 1910, *ante*.

**1922. — — —.]**—JARMAN v. HALE, No. 1909, *ante*.

### iii. Action of Ejectment.

**1923. Operates as determination.]**—DOSSEE v. DOE d. EAST INDIA CO., No. 1840, *ante*.

### D. By Tenant.

**1924. Underletting.]**—ANON. (1563), Dal. 46; 123 E. R. 261.

**1925. — — —.]**—If tenant at will make a lease, & the lessee enters, he only is the disscisor.—SHAW v. BARBOR (1601), Cro. Eliz. 830; 78 E. R. 1057.

**1926. — Tenancy determined at option of landlord.]**—A. being seised of an estate in fee, permits his son to enter into the lands & to occupy them as a tenant at will; the son afterwards leases the lands by indenture for twenty-one years, rendering rent; the father may at his option construe this demise to be a disscisin or not a disscisin.—BLUNDEN v. BAUGH (1633), Cro. Car. 302; W. Jo. 315; 79 E. R. 864.

*Annotations:*—**Refd.** Freeman v. Banos (1670), 1 Vent. 80; Blackmore v. Cumberford (1680), Freem. K. B. 527; Symonds v. Cudmore (1690), Holt, K. B. 666; Eastcourt v. Weekes (1698), 1 Lut. 799; Macdonel v. Weldon (1722), 8 Mod. Rep. 51; Townsend v. Ash (1745), 3 Atk. 336; Taylor d. Atkyns v. Horde (1757), 1 Burr. 60; Goodtitle d. Newman v. Newman (1774), 3 Wils. 516; Birch v. Wright (1786), 1 Term Rep. 378; Morton v. Woods (1869), L. R. 4 Q. B. 293. **Mentd.** Outes v. Say & Seal (1728), 1 Barn. K. B. 98; Lyell v. Kennedy, Kennedy v. Lyell (1889), 14 App. Cas. 437.

**1927. — — —.]**—If a tenant at will lease, it determines the will (BULLER, J.).—BIRCH v. WRIGHT (1786), 1 Term Rep. 378; 99 E. R. 1148.

*Annotations:*—**Mentd.** Pulteney v. Warren (1801), 6 Ves. 73; Denn d. Jacklin v. Cartwright (1803), 4 East, 29; Cholmondeley v. Clinton (1820), 2 Jac. & W. 1; R. v. Hurstmonceaux (1827), 7 B. & C. 551; Re Brindley, Ex p. Hankey (1829), Mont. & M. 247; Doe d. Fisher v. Giles (1829), 5 Bing. 421; Backworth v. Simpson (1835), 5 Tyr. 314; Doe d. Chudborn v. Green (1839), 9 Ad. & El. 658; Brydges v. Lewis (1842), 3 Q. B. 603; Doe d. Clarke v. Smaridge (1845), 7 Q. B. 957; Standen v. Christmas (1847), 9 L. J. Q. S. 169; Blundell v. Drummond (1848), 11 Jur. 573, n.; Catley v. Arnold, Banks v. Arnold (1859), 1 John. & H. 651; R. v. St. Giles without Cripplegate (1863), 4 B. & S. 509; Willesdon Overseers v. Paddington Overseers (1863), 3 B. & S. 593; Re Nicols v. Saunders (1870), 22 L. T. 661; Phillips v. Bonfray (1883), 24 Ch. D. 439; Horn v. Beard, [1912] 3 K. B. 181; A. G. v. De Keyser's Royal Hotel, Ltd., [1920] A. C. 508; Wheeler v. Keeble (1914), Ltd., [1920] 1 Ch. 57; R. v. Paulson, [1921] 1 A. C. 271.

**1928. — Necessity for notice to landlord.]**—MELLING v. LEAK, No. 1837, *ante*.

**1929. Committing waste.]**—An action on the case does not lie against tenant at will, for permissive waste. But if tenant at will commits voluntary waste, it amounts to a determination of the will, & an action of trespass lies against him.—SHREWSBURY'S (COUNTRESS) CASE (1600), 5 Co. Rep. 13 b; 77 E. R. 68; *sub nom.* SALOP (COUNTRESS) v. CROMPTON, Cro. Eliz. 784.

*Annotations:*—**Expld.** Blackmore v. White, [1899] 1 Q. B. 293. **Refd.** Panton v. Isham (1693), 3 Lev. 359; Herne v. Bembow (1813), 4 Taunt. 764; Batthyany v. Walford (1886), 33 Ch. D. 624.

**1930. — — —.]**—DOE d. MELLERSH v. REDMAN, No. 1887, *ante*.

**1931. By notice.]**—PINHORN v. SOUSTER, No. 1906, *ante*.

### PART VIII. SECT. 4, SUB-SECT. 2.—D.

**c. Agreeing to pay & paying rent.]**—STANIER v. FLEMING (1893), 2 Terr. L. R. 223.—CAN.

*Sect. 4.—Tenancy at will: Sub-sect. 2, D.; sub-sect. 3. Sect. 5: Sub-sects. 1 & 2.]*

**1932. By assignment—Necessity for knowledge of landlord.]—**CARPENTER v. COLLINS (1605), 1 Brownl. 88; Yelv. 73; Moore, K. B. 774; 123 E. R. 683.

*Annotation:—*Appl. Pinhorn v. Souster (1853), 8 Exch. 763.

**1933. ———.]—**PINHORN v. SOUSTER, No. 1906, *ante*.

#### SUB-SECT. 3.—EFFECT OF DETERMINATION.

**1934. Right to reap corn—Right of landlord to distrain — For rent of subsequent tenant.]—**If the estate of a tenant at will be determined either by his death or by the act of the landlord, he or his exors. may reap the corn sown by him, & therefore the corn sown by a tenant at will, who died before harvest & purchased by another person, cannot be distrained by the landlord for rent due to him from a subsequent tenant.—EATON v. SOUTHEY (1738), Willes, 131; 7 Mod. Rep. 251; 125 E. R. 1094.

*Annotations:—*Mentd. Peacock v. Purvis (1820), 2 Brod. & Bing. 362; Wright v. Dewes (1834), 1 Ad. & El. 641; A. G. v. Churchill (1841), 8 M. & W. 171.

**1935. Right to remove furniture.]—**A minister of a dissenting congregation placed in the possession of a chapel & dwelling-house by certain persons, in whom the legal estate is vested, in trust to permit & suffer the chapel to be used for the purpose of religious worship, is a mere tenant at will to those trustees; & his tenancy is determined instantly by a demand of possession. He is not entitled *de jure*, before the determination of his tenancy, to have a reasonable time allowed him for the removal of his furniture. *Semble*: he will not be a trespasser, if he enter afterwards to remove his goods & continue a reasonable time for that purpose.—DOE d. NICHOLL v. M'KAEG (1830), 10 B. & C. 721; 5 Man. & Ry. K. B. 620; 8 L. J. O. S. K. B. 311; 100 E. R. 618.

*Annotations:—*Consd. Spurgin v. White (1860), 2 Giff. 473. *Reld*. Perry v. Shipway (1859), 1 Giff. 1; Collier v. King (1861), K. & G. 385. *Mentd*. Burton v. Brooks (1851), 11 C. B. 41.

#### SECT. 5.—TENANCY AT SUFFERANCE.

##### SUB-SECT. 1.—HOW CREATED.

**1936. Necessity for lawful entry.]—**Note for law, that there is no tenant by sufferance but he that first enters by authority & lawfully, as where a man leases for years, or for term of another's life, & holds over his term after the term expired, or after the death of *cestui que vie*, & tenant at will is, where a man leases his land to another at will; for he who enters of his head is a disseisor.—ANON. (circa 1537), Bro. N. C. 175; 73 E. R. 923.

**1937. ———.]—**If a tenant *pur autre vie* of a manor grant by copy, after the death of the *cestui que vie*, it shall not bind the lessor, for he was a tenant at sufferance; & a writ of entry *ad terminum que præterit* lies against him, but it is otherwise as to admittances by him.—ROUS & ARTERS (1587), 4 Co. Rep. 24 a; 2 Leon. 45; Moore, K. B. 236; 76 E. R. 927; *sub nom.* ROUSES CASE, Owen, 27.

#### PART VIII. SECT. 4, SUB-SECT. 3.

*p. Whether tenant may sue landlord.]—*A tenant at will cannot sue his landlord for ousting him from possession.—HENDERSON v. HARPER (1845), 1 U. C. R. 481.—CAN.

#### PART VIII. SECT. 5, SUB-SECT. 1.

**1938 i. Holding over—Lessee for years —After expiry of term.]—**Where a tenant for a term of years holds over after the expiration of his lease, he becomes a tenant on sufferance.—

**1938. Holding over—Lessee for years—After expiry of term.]—**ANON. (circa 1537), No. 1936, *ante*.

**1939. ———.]—**Pltf. had a right to treat deft. as a tenant at sufferance of such undivided third part, for the period during which he held on after the expiration of the lease, & to sue him for use & occupation in respect thereof (WILDE, C.J.).—BAXLEY v. BRADLEY (1848), 5 C. B. 396; 16 L. J. C. P. 206; 136 E. R. 932.

*Annotation:—*Appl. Leigh v. Dickeson (1884), 15 Q. B. D. 60.

**1940. ———.]—**In 1779, P. demised certain land of which he was then seised to M. & co., for a term of sixty-five years. In 1794 an Act was obtained by the Swansea Canal co. for the purpose of making a canal through part of the land in question; and by sect. 47 of that Act, it was enacted, that, upon payment or tender of certain sums of money, adjusted by certain commissioners or assessed by a jury, for the purchase of any such lands, etc., it should be lawful for the Canal co. to enter upon such lands, or before such payment or tender, by leave of the owners or occupiers; and that, thereupon, such land should be vested in the co. for the purposes of the Act. In 1797, & during the continuance of the lease, B. entered into an agreement with M. & co., the lessees, by which a canal, made by the latter, was extended through part of the same land, & formed a continuation of the Swansea Canal. No payment or satisfaction was made or agreed to be made to the owners of the lands, but everything was done by B. with the full consent & in accordance with the wishes of such owners & proprietors. Upon the termination of the lease of 1779, the assignees of the reversion brought ejectments against the assignee of B., who continued in possession of the canal made upon the land demised:—*Held*: the mere consent of the owner of the property to the construction of the canal, did not bring the case within sect. 47 of the Act; & the lessors of pltf. were entitled to the possession of the land.

Here the defendant was a mere tenant at sufferance, as there was no evidence of a tenancy at will. He might, therefore, be treated as a trespasser or as a tenant at will, at the option of the owner (PARKE, B.).—DOE d. PATRICK v. BEAUFORT (DUKE) (1851), 6 Exch. 498; 20 L. J. Ex. 251; 155 E. R. 640; *subsequent proceedings, sub nom.* BEAUFORT (DUKE) v. PATRICK (1853), 17 Beav. 60.

**1941. ———.]—**FINLAY v. BRISTOL & EXETER RY. CO., No. 2037, *post*.

**1942. ———.]—**After death of lives—Lease determinable on lives.]—If it had been a lease for years, determinable on lives, reserving rent, & the lives dead on which the estate determined, deft. would have been a tenant by sufferance; & though there is a mixture of wrong, the landlord may affirm his title by accepting rent, therefore the tenant by sufferance is extremely like a tenant at will, & a fine levied by him will not avail, as has been determined (LORD HARDWICKE, C.).—SHIELDS v. ATKINS (1747), 3 Atk. 560; 26 E. R. 1122, L. C.

**1943. ———.]—**Tenant *pur autre vie*—After death of *cestui que vie*.]—ANON. (circa 1537), No. 1936, *ante*.

**1944. ———.]—**ROUS & ARTERS, No. 1937, *ante*.

YOUNG v. BANK OF NOVA SCOTIA (1915), 8 O. W. N. 505; 34 O. L. R. 176; 23 D. L. R. 854.—CAN.

*After expiry of term.]—*KANTHEPPA RADDI v. SHESHAPPA (1897), 1 L. R. 22 Bom. 893.—IND.

*r. ———.]—*A tenant holding

**1945. — Tenant for life—After determination of estate—Estate defeasible on condition subsequent.]—**If a house be devised to A. for life, "proviso, if she departs therefrom she shall have the rent," the life estate is determined by her departure, & till the entry of him in remainder she continues tenant at sufferance only.—*ALLEN v. HILL* (1591), Cro. Eliz. 238; Gilb. Ch. 257, n.; 78 E. R. 493.

*Annotation:—*Refd. *Butler v. Duckmanton* (1608), 1 Brownl. 207.

**1946. — Purchaser under agreement for sale at price payable by instalments—After forfeiture for non-payment.]—**In an agreement for the sale of leasehold premises to be paid for by instalments it is stipulated that in default of payment of the instalments at specified times, the former instalments shall be forfeited, & the vendor shall not be compellable to convey. The forfeiture, enures to destroy every right which the vendee took under the agreement, but does not affect any right of possession which he had before, & no previous right being proved, *semble*, the party after forfeiture is a mere tenant by sufferance, & it is sufficient for the owner previous to an ejectment to enter upon the premises indicating his intention to take possession without making any formal demand of possession.—*DOE d. MOORE v. LAWDER* (1816), 1 Stark. 308, N. P.

*Annotation:—*Refd. *Doe d. Rogers v. Pullen* (1836), 2 Bing. N. C. 749.

**1947. — Underlessee—In possession at determination of original lease—With permission of reversioner.]—**An undertenant who is in possession at the determination of the original lease, & is permitted by the reversioner to hold over, is *quasi* a tenant at sufferance; & the mere fact of occupation, coupled with the payment of rent for such time of occupation, does not raise the presumption of a demise for years, unless there is some evidence to show an agreement for a demise for a term.—*SIMPKIN v. ASHURST* (1834), 1 Cr. M. & R. 261; 149 E. R. 1078; *sub nom.* *SIMPKIN v. ASHURST*, 4 Tyr. 781.

**1948. — Tenant at will—After termination of tenancy by entry.]—**(1) Where A., in 1817, let B. into possession of lands as tenant at will; & in 1827, A. entered upon the land without B.'s consent, & cut & carried away stone therefrom:—*Held*: this entry amounted to a determination of the estate at will: & B. thenceforth became tenant at sufferance, until, by agreement express or implied, a new tenancy was created between the parties, & therefore unless the fact of such new tenancy were found by the jury, an ejectment brought by A. in 1839, was too late, inasmuch as, by 3 & 4 Will. 4, c. 2, s. 7, his right of action first accrued at the expiration of one year after the commencement of the original tenancy at will, *i.e.* in the year 1818.

(2) A tenant by sufferance is not entitled to the fruits of his own industry as he has no right to emblements (*PAIRKE, B.*).—*DOE d. BENNETT v. TURNER* (1840), 7 M. & W. 226; 10 L. J. Ex. 213; 151 E. R. 749; *subsequent proceedings, sub nom.* *TURNER v. DOE d. BENNETT* (1842), 9 M. & W. 643.

*Annotations:—*As to (1) Refd. *Doe d. Dayman v. Moore* (1846), 15 L. J. Q. B. 324; *Doe d. Goody v. Carter* (1847), 9 Q. B. 863; *Pinhorn v. Souster* (1853), 21 L. T. O. S. 92; *Randall v. Stevens* (1853), 2 E. & B. 641; *Ley v. Peter* (1858), 3 H. & N. 101; *Hodgson v. Hooper* (1860), 3 E. & E. 149; *Lynes v. Snaith*, [1899] 1 Q. B. 486. Generally, *Mentd.* *Doe d. Baker v. Coombes* (1850), 9 C. B. 714.

over after the expiration of the term mentioned in his rent-note is a tenant by sufferance.—*CHANDRI v. DAJI BRAH*

(1900), 1 L. R. 24 Bom. 504.—IND.

t. — — —.]—*VADAPALLI NARA-*

**1949. — Lessee of tenant at will—After termination of tenancy at will.]—***DOE d. GOODY v. CARTER*, No. 1907, *ante*.

**1950. — Husband of tenant for life—After death of tenant for life.]—***ASHER v. WHITLOCK*, No. 1965, *post*.

**1951. Entry under promise of underlease—Underlease not executed.]—**Deft. held premises under lease from one F., & assigned the same by way of mtge. to one R. The lease being forfeited, it was agreed between F., R., & deft. that a new lease should be granted to R., & that R. should grant an underlease to deft. The lease from F. to R. was accordingly executed. The underlease from R. to deft. was not prepared, but possession was given to the latter, to whom R. said on delivering him the key, "go on as before; pay me the money as fast as you can & when you have paid it you shall have your underlease." No rent was ever paid under the tenancy thus created, though a quarter was demanded:—*Held*: deft. did not thereby become tenant from year to year; but a mere tenant by sufferance.—*DOE d. ROGERS v. PULLEN* (1836), 2 Bing. N. C. 749; 2 Hodg. 39; 3 Scott, 271; 5 L. J. C. P. 229; 132 E. R. 288.

#### SUB-SECT. 2.—RIGHTS OF TENANT.

**1952. No power to create tenancy.]—**A mtgor. is no more than a tenant at sufferance, not entitled to notice to quit, & one tenant at sufferance cannot make another (*LORD ELLENBOROUGH, C.J.*).—*THUNDER d. WEAVER v. BELCHER* (1803), 3 East, 449; 102 E. R. 669.

*Annotations:—*Refd. *Walmsley v. Milne* (1859), 7 C. B. N. S. 115; *Jones v. Mills* (1861), 10 C. B. N. S. 788; *Gibbs v. Cruikshank* (1873), 1 L. R. 8 C. P. 454; *Simmons v. Crossley*, [1922] 2 K. B. 95. *Mentd.* *Thorpe v. Facey* (1866), 12 Jur. N. S. 741.

**1953. Action for trespass—Against wrongdoer.]—**One in possession of glebe land under a lease void by 13 Eliz. c. 29, by reason of the rector's non-residence may yet maintain trespass upon his possession against a wrongdoer.—*GRAHAM v. PEAT* (1801), 1 East, 244; 102 E. R. 95.

*Annotations:—*Consd. *Harper v. Charlesworth* (1825), 4 B. & C. 574. Refd. *Chambers v. Donaldson* (1809), 11 East, 65; *Hastings Corp'n. v. Ivall* (1874), L. R. 19 Eq. 558.

**1954. — Against landlord—Tenant ejected without demand of possession.]—**A tenant at sufferance, who is turned out of possession by his landlord, without any demand of possession, cannot maintain ejectment, but may maintain trespass.—*DOE d. HARRISON v. MURRELL* (1837), 8 C. & P. 134; 1 Jur. 593.

**1955. Action for ejectment—Against landlord—Tenant ejected without demand of possession.]—***DOE d. HARRISON v. MURRELL*, No. 1954, *ante*.

**1956. Right to profits.]—**By special verdict it was found that deft. had occupied the residue of the land for two years before as tenant at sufferance & afterwards sold the inheritance.

Tenant at sufferance is in truth a tortfeasor, by which his taking of the profits is not such as is intended by the statute. But yet he afterwards looking into the words of the verdict, which were, that deft. *tenuit* the lands for two years *ex permissione* of another; thereupon it ought to be intended, that he was tenant at will (*WRAY, C.J.*).—*PIKE & HASEN'S CASE* (1588), 3 Leon. 233; 74 E. R. 653.

*Annotation:—*Refd. *Newton v. Harland* (1840), 1 Man. & G. 644.

*SIMHAM v. DRONAMARAJU SEETHARAMA-MURTHY* (1907), 1 L. R. 31 Mad. 163.—IND.

**Sect. 5.—Tenancy at sufferance: Sub-sects. 2, 3, 4 & 5. Sect. 6: Sub-sects. 1 & 2, A. (a).]**

**1957. Right to emblements.]—DOE d. BENNETT v. TURNER, No. 1948, ante.**

#### SUB-SECT. 3.—RIGHTS OF LANDLORD.

**Right of distress.]—See DISTRESS, Vol. XVIII., p. 314, Nos. 490–493.**

**Action for use & occupation.]—See Part XV., Sect. 10, sub-sect. 3, post.**

#### SUB-SECT. 4.—HOW DETERMINED.

**Notice to quit—Necessity for.]—See Part XXIII., Sect. 1, sub-sect. 2, post.**

**1958. Notice to quit—Demand for possession—Necessity for.]—A notice desiring deft. to "quit the premises which you hold under me, your term therein having long since expired," does not recognise a subsisting tenancy from year to year subsequent to the term, but is a mere demand of possession.**

This writing is not in the least like a notice to quit, but is a mere demand of possession, deft.'s term having then some time since expired. The lessor of pltf. need not have given any notice at all; but the circumstance of his having given a notice, will not hurt him (*MANSFIELD, C.J.*).—*DOE d. GODSELL v. INGLIS* (1810), 3 Taunt. 54; 128 E. R. 22.

**1959. ————.]—DOE d. MOORE v. LAWDER, No. 1946, ante.**

**1960. ————.]—DOE d. BENNETT v. TURNER, No. 1948, ante.**

**1961. ————.]—DOE d. BURROWS v. FREEMAN (1844), as reported in 3 L. T. O. S. 58.**

**Compare No. 1954, ante.**

**1962. ———— Entry—Necessity for.]—Tenant for life, remainder to R. in fee, & tenant for life leased for her life & died in 1799, & lessee continued in possession without paying rent till his death in 1805, when his son took possession, & continued without paying rent, & in 1807 levied a fine with proclamations:—*Held*: the heir of R., the remainderman, might maintain ejectment against the son without an actual entry to avoid the fine, or a notice to determine the tenancy.—*DOE d. BURRELL v. PERKINS* (1814), 3 M. & S. 271; 105 E. R. 613.**

**Annotations:—***Refd.* Hall v. Doe d. Surtees (1822), 5 B. & Ald. 687; Doe d. Davis v. Davis (1823), 1 C. & P. 130; Doe d. Parker v. Gregory (1834), 2 Ad. & El. 14; Hodgson v. Hooper (1860), 29 L. J. Q. B. 222. *Mentd.* Doe d. Leeming v. Skirrow (1837), 2 Nev. & P. K. B. 123; Nopcan v. Doe d. Knight (1837), 2 M. & W. 894; Doe d. Cadwalader v. Price (1847), 16 M. & W. 603.

**1963. ———— Showing intention to resume possession—Sufficiency of.]—DOE d. MOORE v. LAWDER, No. 1946, ante.**

**1964. ————.]—Before the passing of Real Property Limitation Act, 1833 (c. 27), R. was let into possession of land as tenant at will to S. He never paid rent. After the statute passed, &**

before twenty-one years had elapsed from R. being so let into possession, S. entered & turned R. out. R. immediately afterwards resumed possession; but no fresh tenancy at will commenced; & he paid no rent:—*Held*: S. might enter, at any time before the lapse of twenty years from such resumption of possession by R., though after the lapse of twenty-one years from the first letting R. into possession; & was not barred by Real Property Limitation Act, 1833 (c. 27), ss. 2, 7, 10.—*RANDALL v. STEVENS* (1853), 2 E. & B. 641; 1 C. L. R. 641; 23 L. J. Q. B. 37, 68; 21 L. T. O. S. 334; 17 J. P. 731; 18 Jur. 128; 118 E. R. 907; *previous proceedings*, 23 L. T. O. S. 211.

**Annotations:—***Refd.* Locke v. Matthews (1863), 13 C. B. N. S. 753; Solling v. Broughton, [1893] A. C. 556.

**1965. ———— Who may sue—Heir of devisee—Testator having only possessory title.]—A person in possession of land without other title has a devisable interest, & the heir of his devisee can maintain ejectment against a person who has entered upon the land & cannot show title or possession in any one prior to testator. W. in 1842 inclosed some waste land; in 1850 he inclosed more land adjoining & built a cottage; he occupied the whole till 1860 when he died having devised it to his wife so long as she remained unmarried, with remainder to his daughter in fee. On his death the widow & daughter continued to reside on the property, & in 1861 deft. married the widow, & came to reside with them. Early in 1863 the daughter died, aged eighteen years, & the mother died soon after. Deft. continued to occupy the property & in 1865 the daughter's heir-at-law brought ejectment against him:—*Held*: pltf. was entitled to recover the whole property.—*ASHIER v. WHITLOCK* (1865), L. R. 1 Q. B. 1; 35 L. J. Q. B. 17; 13 L. T. 254; 30 J. P. 6; 11 Jur. N. S. 925; 14 W. R. 26.**

**Annotations:—***Refd.* Paine v. Jones (1874), L. R. 18 Eq. 320; Mussammat Sundar v. Mussammat Parbati (1889), 5 T. L. R. 683; Calder v. Alexander (1900), 16 T. L. R. 294; Perry v. Clissold, [1907] A. C. 73.

**1966. By forcible ejectment.]—Where a tenant remains in possession after the expiration of his term a landlord is not justified in expelling him by force in order to regain possession:—*Semble*: possession so acquired is not sufficient to vest the possession in the landlord with relation to the termination of the term.—*NEWTON v. HARLAND* (1840), 1 Man. & G. 644; 1 Scott, N. R. 474; 133 E. R. 490.**

**Annotations:—***Expld.* Beddall v. Maitland (1881), 17 Ch. D. 174. *Overd.* Hemmings v. Stoke Poges Golf Club, [1920] 1 K. B. 720. *Refd.* Harvey v. Bridges (1845), 3 Dow. & L. 55; Wright v. Burroughes (1846), 3 C. B. 685; Davis v. Burrell (1851), 10 C. B. 821; Delaney v. Fox (1856), 1 C. B. N. S. 166; Pollon v. Brewer (1859), 1 L. T. 9; Accidental Death Insee. v. Mackenzie (1861), 5 L. T. 20; Blades v. Higgs (1861), 10 C. B. N. S. 713; Telford v. Lows (1874), 31 L. T. 90; Edwick v. Hawkes (1881), 18 Ch. D. 199; Jones v. Foley (1891), 60 L. J. Q. B. 464. *Mentd.* Carter v. Hughes (1858), 2 H. & N. 714.

**1967. ————.]—Damages cannot be recovered against the rightful owner for a forcible entry on land, for 5 Ric. 2, statute 1, c. 8, only makes a forcible entry an indictable offence & does not create any civil remedy for it. But for any independent wrong, such as an assault or an**

#### PART VIII. SECT. 5, SUB-SECT. 2.

**1957 i. Right to emblements.]—Where a mtgor. in possession, after default made in payment of the mtge.-money, received a letter from the mtgee., who was in a foreign country, directing him to put a spring crop into the land, unless he came into the country in time for the mtgor. to remove in the spring, & he did not come until the summer:—*Held*: notwithstanding the**

relation between the parties of mtgor. & mtgee., deft. could not be turned out of possession of the land while crops were growing, nor without a demand of possession.—*DOE d. PATTERSON v. BROWN* (1842), 2 Ont. Dig. 4410.—*CAN.*

#### PART VIII. SECT. 5, SUB-SECT. 4.

**a. By ejectment proceedings—Demand for possession—Necessity for.]—HENDERSON v. WHITE (1873), 23 C. P.**

#### 78.—CAN.

**b. ————.]—A demand of possession is not necessary where the estate of deft. terminated by the death of his grantor, the husband of the lessee for life.—*NOLAN v. FOX* (1865), 15 C. P. 565.—*CAN.***

**c. ————.]—KRISHNAJI RAMCHANDRA v. ANTAJI PANDURANG (1893), 1 L. R. 18 Bom. 256.—*IND.***

**d. Sale by mortgagee.]—A mtgor. in**

injury to furniture, committed in the course of the forcible entry, damages can be recovered, even by a person whose possession was wrongful, for the statute makes a possession obtained by force unlawful, even when it is so obtained by the rightful owner.—BEDDALL *v.* MAITLAND (1881), 17 Ch. D. 174; 50 L. J. Ch. 401; 44 L. T. 248; 29 W. R. 484.

*Annotations*.—*Consd.* Jones *v.* Foley, [1891] 1 Q. B. 730. *Overd.* Hemmings *v.* Stoke Poges Golf Club, [1920] 1 K. B. 720. *Refd.* Scott *v.* Brown (1884), 51 L. T. 746. *Mentd.* Andrew *v.* Aitken (1882), 51 L. J. Ch. 784; Gray *v.* Webb (1882), 21 Ch. D. 802; Toke *v.* Andrews (1882), 8 Q. B. D. 428; Fraser *v.* Cooper, Hall (1883), 31 W. R. 714; McGowan *v.* Middleton (1883), 11 Q. B. D. 464.

1968. —.]—5 Ric. 2, statute 1, c. 7, provides that none make any entry into any lands & tenements, but in case where entry is given by the law; & in such case not with strong hand, nor with multitude of people, but only in peaceable & easy manner; & that if any man do to the contrary, & thereof be duly convicted, he shall be punished by imprisonment of his body, & thereof ransomed at the King's will.

Pltfs., a man & his wife, lived in a cottage belonging to defts., the man being in their service & being required by them to live in the cottage as part of his service & for the performance of his duties. He left their service, but refused to give up the cottage after notice to quit duly given. Thereupon by command of defts. several persons entered the cottage & removed pltfs. & their furniture, using no more force than was necessary for that purpose. In an action by pltfs. for assault, battery & trespass:—*Held*: defts. were not liable, their right of entry being a defence to civil proceedings for the acts complained of.

*Newton v. Harland*, No. 1966, *ante*; *Beddall v. Maitland*, No. 1967, *ante*; & *Edwick v. Hawkes*, No. 2475, *post*, so far as it followed those cases, *overd.*—HEMMINGS *v.* STOKE POGES GOLF CLUB, [1920] 1 K. B. 720; 89 L. J. K. B. 744; 122 L. T. 479; 36 T. L. R. 77; 64 Sol. Jo. 131, C. A.

1969. By grant of lease to new tenant.]—WALLIS *v.* DELMAR, No. 1918, *ante*.

#### SUB-SECT. 5.—OTHER CASES.

1970. Effect of release by remainderman.]—A release by a remainderman to a tenant at sufferance is void.—BUTLER *v.* DUCKMONTON (1607), 1 Brownl. 207; Cro. Jac. 169; 123 E. R. 758.

1971. Effect of payment of rent—Whether tenancy from year to year created—Question of fact.]—FINLAY *v.* BRISTOL & EXETER RY. CO., No. 2037, *post*.

### SECT. 6.—TENANCY FROM YEAR TO YEAR.

#### SUB-SECT. 1.—NATURE OF.

1972. Whether a re-letting at commencement of each year.]—Every lease from year to year is, in point of law, a new demise each year (LORD MANSFIELD, C.J.).—R. *v.* BILSDALE KIRKHAM (1776), Burr. S. C. 828; 2 Bott. 6th ed. 147. *Annotation*:—*Refd.* R. *v.* Aston (1817), 6 M. & S. 54.

possession after default is a tenant at sufferance, whose tenure is determined by a sale by the intgoe.—GRIFFIN *v.* DUNN (1878), 4 V. L. R. 419.—AUS.

#### PART VIII. SECT. 6, SUB-SECT. 1.

6. Continuing tenancy.]—A tenancy from year to year is a continuing J.—VOL. XXXI.

tenancy. — HAYES *v.* FITZ-GIBRON (1870), 1 R. 4 C. L. 500.—IR.

#### PART VIII. SECT. 6, SUB-SECT. 2.—A. (a).

1. What is sufficient agreement.—Agreement to pay taxes.]—Where D., being tenant for life of two lots, gave M. oral permission to occupy one lot

1973. —.]—The distinction taken between a tenant from year to year & a tenant for a term of years is rather a distinction in words than in substance. A tenant from year to year is entitled to estovers & the same advantages as a tenant for a term of years. In truth he is a tenant from year to year as long as both parties please; & considering how many large estates are held by this tenure, it would be dangerous to say that the term ceased at the end of the year, because then the landlord might lose his right of distress (LORD KENYON, C.J.).

If a tenant, who held from year to year, died intestate, his administrator has the same interest in the land that the intestate had. Then what was the interest of the pauper's testator? He had a right to continue on the estate another year, unless six months' notice to quit were given; & of course the pauper, his exor., had the same right (LAWRENCE, J.).—R. *v.* STONE (INHABITANTS) (1795), 6 Term Rep. 295; 2 Bott. 6th ed. 517; 101 E. R. 561.

*Annotations*.—*Mentd.* R. *v.* Ynyscynhanarn (1827), 7 B. & C. 233; R. *v.* Burgate (1854), 23 L. T. O. S. 155.

1974. —.]—In an action of trespass, deft. pleaded *liberum tenementum*, & leave & licence. Pltf. denied the licence, & replied to the other plea a demise from year to year, commencing on Nov. 16, 1836. Deft., in his rejoinder, denied the demise. There was evidence that Nov. 16 was the first day of each year of the tenancy, but from the evidence it seemed that the tenancy must have commenced before 1836. The defence, which was sought to be proved by an admission of pltf., was, that, at the time of the letting, pltf. had agreed to give up the possession whenever deft. required to have the land:—*Held*: the allegation of the tenancy was proved, although the tenancy had begun on some Nov. 16, several years before 1836, as a tenancy from year to year is considered as recommencing every year.—TOMKINS *v.* LAWRENCE (1839), 8 C. & P. 729, N. P.

*Annotations*.—*Consd.* Cattleby *v.* Arnold, Banks *v.* Arnold (1859), 1 John. & H. 651. *Appld.* Gandy *v.* Jubber (1864), 5 B. & S. 78. *Refd.* R. *v.* Thornton (1860), 2 E. & E. 788.

1975. —.]—GANDY *v.* JURBER, No. 2064, *post*.

*See, also*, No. 2048, *post*.

#### SUB-SECT. 2.—HOW CREATED.

##### A. By Express Agreement.

##### (a) In General.

1976. What is sufficient agreement—Verbal promise of future lease—Conditional on payment of debt.]—DOE *d.* ROGERS *v.* PULLEN, No. 1951, *ante*.

1977. — Agreement to hold from quarter to quarter—Subject to three months' notice to quit—Proviso for termination without notice on happening of certain event.]—A tenant holding premises from quarter to quarter, on the terms of quitting possession at the end of any three calendar months upon receiving notice in writing, & in the event of losing his beer license, of quitting when requested by his landlord, & without notice, is not a tenant for "any term or number of years certain, or from

& build upon it, on condition that he should pay the taxes on both lots; & M. accordingly went on & built, & paid the taxes for several years:—*Held*: a yearly tenancy had been created.—DAVIS *v.* MCKINNON (1871), 31 U. C. R. 564.—CAN.

g. —.]—GUNGABAI *v.* KA-

**Sect. 6.—Tenancy from year to year: Sub-sect. 2, A. (a) & (b).]**

year to year"; & therefore cannot, at the expiration of a three months' notice to quit, be compelled under 1 Geo. 4, c. 87, s. 1, to enter into a recognisance to pay costs.—*DOE d. CARTER v. ROE* (1842), 10 M. & W. 670; 2 Dowl. N. S. 449; 12 L. J. Ex. 27; 6 Jur. 1044; 152 E. R. 640.

**1978. — Agreement to increase rent.]**—Deft. being tenant from year to year at a given rent, the rent was raised, at the termination of one of the years, by consent of landlord & tenant:—*Held*: if this created a new contract, it must be a contract to hold on the old terms; & a contract for a tenancy for two years certain from the time of raising the rent could not be inferred, in default of additional evidence, even on the assumption that an original contract for a tenancy from year to year creates a tenancy for two years certain.—*DOE d. MONCK v. GEEKIE* (1844), 5 Q. B. 841; 13 L. J. Q. B. 239; 8 Jur. 360; 114 E. R. 1466.

*Annotation*:—*Mentd.* Phillips v. Miller (1875), L. R. 10 C. P. 420.

Duration of tenant's interest, see Part VIII., Sect. 6, sub-sect. 3, *post*.

**1979. — Parol demise—Entry by tenant.]**—At a letting of lands, the terms of letting were read from a printed paper, & a party present agreed to take certain premises from Lady Day then next, when the lease of the then tenant would expire. No writing was signed by the parties or their agents, but there was at the foot of the printed paper a memorandum, also read over to the future tenant, stating that the parties had agreed to let & to take, subject to the printed terms, the name of the farm & the rent, & that the letting was for one year certain from Lady Day, & so from year to year, till notice to quit. Some of the terms were special, having relation to husbandry. The new tenant entered at Lady Day, & paid rent. Assuming the first transaction not to have been a demise:—*Held*: (1) there was a valid demise by parol under Stat. Frauds, s. 2, when the tenant entered & a demise rendered valid by that sect. might contain the same special stipulations as a regular lease; (2) on the trial of an action by the landlord against the tenant for breach for them, the paper above mentioned might be referred to, to refresh the memory of a witness as to such stipulations.—*BOLTON (LORD) v. TOMLIN* (1836), 5 Ad. & El. 856; 2 Har. & W. 369; 1 Nev. & P. K. B. 247; 6 L. J. K. B. 45; 111 E. R. 1391.

*Annotations*:—As to (1) *Refd.* Giles v. Spencer (1857), 3 C. B. N. S. 244; *Consworth v. Johnson* (1855), Cab. & El. 542. *Generally*, *Mentd.* Cornish v. Stubbs (1870), 22 L. T. 21.

— **Attornment clause in mortgage.]**—See MORTGAGE.

**(b) Letting at Annual Rent.**

**1980. Uncertain terms.]**—A general parol demise at an annual rent, where the bulk of the farm is inclosed & a small part in the open common fields, is only a lease from year to year, & not for so long as the usual round of husbandry extends.

All leases for uncertain terms are, *prima facie*, leases at will; it is the reservation of an annual

rent that turns them into leases from year to year (*DE GREY, C.J.*).—*ROE d. BREE v. LEES* (1777), 2 Wm. Bl. 1171; 96 E. R. 691.

*Annotation*:—*Refd.* Doe d. Clarke v. Smarridge (1845), 9 Jur. 781.

**1981. Rent reserved in agreement for lease of other property.]**—The occupation of premises, & payment of a fixed annual rent for the same, under a clause in an agreement for a lease of other property, engaging "to accommodate" the tenant, so occupying, with such premises during the continuance of the intended lease, will be deemed a tenancy from year to year, & will therefore vest such an interest in the tenant, as may be seized & sold by the sheriff, under a *fi. fa.* against such tenant.—*DOE d. WESTMORELAND & PERFECT v. SMITH* (1827), 1 Man. & Ry. K. B. 137; 6 L. J. O. S. K. B. 44.

**1982. Rent payable weekly.]**—The taking of a tenement at twenty guineas a year, the rent to be paid weekly, but either party to be at liberty to give three months' notice from any quarter day, is a yearly hiring within 6 Geo. 4, c. 57.—*R. v. HERSTMONCEAUX (INHABITANTS)* (1827), 7 B. & C. 551; 1 Man. & Ry. K. B. 426; 6 L. J. O. S. M. C. 35; 108 E. R. 828.

*Annotations*:—*Fold.* R. v. Wainfleet All Saints (1828), 6 L. J. O. S. M. C. 112. *Appld.* R. v. St. Giles without Cripplegate (1863), 4 B. & S. 509; Hastings Union v. St. James, Clerkenwell (1865), L. R. 1 Q. B. 38. *Distd.* R. v. Norwich Incorporation (1874), 30 L. T. 704. *Refd.* Buckworth v. Simpson (1835), 5 Tyr. 344; R. v. Chawton (1841), 1 Q. B. 247; R. v. Pontefract Recorder (1842), 2 Gal. & Dav. 700; R. v. St. Giles-in-the-Fields (1850), 4 New Mag. Cas. 66; Willesden Overseers v. Paddington Overseers (1863), 3 B. & S. 593. *Mentd.* R. v. Sandhurst (1827), 7 B. & C. 557; R. v. Lew (1828), 8 B. & C. 635.

**1983. —]**—The occupation of lands & payment of rent for the same for upwards of a year as a sub-tenant under an agreement to pay the tenant so much a week in addition to the original yearly rent, so as to make the rent exceed the sum of £10 *per annum*, is sufficient to entitle the person so occupying to a settlement under 59 Geo. 3, c. 50.—*R. v. WAINFLEET ALL SAINTS (INHABITANTS)* (1828), 8 B. & C. 227; 2 Man. & Ry. K. B. 223; 1 Man. & Ry. M. C. 400; 6 L. J. O. S. M. C. 112; 108 E. R. 1028.

**1984. Rent payable monthly.]**—A. agrees to let, & B. to take, a cottage for three months from Dec. 29, at the yearly rent of £18, the first monthly payment to be made Jan. 25, free from all taxes, etc., which are to be paid by the tenant, & allowed out of the rent. Three months' notice to quit from either party to be sufficient. B. occupied for eighteen months:—*Held*: a tenancy from year to year, so as to give the tenant a settlement under 6 Geo. 4, c. 57, s. 2.—*WILLESSEN OVERSEERS v. PADDINGTON OVERSEERS* (1863), 3 B. & S. 593; 27 J. P. 324; 11 W. R. 425; 122 E. R. 223; *sub nom.* PADDINGTON (CHURCHWARDENS) v. WILLESSEN (CHURCHWARDENS), 1 New Rep. 435; 32 L. J. Q. B. 150; 7 L. T. 784; *sub nom.* R. v. WILLESSEN PARISH (CHURCHWARDENS & OVERSEERS), 32 L. J. M. C. 109; 9 Jur. N. S. 874. *Annotations*:—*Appld.* Hastings Union v. St. James, Clerkenwell (1865), L. R. 1 Q. B. 38. *Refd.* R. v. St. Giles, Cripplegate, Parish (1863), 3 New Rep. 153.

**1985. Rent payable quarterly.]**—A pauper took a house at a yearly rent, payable quarterly, the tenancy determinable by a quarter's notice at any

LAPA DARI MURRYA (1885), 1 L. R. 9 Bom. 419.—IND.

**h. Oral lease—Void under statute—Yearly tenancy implied.]**—Where the tenant enters under an oral lease void under the statute, a tenancy from year to year may be implied, though no rent has been paid.—*GIBBONEY v. GIB-*

BONEY (1875), 36 U. C. R. 236.—CAN.

**k. Possession under void agreement.]**—*STYLES & CO., LTD. v. RICHARDSON* (1915), 17 W. A. L. R. 81.—AUS.

**l. Lease assigned by lessee—Letter to lessor from assignee—Admitting liability for rent.]**—*DOE d. PETERS v.*

PELLETIER (1858), 4 All. 33.—CAN.

**PART VIII. SECT. 6, SUB-SECT. 2.—A. (b).**

**1982 i. Rent payable weekly.]**—*FITZGERALD v. BUTTON* (1891), 17 V. L. R. 52.—AUS.

**1985 i. Rent payable quarterly.]**—

period. At the end of the first quarter, he said the rent was too high, & that he should quit. His landlady said if he would remain she would take off 10s. per quarter from the rent. This was agreed to & acted upon. The pauper quitted & locked up the house, leaving some few things in it, ten days before the end of the year & offered the key to his landlady. She refused it, & he retained it till the end of the year, paying rent for the whole year:—*Held*: to be a yearly tenancy, & an occupation under 6 Geo. 4, c. 57, s. 2.—*R. v. ST. MARY KALENDAR (INHABITANTS)* (1839), 9 Ad. & El. 626; 1 Per. & Dav. 497; 2 Will. Woll. & H. 103; 8 L. J. M. C. 54; 112 E. R. 1349.

*Annotation*:—*Mentd.* Cheltenham Union Grdms. v. Birmingham Grdms. (1874), 39 J. P. 39.

1886. —.]—Pltf. agreed to let & defts. to take an office from Sept. 29, 1869, at the yearly rent of £20 payable quarterly in advance. The agreement alluded more than once to the term thereby created, & provided, amongst other things, that in case the term thereby created should be determined otherwise than by effluxion of time or legal notice, then the tenants should pay to the landlord the sum of £5, equivalent to one quarter's rent, as & by way of liquidated & ascertained damages, & to be recoverable as such by the said landlord. Defts., without any notice, gave up possession of the premises just before Sept. 29, 1870, having paid in advance all rent for the year ending on that day:—*Held*: the terms of the agreement created a yearly tenancy, & the landlord was entitled to recover £5 from the tenants, in an action for rent due on Sept. 29, in advance.—*FLORENCE v. ROBINSON* (1871), 24 L. T. 705.

1887. —.]—By an agreement dated Oct. 22, 1886, the owner of a piece of land let the same to a tenant from Sept. 29, 1886, at the rent of £19 12s. a year, payable quarterly on the four usual quarter days for payment of rent in every year, & the tenant agreed to pay the said rent at the times aforesaid, & to use the said premises as garden ground only, & to manure, crop, & cultivate the same in a husbandlike manner, & it was agreed that the tenancy might be determined by either party giving to the other three calendar months notice to quit, or of his intention of quitting, as the case might be, on any day of the year. The land so let was used by the tenant as a market garden. In Oct. 1896, the landlord gave the tenant notice to quit. The tenant claimed compensation for improvements under 58 & 59 Vict. c. 27, s. 4, which is to be read as part of 46 & 47 Vict. c. 61:—*Held*: the agreement created a tenancy from year to year, & therefore the tenant came within 58 & 59 Vict. c. 27, s. 4, as having held under a "contract of tenancy" as defined by 46 & 47 Vict. c. 61, s. 61.—*KING v. EVERSFIELD*, [1897] 2 Q. B. 475; 66 L. J. Q. B. 809; 77 L. T. 195; 61 J. P. 740; 46 W. R. 51; 13 T. L. R. 571; 41 Sol. Jo. 712, C. A.

*Annotation*:—*Refd.* Lewis v. Baker (1906), 75 L. J. K. B. 848.

1888. —.]—By an agreement dated June 1, 1901, pltf. let to deft. a licensed house from May 13, 1901, "until such tenancy shall be determined as hereinafter mentioned," at the yearly rent of £70 clear of all deductions except land & property tax, to be paid by equal quarterly payments on Aug. 13, Nov. 13, Feb. 13, & May 13 in every year, the first payment to be made on Aug. 13, 1901; & the tenant agreed to keep the premises in repair, & to apply for & procure a

renewal of all necessary licenses, & there was a clause enabling the landlord to eject the tenant, if the latter was convicted of an offence through which the license was endorsed. The agreement further provided that "it shall be lawful for either of the parties to determine the tenancy hereby created by giving to the other of them three calendar months' notice in writing for that purpose":—*Held*: the agreement created a yearly tenancy determinable on three months' notice expiring at the end of the year of the tenancy.—*LEWIS v. BAKER*, [1906] 2 K. B. 599; 75 L. J. K. B. 818; 95 L. T. 10; 22 T. L. R. 680; 50 Sol. Jo. 616, C. A.

*Annotation*:—*Refd.* Simmons v. Crossley, [1922] 2 K. B. 95.

1889. —.]—A tenancy agreement in writing by which certain premises were let by pltf. to deft. at a rent of £60 *per annum* payable on the usual quarter days, provided that "the tenancy shall commence on Sept. 1, 1918, to continue from year to year until determined by three calendar months' notice to quit, which may be given on either side & at any time." On Apr. 29, 1919, pltf. gave to deft. a notice to quit which expired on Aug. 2, 1919:—*Held*: the agreement created a yearly tenancy, & the notice was a bad notice in that it purported to determine the tenancy before the end of the first year.—*MAYO v. JOYCE*, [1920] 1 K. B. 824; 89 L. J. K. B. 561; 122 L. T. 777, D. C.

*See, also*, No. 2000, *post*.

1990. Agreement for termination by three months' notice.]—*R. v. HERSTMONCEAUX (INHABITANTS)*, No. 1982, *ante*.

1991. —.]—*R. v. ST. MARY KALENDAR (INHABITANTS)*, No. 1985, *ante*.

1992. —.]—*WILLESDEN OVERSEERS v. PAD-DINGTON OVERSEERS*, No. 1984, *ante*.

1993. —.]—*KING v. EVERSFIELD*, No. 1987, *ante*.

1994. —.]—By an agreement of tenancy premises were let "at an inclusive rental of £25 *per annum* from Oct. 1; the tenant to pay rates & taxes in addition; three months' notice on either side to terminate this agreement":—*Held*: this agreement created a yearly tenancy determinable by three months' notice expiring with a year of the tenancy & not at any other time.—*DIXON v. BRADFORD & DISTRICT RAILWAY SERVANTS' COAL SUPPLY SOCIETY*, [1904] 1 K. B. 444; 73 L. J. K. B. 136; 90 L. T. 122; 20 T. L. R. 159.

*Annotations*:—*Consd.* Lewis v. Baker, [1905] 2 K. B. 576. *Refd.* Croft v. Blay, [1919] 1 Ch. 277; Simmons v. Crossley, [1922] 2 K. B. 95.

1995. —.]—*LEWIS v. BAKER*, No. 1988, *ante*.

1996. —.]—*MAYO v. JOYCE*, No. 1989, *ante*.

1997. Tenancy at will.]—*POPE v. GARLAND*, No. 2004, *post*.

1998. Lease of brickfield—Evidence of customary tenure rejected.]—By an agreement F. agreed to let & S. to take, all that, etc. paying for the land on annual surface rent, & also a rent for a cottage on it. S. was to use the land for making bricks, pay F. so much per thousand, & make not less than four millions annually, or pay an annual rent equal thereto; & S. agreed not to excavate beyond a depth of eight feet. S. had paid rent, & been in occupation about four years, when the railway co. under their Act called on him to assign his interest to them. The compensation was referred to arb. under Lands Clauses Consolidation Act, 1845 (c. 18), & the arbitrator rejected evidence of a custom among brickmakers not to become

Payment of rent quarterly is not conclusive evidence of a yearly tenancy. —*HALLIBURTON v. JAMES*, 246.—*CAN.*

*MOLLOY* (1854), | 1985 H. —.]—*HOLMES v. DAY* (1874), 1 R. 8 C. L. 235.—*IR.*

**Sect. 6.—Tenancy from year to year: Sub-sect. 2, A. (b) & (c), & B. (a).]**

tenants from year to year merely; & assessed compensation on the principle that S. was only entitled as tenant from year to year:—*Held*: the arbitrator was right.

It seems to me that the parties did not intend anything more than a tenancy from year to year. By the terms of the instrument the tenant is under no obligation to work out the brick earth. When, then, is the tenancy to be terminable? It might continue for ever, if it was not to terminate till the exhaustion of the brick earth to the depth of eight feet. If there had been a premium, that might have tended to show that a greater interest was contemplated than a yearly tenancy. Here there was no power of distress or re-entry for arrears of rent, & no obligation to work the land. How then can it be supposed that the landlord intended to part with anything like a permanent interest? There is no ambiguity in the terms of the instrument; & there is nothing in it to show that it was intended to be the basis of a future instrument. I cannot conceive how evidence of the custom of the trade could have been admissible. The instrument is to be construed by its own contents (*WILDE, C.J.*).—*Re STROUD & EAST & WEST INDIA DOCK & BIRMINGHAM JUNCTION RY. CO.* (1849), 8 C. B. 502; 19 L. J. C. P. 117; 137 E. R. 604; *sub nom.* *STROUD v. EAST & WEST INDIA DOCK & BIRMINGHAM JUNCTION RY. CO.*, 14 L. T. O. S. 291.

**1999. Agreement to allow tenant to remain as long as rent paid.**—By a written instrument not under seal, & dated Feb. 28, 1872, W. purported to demise a messuage to deft. as tenant from year to year, for so long as he should keep the rent paid, & as W. should have "power to let the said premises"; the rent reserved by the instrument was less than two-thirds of the annual value of the messuage. Deft. entered & paid rent quarterly:—*Held*: (1) the instrument was void as a lease, on the ground of uncertainty, & on the ground that, not being within the terms of sect. 2 of the Stat. Frauds, s. 2, it ought to have been under seal pursuant to Real Property Act, 1845 (c. 106), ss. 2, 3; (2) the only estate vested in deft. was a tenancy from year to year.—*WOOD v. BEARD* (1870), 2 Ex. D. 30; 46 L. J. Q. B. 100; 35 L. T. 866; 41 J. P. 213.

*Annotation*:—*As to* (1) *Reid. Kusel v. Watson* (1879), 11 Ch. D. 129.

**2000. What amounts to annual rent—Agreement to pay royalty quarterly.**—The proprietor of a house & of a marl pit & brick mine demised the house, by unwritten agreement, to D. from a day named; & it was at the same time agreed between them, without writing, that D. should take the marl pit & brick mine & pay quarterly, at the usual quarter days, 8d. per solid yard for all the marl that he got, & 1s. 8d. per thousand for all the bricks that he made. D. took the marl & made bricks accordingly, & paid the stipulated sums for a time; but they afterwards fell into arrear:—*Held*: the agreement for the marl pit & brick mine was a demise of the land from year

to year, at a rent capable of being ascertained with certainty, & for which, therefore, the lessor might distrain.—*DANIEL v. GRACIE* (1844), 6 Q. B. 145; 13 L. J. Q. B. 309; 8 Jur. 708; 115 E. R. 56.

*Annotations*:—*Mentd.* *Pollett v. Forest* (1847), 8 L. T. O. S. 534; *R. v. Westbrook, R. v. Everist* (1847), 10 Q. B. 178; *Edmonds v. Eastwood* (1858), 2 H. & N. 811; *Turner v. Cameron* (1870), 22 L. T. 525; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373; *Holwell Iron Co. v. Mid. Ry.*, [1910] 1 K. B. 296.

**(c) Letting for Less than Annual Rent.**

**2001. Reservation of weekly rent—Agreement to terminate tenancy by six months' notice.**—The pauper occupied, for four years, a tenement, at a rent which exceeded £10 a year, under an agreement, whereby the landlord agreed to let, & he agreed to take, the tenement "for one week certain," "at the weekly rent of 4s. payable daily if demanded." The agreement contained a proviso that in case the tenant should remove goods off the premises, the landlord might follow them & distrain either for a whole quarter's rent or any part of a quarter; & that six calendar months' notice to quit should be given by either party:—*Held*: this did not show a yearly tenancy so as to confer a settlement upon the tenant.—*R. v. St. GEORGE'S, BLOOMSBURY* (1847), 2 New Mag. Cas. 316; 10 L. T. O. S. 162; 12 J. P. 37.

**2002. Reservation of monthly rent—Agreement to rent for indefinite period—Occupation for more than one year.**—A renting of a tenement for an indefinite period, & an occupation for a year, constitute a tenancy for a year.

A. occupied for upwards of a year a house under a written agreement, whereby it was let to him from a certain day "at the monthly rental of £1 10s. 8d.," the said agreement containing this provision, "it is lastly agreed that one month's notice, to expire either on Mar. 25, June 25, Sept. 25, or Dec. 25, shall be a good & sufficient notice on either side for A. to quit & deliver up possession of the house":—*Held*: this was a hiring of a tenement indefinite as to duration, but terminable at a month's notice on either side on any of the specified quarter days; & the house having been actually occupied under that hiring for upwards of a year, it must be considered to have been an occupation under a hiring for a year.—*R. v. St. GILES WITHOUT CRIPPLEGATE (INHABITANTS)* (1863), 4 B. & S. 509; 3 New Rep. 153; 33 L. J. M. C. 3; 9 L. T. 411; 27 J. P. 775; 10 Jur. N. S. 205; 12 W. R. 125; 122 E. R. 550.

*Annotations*:—*Apld.* *Hastings Union v. St. James, Clerkenwell* (1865), L. R. 1 Q. B. 38. *Reid. R. v. Norwich Corp'n. Grdns.* (1874), 38 J. P. 677.

**B. By Presumption of Law.**

**(a) From Payment of Rent.**

**2003. General rule—Prima facie presumption.**—A demise by A. to B. for the term of "his" natural life, may enure as a demise either for the life of A. or of B. according to circumstances. *Semble*: if the *habendum* be to B., his exors., administrators & assigns, a presumption is created in favour of a demise for the life of A. Such presumption is confirmed by a covenant by A. with B. for quiet

**PART VIII. SECT. 6, SUB-SECT. 2.—B. (a).**

**2003 i. General rule—Prima facie presumption.**—Where a tenant is let into occupation of land, under a parol agreement, for an indefinite time, with a direction to pay a third person a yearly rent due by the immediate landlord, the payment of such rent for more than a year affords evidence from which a tenancy from year to

year may be inferred.—*PYLE v. TAYLOR* (1882), 8 V. L. R. 51.—*AUS.*

**2003 ii.** ———.—*J.*—*MORISON v. EDMISTON*, [1907] V. L. R. 191.—*AUS.*

**2003 iii.** ———.—*J.*—*HOUGHTON v. THOMPSON* (1866), 25 U. C. R. 557.—*CAN.*

**2003 iv.** ———.—*J.*—*MANNING v. DEVER* (1874), 35 U. C. R. 294.—*CAN.*

**2003 v.** ———.—*J.*—*O'NEIL v.*

*WELLS* (1876), 2 R. & C. 205.—*CAN.*

**2003 vi.** ———.—*J.*—*REEVE v. THOMPSON* (1887), 14 O. R. 499.—*CAN.*

**2003 vii.** ———.—*J.*—*Held*: payment of rent was one of the many things from which a tenancy from year to year might be inferred.—*FAHY v. O'DONNELL* (1) (1870), 1 R. 4 C. L. 332.—*IR.*

**2003 viii.** ———.—*J.*—*Held*: as no

joyment during the life of A. Such a covenant *rese* would amount to a demise.

Where a party to a conveyance is therein described as heir-at-law of J., a surviving devisee of the legal estate, such description is not evidence of the prior death of the co-devisees, or that such party is heir of J., even against another party who executed the conveyance. Payment of rent is *prima facie* evidence of a tenancy from year to year. *Secus*, where the existence of such a tenancy would imply that devisees in trust had conveyed away their estate, whilst a duty still remained to be performed by them.

The presumption is completely rebutted by showing that the rent paid & reserved is of the same amount as the rent reserved in an unexpired lease, the premises being, at the time of such payment of rent, of much greater value than the rent so reserved & so paid.—*DOE v. PRITCHARD v. DODD* (1833), 5 B. & Ad. 689; 2 Nev. & M. K. B. 838; 110 E. R. 945.

**2004.** ———.]—A tenant at will, at a yearly rent, is a tenant from year to year.—*POPE v. GARLAND* (1841), 4 Y. & C. Ex. 394; 10 L. J. Ex. Eq. 13, 92; 160 E. R. 1059.

*Annotations:—Mentd.* *Strangways v. Bishop* (1857), 29 L. T. O. S. 120; *Grosvenor v. Green* (1858), 28 L. J. Ch. 173; *Evans v. Robins* (1863), 11 L. T. 211; *Cullen v. O'Meara* (1867), 15 W. R. 1174.

**2005.** ———.]—Deft. was a bkpt.'s widow, who had gone into actual possession & occupation after his death, in 1858, & had not paid rent:—*Held*: deft. was not a tenant from year to year as she had not paid rent.—*MACKLEY v. PATTENDER* (1860), 2 F. & F. 61, N. P.; *subsequent proceedings* (1861), 1 B. & S. 178.

**2006.** ———.]—Defts., who were poor parishioners of the parish of C., claimed to hold as yearly tenants certain lands in the parish which were vested under Poor Relief Act, 1819 (c. 12), s. 17, in the churchwardens & overseers for the time being, at the yearly rent of 4s. per acre. Up to the year 1803 these lands had been occupied at the above rent, which was always paid in advance; in that year these lands were inclosed, & to pay the expenses the rent was raised to 12s., which was paid up to the year 1848, when all the expenses being liquidated, defts. refused to pay more than 4s. which sum was tendered & refused & the present action brought:—*Held*: in the absence of any agreement to the contrary, they were tenants from year to year, & entitled to notice to quit.—*HUNT v. ALLGOOD* (1861), 10 C. B. N. S. 253; 30 L. J. C. P. 313; 4 L. T. 215; 25 J. P. 614; 7 Jur. N. S. 1123; 9 W. R. 536; 142 E. R. 448.

**2007.** ———.]—A tenancy from year to year is created by estoppel between the mtgee. of an assignee of a lease, disclaimed by the assignee's trustee in bkpcy., & the original lessor, where, in the absence of a vesting order under Bkpcy. Act, 1883 (c. 52), s. 55, in favour of either party, the mtgee. has entered into possession & occupation of the premises, & has for some years continued to pay quarterly the original rent reserved by the lease to the lessor. That the mtgee. had done this merely to preserve his security is no defence to an action for rent due under a tenancy from year

to year, nor is it a defence that the lessor had a remedy by distress.—*JUMP v. PAYNE* (1899), 68 L. J. Q. B. 607, N. P.

**2008.** ———.]—A piece of land parcel of a manor, of which there were no copyhold tenants, had been held since 1709 at a rent which had from time to time increased from 1s. to 5s. 1d. Some of the additions to the rent were traceable to additions to the holding, but some were not so traceable. There was no trace of the holding prior to 1709:—*Held*: defts., the present holders, were not freehold tenants at a quit rent, but merely annual tenants of the lord of the manor.—*FOL-JAMBE v. SMITH'S TADCASTER BREWERY CO.* (1904), 73 L. J. Ch. 722; 91 L. T. 312; 48 Sol. Jo. 699.

**2009.** Rent must be referable to a year—Or aliquot part of year.]—*RICHARDSON v.* No. 1825, *ante*.

**2010.** ———.]—The lessor of pltf. has proved a tenancy from year to year in W. II., the decease of W. II., & letters of administration granted to himself in Mar. 1844. The term for a tenancy from year to year is a term, therefore vests in him until there is some legal determination of it; & thus he has made out a good *prima facie* case. . . . In this case I think there was no evidence that this tenancy from year to year had been determined by operation of law, as suggested, viz. by surrender, either by the administrator allowing the widow to occupy the premises under Lady II., or by a virtual assignment of them. In order to make out that, it must be shown that there was the relation of landlord & tenant, with the assent of the administrator, between Lady II. & deft. But it is further contended, that the widow, if not tenant to Lady II., was tenant from year to year to the administrator, & was entitled to six months' notice to quit; but there is no evidence at all to show an agreement for a tenancy from year to year to the administrator: it only amounts to this, that he allowed her to pay the rent for him to the head landlord instead of to himself. We cannot infer a tenancy from year to year from a simple payment by the occupier. . . . A simple permission to occupy creates a tenancy at will, unless there are circumstances to show an intention to create a tenancy from year to year; as for instance an agreement to pay rent by the quarter, or some other aliquot part of a year (*PARKE, B.*).—*DOE d. HULL v. WOOD* (1845), 14 M. & W. 682; 15 L. J. Ex. 41; 6 L. T. O. S. 102; 9 Jur. 1060; 153 E. R. 649.

*Annotations:—Reid.* *It. v. Halifax* (1855), 4 E. & B. 647. *Mentd.* *It. v. Thornton* (1860), 2 E. & E. 788; *Brighton Corp'n. v. Brighton Grdns.* (1880), 5 C. P. D. 368.

**2011.** ———.]—Proviso for three months' notice to quit.]—*KING v. EVERSFIELD*, No. 1987, *ante*.

**2012.** Application of rule — Lodgings.] — A. let apartments in his dwelling-house to B., at a rent payable half yearly. B. took possession at Michaelmas 1822, & at Lady Day 1823 paid half a year's rent. In June of that year, B. left the apartments without giving any notice to quit, but at Michaelmas 1823 he paid half a year's rent. At Lady Day 1824, A. demanded another half year's rent, which B. refused to pay:—*Held*: from these facts the law would not imply a taking

other tenancy appeared under which the rent would have been payable, the tenancy so acknowledged would, *prima facie*, be a tenancy from year to year.—*HANWAY v. TAYLOR* (1874), 1 R. 8 C. L. 254.—*IR.*

**2003 ix.** ———.]—Conveyancing Ordinance, sect. 6, did not do away with the inference of a tenancy from year to year which at common law arose

from the payment of an annual rent.—*YOUNG v. MCKINNON*, Mac. 164.—*N.Z.*

**2003 x.** ———.]—Where the lessee enters into possession under a void lease, & pays rent, he becomes a tenant from year to year.—*OTAGO HARBOUR BOARD v. SPEDDING* (1885), 4 N. Z. L. R. 272 (S. C.)—*N.Z.*

**2003 xi.** ———.]—*LEGG v.*

*MCCARTHY & BANFIELD* (1818), 1 Nfld. L. R. 112.—*NFLD.*

*m. Application of rule—Customary yearly tenancy at weekly rent—Licensed house—Payment of license duty annually.*—*LUNDY v. DOYLE* (1857), 30 L. T. O. S. 223.—*IR.*

*n. Whether conclusive—One year's rent by tenant at will.*—Where a tenant

**Sect. 6.—Tenancy from year to year: Sub-sect. 2, B. (a).]**

from a year to year.—**WILSON v. ABBOTT** (1824), 3 B. & C. 88; 2 L. J. O. S. K. B. 215; 107 E. R. 667; *sub nom.* **WILLSON v. ABBOTT**, 4 Dow. & Ry. K. B. 693.

**2013. — Assignment of building lease—Entry by assignee—& payment of sums due.]—CAMDEN (MARQUIS) v. BATTERBURY**, No. 2319, *post*.

**2014. — House let to necessitous burgess—Under corporation bye-law.]—**A corpn., being possessed of certain lands, made a bye-law that they should be occupied by poor & necessitous burgesses at a rent to be fixed & named by the corpn. at their pleasure. The bye-law provided that only such persons were poor & necessitous burgesses as were declared so by a majority of the council of the borough. Claimant, who claimed to be entitled to a vote as a 40s. freeholder, had been declared a poor & necessitous burgess, & had been allotted one acre at a rent of 5s. *per annum* until further notice:—*Held*: claimant had no freehold or equitable interest sufficient to entitle him to a vote; the estate was held at the will of the council, & at the most his interest was not greater than that of a tenant from year to year.—**FERNIE v. SCOTT** (1871), L. R. 7 C. P. 202; 1 Ilp. & Colt. 718; 41 L. J. C. P. 20; 25 L. T. 836; 36 J. P. 72; 20 W. R. 236.

*Annotation* —**Mentd.** **Spencer v. Harrison** (1879), 5 C. P. D. 97.

**2015. — Encroachment on waste of manor.]—**In 1739 articles of agreement were entered into between the lord & freehold tenants of a manor, by the eighth clause of which it was agreed that no other part of the wastes of the said manor should at any time thereafter be inclosed or built upon, unless by the mutual consent of the lord of the manor for the time being, & of the greater part in number & value of the freehold tenants of the said manor, under their hands & seals; & in case of any improvements & inclosures by such consents as aforesaid, it was agreed that the same & all profits & advantages arising therefrom should belong to & be divided between the lord & freehold tenants in the proportions therein mentioned. The articles of agreement were confirmed by a private Act of Parliament passed in the same year. Persons were appointed by the lord & freeholders to receive the rents on their behalf, & books were kept showing how the rents were received & divided, in accordance with the provisions of the articles. An entry appeared in one of these books in 1803 that one R. paid a rent of £1 1s. in respect of certain premises which were there described as a stable; & it appeared from entries in the books that he continued to do so down to 1808, when the property then in tenancy was mentioned as held by D. at a yearly rent of £2 12s. 6d. In 1811 D. was entered as holding a coal warehouse at the rent of £4 10s. "now & in future." In 1813 D. paid the same rent in respect of a coal & corn warehouse, & that rent was paid by D. & his successors in title until just before this action was brought. In 1816 D. sold or mortgaged the property for £299 to B., who subsequently reconveyed it to him for the same amount. In 1829 D. conveyed the property by lease & release to K. for £1,000. He mortgaged it to S. by feoffment for £1,000, & subsequently became bkpt., & the equity of redemption vested

in his assignees. In 1836 the assignees & S. conveyed the property to J. for £1,440. In 1838 J. leased the property to R. The property was described in the lease as part of the waste of the manor, & it was provided that the lessee was to pay £4 10s. *per annum*, & any future rent which might become payable, to the lord & freeholders. New buildings were from time to time built on the property. Deft. became entitled to the premises under the will of his father, J. Questions having arisen as to the title to the property, deft. claiming to be entitled in fee simple, the lord & the freeholders brought this action to recover possession of it:—*Held*: (1) a consent to the inclosure of the property in question, in accordance with clause eight of the articles, might under the circumstances be fairly assumed, but the result of possession under such consent was that a tenancy from year to year was created; (2) the feoffment by K. to S. in 1829 did not tortiously pass the fee to S.; (3) there was no evidence that the tenants were under any misapprehension as to title, or had built under misapprehension, or that the lord or freeholders were aware of any such misapprehension of titles, & therefore deft. was not entitled to equitable relief.—**WELLER v. STONE** (1885), 54 L. J. Ch. 497; 53 L. T. 361; 33 W. R. 421, C. A.

**Tenant holding over after expiration of term.]—See Nos. 2034–2044, *post*.**

**Occupation under agreement for lease.]—See Part II., Sect. 5, sub-sect. 1, B., *ante*.**

**2016. Whether conclusive—Of tenancy from given date.]—**If the issue is whether pltf. is tenant of deft. under a demise, "for one year, from Apr. 23, 1821, & thence afterwards, from year to year"; evidence that pltf. has paid deft. rent, is not sufficient proof of the demise in issue.—**PHILLIPS v. MOSELY** (1824), 1 C. & P. 262, N. P.

**2017. Rebuttal of presumption—Payment made otherwise than as rent.]—**Under a grant by a copy of ct. roll of a reversionary estate to A., who had before a life estate in the premises, *habendum* to him for the lives of B. & C., his grandsons during the life of either of them longest living successively, according to the custom, etc., reserving a heriot & 6d. rent; A. only takes the legal estate in reversion & not the *cestuis que vie* there being no custom to enable them to take; although they were stated to be admitted tenants in reversion; & though in consideration of the fine paid by the grandfather the lord suffered the first in succession of the *cestuis que vie* to enter as tenant upon the death of his grandfather & received the 6s. rent from him till his death; yet he not dying seized of the legal estate his widow could not claim her free bench according to the custom. Nor did such receipt of rent from the *cestui que vie* constitute a tenancy from year to year, so as to entitle the widow to notice to quit, the rent not being received as between landlord & tenant but attributable to another consideration.—**RIGHT d. WELLS (DEAN & CHAPTER) v. BAWDEN** (1803), 3 East, 260; 102 E. R. 597.

*Annotations* :—**Apld.** **Mildmay d. Digby v. Shirley** (18 cited in 10 East, at p. 164. **Consd.** **Roe d. Bruns** .. **Prideaux** (1808), 10 East, 158. **Refd.** **Smith v. Widalake** (1877), 26 W. R. 52. **Mentd.** **Doe d. Nepean v. Goddard** (1827), 1 B. & C. 522; **Jeans v. Cooke** (1857), 24 Beav. 513.

**2018. — — —.]—MILDMAY d. DIGBY (LORD) v. SHIRLEY** (1806), cited in 10 East, at p. 164; 103 E. R. 738.

at will was in quiet possession only one year & paid rent for one year only, the acceptance of the rent by the landlord did not change the tenancy at will into

a yearly tenancy.—**MATHER & MANN v. ROSS** (1916), 33 W. L. R. 735; 9 W. W. R. 1359.—**CAN.**

**o. — No lease under seal.]—**

Deft. co. who had occupied certain premises under an oral agreement & paid rent for a year, continued in possession after the year & then went

**2019.** ———.]—Where the only evidence of a tenancy is payment of rent, the person paying is in all cases at liberty to explain the payment, & to show on whose behalf it was received.—*DOE d. HARVEY v. FRANCIS* (1837), 2 Mood. & R. 57, N. P.; *subsequent proceedings, sub nom. FRANCIS v. DOE d. HARVEY* (1838), 4 M. & W. 331, Ex. Ch. Annotation:—*Mentd.* *Doe d. Bailey v. Foster* (1846), 3 C. B. 215.

**2020.** ———.]—In order to prove a renewal of a lease for lives, in an action of ejectment, deft. called a witness, who stated that a conversation took place, about fifteen years before, between himself & the former owner of the property, through whom the lessor of pltf. made title, in which such former owner had said that the premises had been new-leased, or new-lived, but without mentioning either term, or lives, or rent, or any of the stipulations of the supposed lease:—*Held*: too loose to be available as evidence for the purpose for which it was offered. Although a tenancy from year to year is, ordinarily, implied from the mere receipt of rent, it is open to the party receiving it to show the circumstances under which it was received, for instance, that it was received by him in ignorance of the death of a party upon whose life the premises were held.—*DOE d. LORD v. CRAGO* (1848), 6 C. B. 90; 17 L. J. C. P. 263; 11 L. T. O. S. 353; 12 Jur. 705; 136 E. R. 1185.

Annotation:—*Refd.* *Hurley v. Hanrahan* (1867), 15 W. R. 990.

**2021.** ———.]—In replevin for taking goods in the workhouse of the W. Union, against the guardians of C., incorporated by a local Act, defts. avowed as landlords for rent in arrear, & the tenancy was put in issue by a plea in bar. It appeared in evidence that by an order of the Poor Law Comrs., made on Sept. 16, 1835, which purported to be founded on the consent of two-thirds of the guardians of C., such Union was ordered to be dissolved; & on Sept. 17, another order of the Comrs. was made under Poor Law Amendment Act, 1834 (c. 76), that the parishes comprised in the Union of C. should, together with others, be formed into the Union of W. From the date of the latter order the guardians of the W. Union used the Union house formerly belonging to the C. Union for the poor of their Union, & payments expressed to be for rent had been made by the guardians of the W. Union to the treasurer of the C. Union until Sept. 1838, when the payments were made generally, but receipts were given by the treasurer as for rent. On that day a sum of money was paid by the W. Union to the C. Union as a balance for the furniture, etc. in the workhouse. In Jan. 1841 the Poor Law Comrs. made an order, which recited that the premises in question had, under the order of Sept. 17, become convertible to the use of the W. Union, & had since been used & occupied by the poor of such Union, & directed the guardians of the W. Union to pay to the treasurer of the C. Union a yearly rent as compensation for the use of the premises. This order appeared to have been acted on by both parties:—*Held*: under the circumstances the occupation of the workhouse by the W. Union must be referred to the order of the Comrs., which must be presumed to have been communicated to the C. Union, & not to any contract creating the relation of landlord & tenant between the parties.—*WOODBRIDGE UNION GUARDIANS v. COLNEIS & CARLFORD HUNDREDS GUARDIANS* (1849), 13 Q. B. 269; 18

L. J. Q. B. 126; 12 L. T. O. S. 421; 13 J. P. 409; 13 Jur. 803; 116 E. R. 1266.

**2022.** ———.]—Disparity between rent reserved & real value—Tenant holding under void lease.]—Special verdict finding that the tenant in tail had received the rent reserved by such lease accruing after the death of the tenant for life who made it, & who had not given any notice to quit:—*Held*: the receipt of rent was evidence of a tenancy, the particular description of which it was for the jury to decide upon; & for the defect of the special verdict in this respect a *venire de novo* was awarded.

The ct. intimated that under the circumstances of the case, & the disparity of the rent reserved, being £4 2s. while the rack-rent value was £60 a year, though one of the lessees had been presented by the homage as tenant after the death of the tenant for life, & admitted by the lord's steward, & the £4 2s. reserved was more than the ancient rent, a jury would be strongly advised to decide against a tenancy from year to year.—*ROE d. BRUNE v. PRIDEAUX* (1808), 10 East, 158; 103 E. R. 735.

Annotations:—*Refd.* *Smith v. Widdlake* (1877), 3 C. P. D. 10. *Mentd.* *Oakley v. Monck* (1866), L. R. 1 Exch. 159.

**2023.** ———.]—*DOE d. PRITCHARD v. DODD*, No. 2003, *ante*.

**2024.** ———.]—Yearly tenancy determining trust estate — While trusts unfulfilled.] — *DOE d. PRITCHARD v. DODD*, No. 2003, *ante*.

**2025.** ———.]—Surrounding circumstances — Inadequate sum—Mistake—Paid as "chief rent."—It was urged on behalf of pltf. that the receipt of rent created a tenancy from year to year. This is not so. Receipt of rent is evidence of such a tenancy which can be rebutted by surrounding circumstances. There the inadequacy of the sum received & the fact that it was paid & received under the name of "chief rent" negatives the presumption that it was paid in respect of a yearly tenancy of the premises. It was paid under a mistake & it is clear that rent received under a mistake does not create a tenancy from year to year (*BRAMWELL, L.J.*).—*SMITH v. WIDLAKES* (1877), 3 C. P. D. 10; 47 L. J. Q. B. 282; 26 W. R. 52, C. A.

Annotation:—*Mentd.* *Mercantile Investment & General Trust Co. v. River Plate Trust, Loan & Agency Co.*, [1892] 2 Ch. 303.

**2026.** ———.]—Rent paid under mistake.]—*SMITH v. WIDLAKES*, No. 2025, *ante*.

**2027.** ———.]—Tenancy in name of one partner—Rent paid by firm.]—Where the premises upon which a partnership business is carried on are, & are declared by the partnership deed to be, the property of one partner, & the partnership deed contains no provision as to the tenancy of the partnership, but only a general direction that all rent is to be paid out of profits, the ct. will infer that the partnership was intended to hold the premises on a tenancy during the continuance of the partnership & not on a tenancy from year to year or at will.—*POCOCK v. CARTER*, [1912] 1 Ch. 663; 81 L. J. Ch. 391; 106 L. T. 423; 56 Sol. Jo. 362.

**2028.** Joint tenancy—Change in status of tenants.]—A., B., & C., being an unmarried woman, entered into an agreement, dated Dec. 25, 1834, to take a house of pltf. for seven years, at a certain annual rent, payable quarterly; under which they entered. In Sept. 1835, C. married; in Dec. A. became bkpt. In an action of debt by pltf. against A., B., C., & C.'s

out, paying rent for the time they were actually in possession:—*Held*: as there was no lease under seal, the co. were not liable as tenants from year

to year but only for use & occupation while actually in possession.—*GARLAND MANUFACTURING CO. v. NORTUMBERLAND PAPER & ELECTRIC CO., LTD.*

(1899), 31 O. R. 40.—*CAN.*

p. ———.]—Payment to third person.]—*FAIRLOUGH v. SWINEY* (1838), 1 Jebb & S. 333.—*IR.*

**Sect. 6.—Tenancy from year to year: Sub-sect. 2, B. (a) & (b).]**

husband, for two years' rent, claimed to be due under the demise contained in the above agreement, defts. by their plea denied the demise. There was also a count for use & occupation, to which they pleaded payment of all the rent due before C.'s marriage. Defts. proved payment by A.'s assignees of the quarter's rent due at Michaelmas, 1835, & an admission by pltf. of the receipt of the two previous quarters' rent; but it was not shown when, or by whom, these latter payments were made:—**Held:** this was not evidence from which a new yearly tenancy, on the terms of the agreement, could be inferred, so as to charge all defts., inasmuch as it was not shown that the payments were made before C.'s marriage, or with her assent after her marriage.

Under the original contract no demise could be created but a mere tenancy at will. Then, in order to constitute a new tenancy, it must be shown that all the three parties to the instrument had agreed to vary it by a new contract for a tenancy from year to year (PARKE, B.).—**DOIDGE v. BOWERS** (1837), 2 M. & W. 365; Murp. & H. 170; 6 L. J. Ex. 132; 150 E. R. 797.

**(b) Holding Over.**

**2029. Mere holding over.]—GREVILLE v. DE RUTZEN** (1840), cited in 7 Exch. at p. 420; 7 Ry. & Can. Cas. at p. 458; 155 E. R. 1012.  
**Annotation:—****Refd.** Finlay v. Bristol & Exeter Ry. (1852), 7 Exch. 409.

**2030. — After giving notice to quit.]—**To a declaration for rent of a coal mine, deft. pleaded a determination of the tenancy by notice, & pltf. replied a waiver of such notice, which was denied:—**Held:** it was properly left to the jury to say whether a continuance to work the mine for a short time after the expiration of the notice, was intended by defts. as a waiver of the notice.

No continuance of the tenancy is necessarily implied from the mere fact of a tenant's continuing in possession after the expiration of a notice to quit given by such tenant.—**JONES v. SHEARS** (1836), 4 Ad. & El. 832; 2 Har. & W. 43; 6 Nev. & M. K. B. 428; 5 L. J. K. B. 153; 111 E. R. 997; *previous proceedings*, 7 C. & P. 346.

**Annotations:—****Refd.** Finlay v. Bristol & Exeter Ry. (1852), 7 Exch. 409. **Mentd.** Simpson v. Ingley (1872), 26 L. T. 543.

*See, also*, No. 2078, *post*.

**— Creation of tenancy at will.]—***See* Sect. 4, sub-sect. 1, C., *ante*.

**2031. Holding over after determination of lessor's interest.—Payment of rent.]—**Tenant for life makes a lease for years to commence on a certain day & dies before the expiration of the lease in the middle of the year. The remainder man receives rent from the lessee, who continues in possession, but not under a fresh lease, for two years together, on the days of payment mentioned in the lease. This is evidence from which the ct. will presume an agreement between the remainder man & the lessee that the lessee should continue

to hold from the day & according to the terms of the original demise, so that notice to quit ending on that day is proper.—**ROE d. JORDAN v. WARD** (1789), 1 Hy. Bl. 97; 126 E. R. 58.

**Annotations:—****Consd.** Kelly v. Patterson (1874), L. R. 9 C. P. 681; Croft v. Blay, [1919] 1 Ch. 277. **Refd.** Roe d. Brune v. Prideaux (1808), 10 East, 158; Doe d. Buddle v. Lines (1848), 17 L. J. Q. B. 108; Oakley v. Monck (1865), 12 L. T. 465.

**2032. — — —.]—**A. let land to B. on a tenancy from year to year, which B. continued to hold for several years after A.'s title had determined, paying rent to A., & he at length gave up possession on a notice to quit from A. Subsequently to the determination of A.'s title, but before B. had given up possession, B. underlet to C. C. paid rent to B. as long as B. continued to hold, but paid no rent to any one subsequently. In an action of ejectment brought by A. against C. after B. had given up possession:—**Held:** it might be presumed, as a matter of fact, that a new tenancy from year to year had been commenced by B. after A.'s title had ceased, & that C., therefore, could not dispute A.'s title.—**LONDON & NORTH WESTERN RY. CO. v. WEST** (1867), L. R. 2 C. P. 553; 36 L. J. C. P. 245.

**2033. — — —.]—**Wherever a tenancy for years comes to an end either by efflux of time, or by the death or end of title of the lessor, so that either he or his representative, or any independent owner of the demised hereditament, can without notice eject the tenant, & the person entitled to eject leaves the tenant in possession, & receives rent from him without explanation or stipulation, the person receiving the rent is to be assumed to have created a tenancy upon the terms on which the tenant held in the demise originally made to him; & the holding to be presumed is as of a tenancy from year to year according to the former holding of the tenant, & therefore commencing at a time corresponding to that from which he originally held.

Certain premises had been let by the tenant in fee on a lease expiring at Midsummer, 1866: at that date deft. was in occupation as tenant from year to year to the intermediate lessee, on a demise commencing at Michaelmas; the tenant in fee let the premises on a fresh lease to pltf., commencing at Midsummer, 1866: deft. continued in occupation & paid rent to pltf. Notice to quit at Midsummer was given by pltf. to deft., who refused to leave the premises. Pltf. having sued in ejectment:—**Held:** pltf. having allowed deft. to hold over, & having received rent as from year to year without explanation or stipulation, the inference was that there had been a tacit agreement that deft. should hold from year to year according to the terms of his former tenancy, that is to say, from Michaelmas to Michaelmas, the notice to quit at Midsummer was wrong, & pltf. must be non-suited.—**KELLY v. PATTERSON** (1874), L. R. 9 C. P. 681; 43 L. J. C. P. 320; 30 L. T. 842.

**Annotation:—****Expld.** Croft v. Blay, [1919] 2 Ch. 343.

**2034. Holding over after expiration of lease.—Payment of rent.]—****DOE d. HOLLINGSWORTH v. STENNETT**, No. 1851, *ante*.

**PART VIII. SECT. 6, SUB-SECT. 2.—B. (b).**

**2029 i. Mere holding over.]—**A contract for a new tenancy for a year cannot be implied from the mere fact of the tenant holding over, no act being done from which an agreement for a new tenancy can be inferred.—**LEIGHTON v. VANWART** (1877), 1 P. & B. 489.—**CAN.**

**2029 ii. — — —.]—**Where deft. had been in possession as tenant for more than thirty years, & there was no lease or agreement showing the nature of the original tenancy, the presumption of law is that he is a tenant from year to year, & therefore liable to be ejected.—**BAI GANGA v. DULABH PARAG** (1868), 5 Bom. A. C. 179.—**IND.**

**2029 iii. — — —.]—****NIXON v. DARLEY** (1868), 1 R. 2 C. L. 467.—**IR.**

**2034 i. Holding over after expiration of lease.—Payment of rent.]—**If after the expiration of a tenancy for a year certain at a weekly rent, the tenant is allowed to remain in possession, still paying the same rent, the presumption is that the continuing tenancy is a yearly one.—**BOX v. ATTFIELD** (1886), 12 V. L. R. 574.—**AUS.**

**2034 ii. — — —.]—**The implication

**2035.** ———.]—A tenant, whose lease expired at Midsummer, continued in possession after that day, but no agreement was made as to the kind of tenancy which was to exist between him & his landlord. He paid a quarter of a year's rent at Michaelmas, & then gave notice that he should quit at Christmas, which he did. The landlord brought an action for a quarter of a year's rent, said to become due at Lady Day:—*Held*: if a tenant held over, the landlord has a right to waive the trespass, & consider him as a tenant for a year.—**BISHOP v. HOWARD** (1823), 2 B. & C. 100; 3 Dow. & Ry. K. B. 293; 1 L. J. O. S. K. B. 243; 107 E. R. 320.

*Annotations*:—**Refd.** Willson v. Abbott (1824), 4 Dow. & Ry. K. B. 693; Woodcock v. Nuth (1832), 1 Moo. & S. 317; Doe d. Clarke v. Smaridge (1845), 7 Q. B. 957; Doe d. Lord v. Crago (1848), 6 C. R. 90; Gentle v. Faulkner (1899), 68 L. J. Q. B. 848. **Mentd.** Dougal v. McCarthy (1893), 68 L. T. 699.

**2036.** ———.]—A. being possessed of the residue of a term, made an underlease for fourteen years & a half, from Dec. 25, 1831, expiring on June 24, 1846. Deft. became assignee of the term, & remained in possession after it had expired, paying rent to the lessor of pltf., who had become assignee of A.:—*Held*: the tenancy, after the expiration of the lease, was a tenancy from year to year, commencing from such expiration, & therefore a notice given Dec. 24, 1846, to quit June 24 next, was a good notice.—**DOE d. BUDDLE v. LINES** (1848), 11 Q. B. 402; 17 L. J. Q. B. 108; 10 L. T. O. S. 390; 12 Jur. 80; 116 E. R. 527.

*Annotations*:—**Consd.** Kelly v. Patterson (1874), L. R. 9 C. P. 681; Croft v. Blay, [1919] 2 Ch. 343. **Mentd.** Sidebotham v. Holland, [1895] 1 Q. B. 378.

**2037.** ——— **Question of fact.**]—An incorporated railway co. agreed by parol to take certain premises for a year. They occupied, & at the end of the year continued to occupy for another year, at the expiration of which period they removed their goods, without any previous notice to quit, but paid rent up to the end of the following quarter:—*Held*: they were not liable in an action for use and occupation for the remaining three quarters of a year, since they did not occupy during that period; & no tenancy could be inferred from the payment of rent, inasmuch as they could not contract except under seal.

The old doctrine was, that a tenant who held over after his term had expired, was a mere tenant at sufferance; but it is now considered that, when once he has paid rent, & it has been received by the landlord, it is a question for the jury, whether the former does not become, & the latter accept him as, tenant from year to year, & therefore whether the one is not bound to receive, & the other to give, a notice to quit in order to deter-

mine the tenancy (**MARTIN, B.**).—**FINLAY v. BRISTOL & EXETER RY. CO.** (1852), 7 Exch. 409; 7 Ry. & Can. Cas. 449; 21 L. J. Ex. 117; 155 E. R. 1008.

*Annotations*:—**Refd.** Lowe v. L. & N. W. Ry. (1852), 18 Q. B. 632. **Mentd.** Smart v. West Ham Union Grdns. (1855), 24 L. J. Ex. 201.

**2038.** ———.]—By an agreement dated in 1891 D. agreed to let & B. agreed to take a farm which was subject to tithe rentcharges for a term which expired on Oct. 11, 1898, at a rent of £150 *per annum*, & in addition, to pay any amount assessed or charged by way of tithe rentcharge. B. entered into possession & so remained until the issue of a writ on June 9, 1911, in an action by the owners claiming possession of the farm, having throughout the whole period repaid to D.'s agent the amounts paid by him for tithe rentcharge, but never having paid anything in respect of the £150 rent. B. pleaded his possession, & argued that, since by the Tithe Act, 1891, his agreement as tenant to pay the tithe rentcharge was void, no inference adverse to his title could be drawn from the fact of such payments having been made by him:—*Held*: even assuming that the tenant's obligation to pay tithe rentcharge was void, regard must be had to the continuance of the practice obtaining during the term of repaying the tithe rentcharges to the landlord's agent, & B. was not paying them as owner of R. Farm, but under the previous arrangement. The proper inference therefore, to be drawn, was that there was a new agreement in 1899 creating the relationship of landlord & tenant between the parties under a tenancy from year to year, & pltf.' title not being barred, they were entitled to a declaration of his title & an order for possession.—**NEALL v. BEADLE** (1912), 107 L. T. 646; 57 Sol. Jo. 77.

**2039.** ——— **Term contained in agreement for lease—Lease not granted—Notice to quit.**]—Landlord enters into an agreement with tenant, on Jan. 2, 1815, to grant the latter a lease for eight years of certain premises, the agreement to take effect from Oct. 10, 1814, from which time tenant had been in possession, yielding 2s. 6d. yearly, & in case he held over after the term, he was to pay 40s. *per diem* for every day he retained possession. The lease was never granted. At the expiration of the term tenant held over, after having been served with a nine months' notice, to quit at the end of the year for which he held, which should first happen after the expiration of half a year, from the date of the notice. He was then served with a written demand, of possession, & the same paper notified to him that if he did not yield quiet possession, an ejectment would be brought:—*Held*: the tenant was not to be treated as a tenant from year to year.—**DOE d.**

of a tenancy from year to year from the acceptance of rent by a landlord from a tenant holding over after the expiration of his tenancy may be excluded by the other circumstances of the case.—**THOMAS v. R.** (1904), 2 C. L. R. 127.—**AUS.**

**2034 iii.** ———.]—Where a tenancy has expired, & the tenant holds over with the consent of the landlord, & rent is paid & received in respect of such periods, the implication of law is, unless there is something to rebut it, that the tenant holds over as a tenant from year to year.—**BEATTIE v. FINK**, [1925] V. L. R. 363; 47 A. L. T. 19; 31 Argus L. R. 331.—**AUS.**

**2034 iv.** ———.]—The receipt of rent by the wife, with the husband's assent, from a tenant of her estate after the expiration of a term, creates a tenancy from year to year.—**JOHNSON**

**v. McLELLAN** (1871), 21 C. P. 304.—**CAN.**

**2034 v.** ———.]—*Held*: at the expiration of the term, the fact of the lessee's remaining in possession & paying a year's rent, only created a tenancy from year to year.—**ST. JOHN CORPN. v. SEARS** (1889), 28 N. B. R. 1.—**CAN.**

**2034 vi.** ———.]—**GASS v. McAMMON** (1904), 6 Terr. L. R. 96.—**CAN.**

**2034 vii.** ———.]—**Re HARDISTY & BISHOPRIC** (1905), 2 W. L. R. 21.—**CAN.**

**2034 viii.** ———.]—Where a tenant for a term of years holds over after the expiration of his lease, he becomes a tenant at sufferance; but when he pays, or expressly agrees to pay, any subsequent rent at the previous rate, a new tenancy from year to year is

thereby created upon the same terms & conditions as those contained in the expired lease, so far as the same are applicable to & not inconsistent with a yearly tenancy.—**YOUNG v. BANK OF NOVA SCOTIA** (1915), 8 O. W. N. 505; 34 O. L. R. 176; 23 D. L. R. 854.—**CAN.**

**2034 ix.** ———.]—L. leased land to M. for a term of 14 months, at a fixed sum for rent payable every month. M. went into possession, & when the term ended remained in possession, without a new lease or agreement, still paying rent monthly:—*Held*: M. was a tenant from year to year.—**Re LYONS & McVERRY** (1919), 46 O. L. R. 148; 17 O. W. N. 56.—**CAN.**

**2037 i.** ——— **Question of fact.**]—**CAULFIELD v. FARR** (1873), 1. R. 7 C. L. 469.—**IR.**

*Sect. 6.—Tenancy from year to year: Sub-sect. 2, B. (b) & (c); sub-sect. 3, A.]*

ANGLESEY (MARQUIS) v. ROE (1823), 2 Dow. & Ry. K. B. 565.

2040. ——— Holding over above a year.]—DOE d. HOLLINGSWORTH v. STENNETT, No. 1851, *ante*.

2041. ——— No steps taken by landlord to recover possession.]—If a landlord allows his tenant to hold over above a year, without taking any step to recover the premises, he is not entitled to the benefit of 1 Geo. 4, c. 87, s. 1.

A tenancy from year to year has been created, &, therefore, the case does not come within the statute (PATTESON, J.).—DOE d. THOMAS v. FIELD (1834), 2 Dowl. 542.

2042. ——— Lease granted with option of renewal.]—Defts. took a forge & premises for nine months at a certain rent, with the option, at the end of that period, of taking a lease for seven, fourteen, or twenty-one years. Before the termination of the nine months, they let the premises to a company for six months:—*Held*: at the end of the year, they were liable to the lessor for a year's rent, as tenants from year to year, in an action for use & occupation.—WARING v. KING (1841), 8 M. & W. 571; 11 L. J. Ex. 49; 151 E. R. 1106.

2043. ———.]—Demise for seven years, with a proviso that, notwithstanding anything before contained, if notice should not be given to determine the lease at the end of the seven years, it should be considered a lease upon the same covenants, from year to year, until notice to determine it:—*Held*: the demise continued after the seven years until put an end to by notice, & the covenants continued binding.—BROWN v. TRUMPER (1858), 26 Beav. 11; 53 E. R. 800.  
*Annotation*:—*Mentd.* Calthorpe v. McOscar, [1923] 2 K. B. 573.

2044. ——— Forfeiture of lease on breach of covenant.]—T. & others held a lease for a term from G. of a house, & covenanted not to allow a business to be carried on without a licence of G., & on breach of covenant there was a power of re-entry. T. allowed a plumber to carry on his business on part of the premises, no licence having been obtained from G., who, however, with knowledge accepted two quarters' rent. G. brought ejectment on the ground of forfeiture:—*Held*: in the absence of evidence, it was to be presumed that the plumber had a tenancy from year to year, & G. had waived the forfeiture by receipt of rent.—GRIFFIN v. TOMKINS (1880), 42 L. T. 359; 44 J. P. 457.

*Annotation*:—*Consd.* Atkin v. Rose, [1923] 1 Ch. 522.

(c) *Entry under Agreement for Lease.*

See Part II., Sect. 5, sub-sect. 1, B.

#### SUB-SECT. 3.—DURATION OF TENANT'S INTEREST.

##### A. *In General.*

2045. For a term certain.]—DOE d. HULL v. WOOD, No. 2010, *ante*.

2046. One year certain—& for each year on which lessee enters.]—ANON. (1622), Win. 32; 124 E. R. 27.

2047. ———.]—If a lease be for a year & so from year to year as long as both parties shall please, that is a lease binding but for one year; but if the lessee, without countermand of the lessor, enter upon the second year, he is bound for that year, & so on; & if the lease be for a year & so from year to year till six years expire, that is

a lease for six years determinable at every year's end at the will of either party (HOLT, C.J.).—DOD v. MONGER (1704), Holt, K. B. 416; 6 Mod. Rep. 215; 90 E. R. 1129, N. P.

*Annotations*:—*Mentd.* Swann v. Falmouth (1828), 8 B. & C. 456; Canadian Pacific Wine Co. v. Tuley, [1921] 2 A. C. 417.

2048. ———.]—Demise for a year, & so from year to year, is a lease for every particular year, & good for every year that lessee enters into.—COMBES v. COLE (1736), Lee temp. Hard. 305; 95 E. R. 197.

2049. ———.]—Lease to hold for one year, & so for two or three years, or such term as the parties should think fit:—*Held*: a lease for one year only, without subsequent agreement.—HARRIS v. EVANS (1756), Amb. 329; 1 Wils. 262; 27 E. R. 221.

2050. ———.]—A lease from Lady Day for the "term of one year, *et sic de anno in annum quamdiu ambabus partibus placuerit*," is, after the first year, a lease from year to year, until the lessor or lessee determine it.—JEGG v. STRUDWICK (1709), 2 Salk. 414; Holt, K. B. 417; 11 Mod. Rep. 203; 91 E. R. 359.

*Annotations*:—*Expld.* Birch v. Wright (1786), 1 Term Rep. 378. *Consd.* Doe d. Clarke v. Smaridge (1845), 7 Q. B. 957. *Refd.* Harris v. Evans (1749), 1 Wils. 262; Denn d. Jacklin v. Cartright (1803), 4 East, 29; Oxley v. James (1844), 13 M. & W. 209; Cattley v. Arnold, Banks v. Arnold (1859), 1 John. & H. 651.

2051. ———.]—A tenancy from year to year so long as both parties please is determinable at the end of the first as well as of any subsequent year, unless, in creating such tenancy, the parties use words showing that they contemplate a tenancy for two years at least. Therefore where a tenant at the expiration of a term of years held over & the landlord received rent from him:—*Held*: the landlord might, by a half-year's notice, require him to quit at the end of the first year after the term of years had expired.—DOE d. CLARKE v. SMARIDGE (1845), 7 Q. B. 957; 14 L. J. Q. B. 327; 6 L. T. O. S. 172; 9 Jur. 781; 115 E. R. 748.

*Annotation*:—*Refd.* Croft v. Blay, [1919] 1 Ch. 277.

2052. ——— Lease of undertaking—Condition as to manner of working.]—An agreement for the holding of certain quarries, provided that the rent should be £50 a year; that the tenant was to work the whole of the stone, but not to employ more than a given number of men; that the rent was not to be advanced; & that that agreement was to have the effect of creating a new yearly tenancy between the parties. It would, in point of fact, take five years to work out the stone with the limited number of men:—*Held*: this created only a tenancy determinable by notice to quit at the end of the first year.—DOE d. SKRINE v. WATSON (1829), 8 L. J. O. S. K. B. 12.

2053. ——— Growing interest on each subsequent year—As parcel of original contract.]—The nature of an estate from year to year; namely, a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract & parcel of it (PARKE, B.).—OXLEY v. JAMES (1844), 13 M. & W. 209; 13 L. J. Ex. 358; 3 L. T. O. S. 222; 153 E. R. 87.

*Annotations*:—*Apld.* Cattley v. Arnold, Banks v. Arnold (1859), 1 John. & H. 651. *Expld.* Gray v. Spyer, [1922] 2 Ch. 22.

2054. ———.]—CATTLEY v. ARNOLD, BANKS v. ARNOLD, No. 2107, *post*.

2055. ——— Effect of words contemplating duration for more than one year.]—Premises were demised under a written agreement, dated Aug. 4, 1845, "the tenancy to be from year to year from Michaelmas next," at the rent of £55 payable half-yearly, "except the last half year, which

portion of rent shall be paid on or before Aug. 1, in that year, & to be deemed then due for all legal remedies for recovering rent in arrear." Tenant, "to allow the landlord, or incoming tenant, in the last year, to enter on May 1, to make fallows, & carry out the manure," for which compensation was to be paid, etc. Tenant to have "the use of the barns for stacking & threshing the crops of the last year till May 1, after the tenancy":—*Held*: these stipulations did not necessarily import that the tenancy was to be extended beyond the first year; consequently, the tenancy was determined by a notice dated Mar. 24, to quit at Michaelmas that year.—*DOE d. PLUMER v. MAINBY* (1847), 10 Q. B. 473; 16 L. J. Q. B. 303; 11 Jur. 308; 116 E. R. 180.

**2056. — & for each year till determinated.]**—A tenancy was for one year certain & so on from year to year unless or until the tenancy thereby created should be determined by either party giving to the other twenty-eight days' notice in writing, such notice to expire at any period of the year:—*Held*: the notice could not be given so as to terminate the tenancy during first year.—*CANNON BREWERY v. NASH* (1898), 77 L. T. 648; 14 T. L. R. 158, C. A.

**2057. For two years certain—& for each year till determinated.]**—A lease *de anno in annum quamdiu ambabus partibus placuerit*, is a lease for two years certain, & for every year after until it is determined.—*AGARD v. KING* (1600), Cro. Eliz. 775; 78 E. R. 1006.

*Annotations*:—*Refd.* *Belasyse v. Burbridge* (1695), 1 Lut. 213; *Legg v. Strudwick* (1709), 2 Salk. 414; *Roe d. Broc v. Lees* (1778), 2 Wm. Bl. 1171; *Doe d. Clarke v. Smaridge* (1845), 7 Q. B. 957.

**2058. — — — — —]**—A demise "for two years certain & thereafter from year to year until either party" gives a three months' notice to determine the tenancy is not determinable at the end of the two years, but is a tenancy for three years at least, & only determinable by a notice expiring at the end of the third or any subsequent year.—*Re SEARLE, BROOKE v. SEARLE*, [1912] 1 Ch. 610; 81 L. J. Ch. 375; 106 L. T. 458; 56 Sol. Jo. 441.

**2059. — — — — —]**—A lease for a year & *sic de anno in annum quamdiu ambabus partibus placuerit* is a lease for at least two years.—*BELLASIS v. BURBRIDGE* (1697), 1 Ld. Raym. 170; cited 2 Salk. at p. 413; 91 E. R. 1010; *sub nom.* *BELASYSE v. BURBRIDGE*, 1 Lut. 213.

*Annotations*:—*Consd.* *Birch v. Wright* (1786), 1 Term Rep. 378; *Denn d. Jacklin v. Cartright* (1803), 4 East, 29. *Refd.* *Doe d. Clarke v. Smaridge* (1845), 7 Q. B. 957. *Mentd.* *Eaton v. Jaques* (1780), 2 Doug. K. B. 455; *Williams v. Bosanquet* (1819), 1 Brod. & Bing. 238.

**2060. — & afterwards at will.]**—*STOMFILL v. HICKS* (1699), Holt, K. B. 414; 2 Salk. 413; 90 E. R. 1128; *sub nom.* *STANFILL v. HICKES*, 1 Ld. Raym. 280.

*Annotations*:—*Consd.* *Birch v. Wright* (1786), 1 Term Rep. 378. *Refd.* *Combes v. Cole* (1736), Lee temp. Hard. 305.

**2061. — — — — —]**—A. agreed by parol to sell an estate to B. on certain terms, provided B. would continue C. his tenant, not for one year only, but from year to year, C. having just before been let into possession under a contract for the purchase of the estate, which he had failed to pay for in time, & had therefore forfeited his deposit; & A. thereupon agreed to take C.'s forfeited deposit as part of the purchase-money; A. & B. afterwards reduced their agreement respecting the purchase into writing, in which no notice was taken of the stipulation concerning C.'s tenancy:—*Held*: this stipulation, being collateral to the written agreement, was binding upon B.; & the agreement operated as a tenancy for two years certain at

least, though no rent was then mentioned, but was to be settled afterwards, & the tenancy could not be put an end to at the end of the first year by six months' previous notice to quit.—*DENN d. JACKLIN v. CARTRIGHT* (1803), 4 East, 29; 102 E. R. 740.

*Annotations*:—*Apld.* *Doe d. Chadburn v. Green* (1830), 8 L. J. Q. B. 100. *Refd.* *Doe d. Clarke v. Smaridge* (1845), 7 Q. B. 957.

**2062. — — — — —]**—Land was let for one year, & so on from year to year, until the tenancy should be determined as was after mentioned, with a subsequent proviso, that three months should be sufficient notice to be given from either party, & another subsequent proviso, that it should be lawful for either party to determine the tenancy by giving three months' notice:—*Held*: the tenancy was not determinable by three months' notice expiring before the end of the second year.—*DOE d. CHADBORN v. GREEN* (1839), 9 Ad. & El. 658; 1 Per. & Dav. 454; 2 Will. Woll. & H. 122; 8 L. J. Q. B. 100; 112 E. R. 1361.

*Annotations*:—*Consd.* *Cannon Brewery v. Nash* (1898), 77 L. T. 618. *Refd.* *R. v. Chawton* (1841), 1 Q. B. 247; *Doe d. Clarke v. Smaridge* (1845), 7 Q. B. 957; *Tilling v. James* (1906), 22 T. L. R. 599.

**2063. — — — — —]**—An agreement "to hold from Christmas 1845 for the term of one year certain, & so on from year to year, until a quarter's notice be given by either party, & until said notice shall have expired," is a tenancy for two years at least.—*DOE d. MARTIN v. ROE* (1847), 2 New Pract. Cas. 136; 8 L. T. O. S. 393.

**2064. — Growing interest in each successive year—As parcel of original contract.]**—There frequently is an actual demise from year to year so long as both parties please. . . . The true nature of such a tenancy is that it is a lease for two years certain, & that every year after it is a springing interest arising upon the first contract & parcel of it, so that if the lessee occupies for a number of years, these years, by computation from the time past, make an entire lease for so many years, & that after the commencement of each new year it becomes an entire lease certain for the years past & also for the year so entered on, & that it is not a re-letting at the commencement of the third & subsequent years. We think this is the true nature of a tenancy from year to year created by express words, & that there is not in contemplation of law a recommencing or re-letting at the beginning of each year (*per CUR.*).—*GANDY v. JUBBER* (1865), 9 B. & S. 15, Ex. Ch.

*Annotations*:—*Expld.* *Mellows v. Low*, [1923] 1 K. B. 522. *Extd.* *Queen's Club Gardens Estates v. Bignell*, [1924] 1 K. B. 117. *Refd.* *Sandford v. Clarke* (1888), 21 Q. B. D. 398; *Bowen v. Anderson*, [1894] 1 Q. B. 164; *Edell v. Duffen* (1923), 92 L. J. K. B. 559. *Mentd.* *Bartlett v. Baker* (1861), 3 H. & C. 153; *Gwinnell v. Eamer* (1875), L. R. 10 C. P. 658; *A.-G. v. Tod Heatley*, [1897] 1 Ch. 560.

**2065. Effect of proviso limiting duration—Lease for years determinable at will.]**—A demise for the term of one year, & so from one year for a year, as long as both parties shall please, is but a lease for three years at most. If a lease be made for years, it is a good lease for two years.—*BATH'S (BP.) CASE* (1605), 6 Co. Rep. 34 b; 77 E. R. 303; *sub nom.* *FISH v. BELLAMY*, Cro. Jac. 71.

*Annotations*:—*Refd.* *Hemming v. Brabason* (1660), O. Bridg. 1; *Belasyse v. Burbridge* (1697), 1 Lut. 213; *R. v. Chawton* (1841), 1 Q. B. 247; *Austh v. Newham*, [1906] 2 K. B. 167. *Mentd.* *Blamford v. Blamford* (1615), 3 Bulst. 98; *Selbye v. Becke* (1627), Litt. 17; *Keeble's Case* (1631), Litt. 370; *Miller v. Manwaring* (1635), Cro. Car. 397; *Petty v. Goddard* (1662), O. Bridg. 35; *Bate v. Amherst & Norton* (1663), T. Raym. 82; *Footo v. Berkley* (1666), O. Bridg. 527; *Thomason v. Mackworth* (1666), O. Bridg. 502; *Jenniot v. Cooley* (1667), 2 Keb. 270; *Manfield v. Dugard* (1713), Gilb. Ch. 36; *Dann v. Spurrier* (1803), 3 Bos. & P. 399.

**Sect. 6.—Tenancy from year to year: Sub-sect. 3, B.; sub-sect. 4, A. (a).]**

**B. Effect of Death of Tenant.**

**2066. Interest vests in executors.**—A lease to A. B., his exors., etc., for a year, & so from year to year for so long time as it shall please the lessor & A. B., his exors., etc., does not expire on the death of A. B., but rests in his exors.—**MACKAY v. MACKRETH** (1785), 4 Doug. K. B. 213; 2 Chit. 461; 99 E. R. 840.

**2067.** —[In the case of a tenancy from year to year as long as both parties please, if the tenant dies intestate, his administrator has the same interest in the land which the intestate had.—**DOE d. SHORE v. PORTER** (1789), 3 Term Rep. 13; 100 E. R. 429.

**Annotations:**—**Consd. Croft v. Blay**, [1919] 1 Ch. 277. **Refd. R. v. Stone** (1795), 6 Term Rep. 295; **James v. Dean** (1805), 11 Ves. 383; **Wilkinson v. Calvert** (1878), 3 C. P. D. 360; **Sidebotham v. Holland**, [1895] 1 Q. B. 378.

**SUB-SECT. 4.—TERMS APPLICABLE TO TENANCY CREATED.**

**A. Tenant Holding Over.**

**(a) After Expiration of Former Tenancy.**

**2068. Question of fact.**—Where a party is allowed to hold after the expiration of a tenancy by agreement, the terms on which he continues to occupy are matters of evidence rather than of law. If there is nothing to show a different understanding he will be considered to hold on the former terms (**WIGHTMAN, J.**).—**THETFORD CORPN. v. TYLER** (1845), 8 Q. B. 95; 15 L. J. Q. B. 33; 6 L. T. O. S. 124; 10 Jur. 68; 115 E. R. 810.

**2069.** —[1] If a landlord chooses to let a tenant hold over after the expiration of his lease, the terms on which the tenant continues to hold are a question of fact for the jury.

[2] A remainderman is not bound by the terms made between a previous tenant for life & his tenant, merely by the receipt of rent from the tenant after the death of the tenant for life; some knowledge of the terms made, & some evidence of acquiescence in them, must be shown in order to bind him.

[3] He had . . . the ordinary right of a tenant holding an uncertain interest, to remove within a reasonable time such fixtures as in the trade of a nurseryman are in the nature of trade fixtures (**WILLES, J.**).

A person who holds a nursery ground as tenant has a right at the expiration of his tenancy to remove fruit trees & shrubs planted by him & which then in fact form part of his stock in trade; but this does not entitle him to cut down or remove plants which would only be destroyed by such a process, & would after it be of no use to him for the purpose of his trade; such mere waste as this is not allowed to him by the rule (**WILLES, J.**).—**OAKLEY v. MONCK** (1860), L. R. 1 Exch. 159; 4

H. & C. 251; 35 L. J. Ex. 87; 14 L. T. 20; 30 J. P. 180; 12 Jur. N. S. 213; 14 W. R. 406, Ex. Ch.

**Annotations:**—**As to** (1) **Consd. Keith v. Gancia**, [1904] 1 Ch. 774. **Refd. Wedd v. Porter**, [1916] 2 K. B. 91. **As to** (2) **Distd. Wyatt v. Cole** (1877), 36 L. T. 613.

**2070.** —[**WEDD v. PORTER**, No. 2079, *post*.

**2071. Terms of former agreement.**—If there be a lease for a year, & by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract (**LORD MANSFIELD, C.J.**).—**RIGHT d. FLOWER v. DARBY & BRISTOW** (1786), 1 Term Rep. 159; 99 E. R. 1029.

**Annotations:**—**Consd. Bridges v. Potts** (1864), 17 C. B. N. S. 314. **Apld. Dougal v. McCarthy**, [1893] 1 Q. B. 736. **Consd. Croft v. Blay**, [1919] 2 Ch. 343. **Refd. Doe d. Clark v. Smarridge** (1845), 6 L. T. O. S. 172; **Doe d. Hull v. Wood** (1845), 14 M. & W. 682; **Cattley v. Arnold, Banks v. Arnold** (1859), 1 John. & H. 651; **Wedd v. Porter** (1916), 85 L. J. K. B. 1298; **Cole v. Kelly**, [1920] 2 K. B. 106. **Mentd. Jones v. Mills** (1861), 10 C. B. N. S. 788; **Morgan v. Davies** (1878), 3 C. P. D. 260; **Wilkinson v. Calvert** (1878), 3 C. P. D. 360; **Barlow v. Teal** (1885), 15 Q. B. D. 403; **Sidebotham v. Holland**, [1895] 1 Q. B. 378.

**2072.** —[Special covenants, as to cultivation, not implied from the mere Act of holding over; as they may be from payment of rent of the same period; as evidence of agreement to hold, not only on the same terms, but subject to the same covenants.

In the case of a lease determined by effluxion of time the payment of rent at the same period is evidence of holding, not only on the same terms, but subject to the same covenants & agreements. It is, however, but evidence (LORD ELDON, C.).—**KIMPTON v. RYE** (1813), 2 Ves. & B. 349; 35 E. R. 352, L. C.

**Annotations:**—**Mentd. Durant v. Moore** (1830), 9 L. J. O. S. Ch. 12; **R. Bishop, Ex p. Langley, Ex p. Smith** (1879), 13 Ch. D. 110.

**2073.** —[Deft. entered into possession of certain premises as tenant under a written agreement, for a term of years, made on Mar. 28, 1845, between pltf. & T. of the one part, & deft. of the other part, & which agreement was prevented from operating as a lease by the 7 & 8 Vict. c. 70. The agreement stipulated that deft. would put & keep the premises in good repair & condition. On June 16, 1847, T. assigned all his interest in the premises to pltf., of which deft. had notice, & afterwards paid the rent to pltf. alone:—**Held:** a tenancy from year to year, upon the terms of the written agreement with pltf. & T., was to be presumed; after the assignment by T. a new substituted agreement with pltf., upon the same terms as those contained in the original agreement, might be implied; & pltf. might sue alone for a breach of such implied agreement by deft. in not repairing the premises.—**ARDEN v. SULLIVAN** (1850), 14 Q. B. 832; 19 L. J. Q. B. 268; 15 L. T. O. S. 45; 14 Jur. 712; 117 E. R. 320.

**Annotation:**—**Fold. Wyatt v. Cole** (1877), 36 L. T. 613.

**2074.** —So far as applicable.—If after the expiration of a written lease containing a covenant

of the new holding, that new holding is not of necessity to be on the same terms as the former, but the landlord may be awarded an increased rent if there are circumstances to show that such was expected by him & that such expectation was known to & not repudiated by the tenant.—**WINNIPEG LAND & MORTGAGE CORPN. v. WITCHER** (1905), 15 Man. L. R. 423.—**CAN.**

**2071 iii.** —[**IBROJNAUTH MULICK v. WESKINS** (1867), 2 Ind. Jur. N. S. 163.—**IND.**

**2074 i.** —So far as applicable.—**Re RABINOVITCH & BOOTH** (1914), 31 O. L. R. 88; 19 D. L. R. 296; 6 O. W. N. 58.—**CAN.**

**PART VIII. SECT. 6, SUB-SECT. 4.—A. (a).**

**2068 i. Question of fact.**—Where a tenant is allowed to hold over after the expiration of his lease, the terms on which he continues to occupy are matters of evidence rather than of law. If there is nothing to show a different understanding he will be considered to hold on the former terms.—**HENDERSON v. CRAIG**, [1922] 2 W. W. R. 597; 68 D. L. R. 629.—**CAN.**

**2068 ii.** —[Where a person, who held as tenant from year to year, has been permitted to remain undisturbed in possession after the expiration of

a notice to quit, the question, whether there is a subsisting tenancy from year to year, is one of fact for a jury.—**VANCE v. VANCE** (1871), 1 R. 5 C. L. 363.—**IR.**

**2071 i. Terms of former agreement.**—Where a tenant continues in possession after the expiration of his lease with the assent of his landlord, it will be presumed, in the absence of an express agreement, that the rent & terms of payment are the same as before.—**ISAACS v. FERGUSON** (1886), 26 N. B. R. 1.—**CAN.**

**2071 ii.** —[When a tenant holds over after the expiration of the term & nothing is agreed on as to the terms

by the tenant to keep the premises in repair, he verbally agrees to hold over, paying an additional rent, nothing more being expressed between the parties respecting the terms of the new tenancy, he is presumed to hold under the covenants of the former lease, as far as they are applicable to his new situation, & if the premises are afterwards burnt down by accidental fire, he is bound to rebuild them.—*DIGBY v. ATKINSON* (1815), 4 Camp. 275, N. P.

*Annotations*:—*Distd.* *Johnson v. St. Peter, Hereford* (1836), 4 Ad. & El. 520; *Jones v. Shears* (1836), 4 Ad. & El. 832. *Consd.* *Re Leeds & Batley Breweries & Bradbury's Lease, Bradbury v. Grimble*, [1920] 2 Ch. 548. *Refd.* *Thomas v. Packer* (1857), 1 H. & N. 669; *Wedd v. Porter*, [1916] 2 K. B. 91.

#### 2075. ——— Terms imported by custom.]—

An outgoing tenant claimed an allowance from his landlord under the custom of the country for labour bestowed in tilling & sowing a certain portion of the land within the last year of his tenancy. The outgoing tenant had held the land for several years after the expiration of a lease, without coming to any fresh agreement. The lease contained a covenant by the tenant to spend & consume on the demised premises three parts out of four of the straw arising from them, & to leave the manure there at the end of the term to & for the use of the lessor, he paying the full price for the same:—*Held*: the tenant must be taken to have held under the terms of the expired lease as far as they were applicable to a tenancy from year to year, & the stipulation in it, as to leaving the manure at the end of the term, did not exclude parol evidence of the custom of the country allowing the outgoing tenant for the tillages & sowing claimed; that custom was imported into the lease by implication.—*HUTTON v. WARREN* (1836), 1 M. & W. 466; 2 Gale. 71; Tyr. & Gr. 646; 5 L. J. Ex. 234; 150 E. R. 517.

*Annotations*:—*Consd.* *Re Constable & Cranswick* (1899), 80 L. T. 164. *Appld.* *Westacott v. Hahn*, [1917] 1 K. B. 605. *Refd.* *Wilkins v. Wood* (1848), 12 Jur. 583; *Arden v. Sullivan* (1850), 19 L. J. Q. B. 268; *Vint v. Constable* (1871), 25 L. T. 324. *Mentd.* *Johnston v. Uslorne* (1840), 11 Ad. & El. 549; *Johnson v. Blenkinsopp* (1841), 5 Jur. 870; *Syers v. Jonas* (1848), 2 Exch. 111; *Spartali v. Benecke* (1850), 10 C. B. 212; *Gibson v. Small* (1852), 4 H. L. Cas. 353; *Brown v. Byrne* (1854), 3 E. & B. 703; *Cuthbert v. Cumming* (1855), 10 Exch. 809; *Myers v. Sari* (1860), 3 E. & E. 306; *Biddell v. E. Clemens Horst Co.*, [1911] 1 K. B. 934; *Produce Brokers Co. v. Olympia Oil & Cake Co.*, [1916] 1 A. C. 314; *Re Sutro & Heilbut, Synons*, [1917] 2 K. B. 348.

2076. ——— Unless stipulation to the contrary.]—*THETFORD CORPN. v. TYLER*, No. 2068, ante.

2077. ———.]—A. held premises of B. under a lease for three, seven, or ten years, determinable on notice; with a stipulation that the amount of a quarter's rent should be paid by A. on taking possession, which was to be allowed to him for the last quarter's rent, "on the determination of the said tenancy." After a notice to determine the lease at the expiration of the third year had been given, & before its expiration, the parties verbally agreed that A. should continue tenant for another year, no express mention being made of the terms of the tenancy:—*Held*: the above was in substance a stipulation for a forhand rent; &, in the absence of any express mention of other terms, A. continued to hold subject to the terms of the original lease; &, consequently, the payment made on taking possession, was applicable to the last quarter of the fourth year.—*FINCH v. MILLER* (1848), 5 C. B. 428; 10 L. T. O. S. 327; 136 E. R. 945.

2078. ———.]—Where there has been a demise for one year & the tenant afterwards remains in possession with the consent of the land-

lord, a new tenancy from year to year, upon the terms of the former demise, will be implied, if nothing has been said or done to rebut that implication.—*DOUGAL v. MCCARTHY*, [1893] 1 Q. B. 736; 62 L. J. Q. B. 462; 68 L. T. 699; 57 J. P. 597; 41 W. R. 484; 9 T. L. R. 419; 4 R. 402, C. A.

*Annotations*:—*Consd.* *Re Leeds & Batley Breweries & Bradbury's Lease, Bradbury v. Grimble*, [1920] 2 Ch. 548. *Refd.* *Cole v. Kelly*, [1920] 2 K. B. 106; *Lowther v. Clifford* (1926), 95 L. J. K. B. 576.

2079. ———.]—It is a question of fact in each case whether a tenant holding over on the expiration of the term granted by a lease does so upon the terms of the expired lease. If the true inference of fact is that the tenant holds over as tenant from year to year on the terms of an expired lease so far as those terms are applicable to such tenancy, in law there is constituted a new agreement to that effect between the parties. Where a tenant holds over on the expiration of a term, & the facts do not exclude an implied agreement to hold upon the terms of the old lease the law determines that he impliedly holds subject to all the covenants in the lease which are applicable to the new tenancy.

A tenant from year to year of a farm & buildings at a rent, who has not entered into any other express agreement with his landlord than as to the amount of the rent, is under an obligation implied by law to use & cultivate the land in a husbandlike manner according to the custom of the country, subject to Agricultural Holdings Act, 1908 (c. 28), & to keep the buildings wind & water tight; & the assignee of the reversion can at common law enforce this implied obligation against the tenant. Where therefore, a tenant of a farm & buildings under a lease containing express covenants by him, continued in occupation after the expiration of the term, the landlord & tenant agreeing that the terms of the old lease should not apply, but not agreeing upon the terms of the new tenancy except that there should be a yearly tenancy at a fixed rent, & the landlord assigned the reversion during the continuance of the tenancy, the assignee of the reversion was held entitled to sue the tenant for breaches of the above implied obligations which occurred after the assignment of the reversion.—*WEND V. PORTER*, [1916] 2 K. B. 91; 85 L. J. K. B. 1298; 115 L. T. 243, C. A.

*Annotations*:—*Consd.* *Cole v. Kelly*, [1920] 2 K. B. 106. *Refd.* *Blane v. Francis*, [1917] 1 K. B. 252. *Mentd.* *Barnes v. City of London Real Property Co.*, *Webster v. Same*, *Sollas v. Same*, *Kersey v. Same*, *Oakley, Sollas v. Same*, [1918] 2 Ch. 18.

2080. ——— Whether includes terms necessarily applicable.]—A tenant holding over after the expiration of a lease for years may be taken to hold upon any of the terms of such former lease which are consistent with a yearly tenancy. Whether he does hold on any of such terms or not is a question for the jury on the facts proved. A covenant in a lease for years ending at Michaelmas, that the tenant shall & may retain & sow forty acres of wheat on the arable land demised at the seed time next after the end of the term, & have the standing thereof till the harvest then next following, rent free, with the use of premises for the threshing, etc., till a day named, is a term which may be made incident to a tenancy from year to year.

When it is said that a party becoming tenant from year to year may be deemed to hold over on the terms of a prior lease for years, that cannot be confined to such terms as are necessarily incident to a yearly tenancy. . . . It must

**Sect. 6.—Tenancy from year to year: Sub-sect. 4, A. (a) & (b), & B.; sub-sect. 5, A., B. & C.]**

include such terms as may be incident (PATTESON, J.).—HYATT v. GRIFFITHS (1851), 17 Q. B. 505; 18 L. T. O. S. 74; 117 E. R. 1375.

**Annotations:—**Consd. *Re Leeds & Batley Breweries & Bradbury's Lease*, Bradbury v. Grimble, [1920] 2 Ch. 548. **Refd.** Wedd v. Porter, [1916] 2 K. B. 91; Felce v. Hill (1923), 39 T. L. R. 673; Lowther v. Clifford (1926), 95 L. J. K. B. 576.

**2081. — Including such terms as may be applicable.]—**HYATT v. GRIFFITHS, No. 2080, *ante*.

**2082. — Perpetual right of renewal.]—**GRAY v. SPYER, No. 2242, *post*.

**2083. —]**DOE d. MONCK v. GEEKIE, No. 1978, *ante*.

**2084. — So far as consistent with state of premises—At time of expiration of lease.]—**The principle that a tenant who holds over after the expiration of a lease, holds subject to the terms & covenants contained in that lease, only extends to make a tenant liable, upon such implied undertaking, for any breach of those covenants which has accrued since the expiration of the lease, & not for a mere continuing breach of a covenant broken whilst the lease was running; & only on such covenants [to repair] as may be consistent with the state in which the premises were at the time when the lease expired, & the supposed implied undertaking arose.—JOHNSON v. ST. PETER, HEREFORD (CHURCHWARDENS) (1836), 4 Ad. & El. 520; 1 Har. & W. 720; 6 Nev. & M. K. R. 106; 5 L. J. K. B. 116; 111 E. R. 883.

**Annotation:—**Refd. Wedd v. Porter, [1916] 2 K. B. 91.

**2085. — Whether necessarily implied.]—**Where a tenancy is continued beyond the time for which it was originally taken, & nothing is arranged respecting the amount to be paid on the new holding, that new holding is not of necessity to be on the same terms as the former; but the jury may give the landlord a larger sum for the continued occupation, if there be circumstances to show that such increased rent was expected by him in the event of holding over, & that that understanding was not repudiated by the tenant.—ELGAR v. WATSON (1842), Car. & M. 494, N. P.

**Annotation:—**Refd. Thetford Corpn. v. Tyler (1845), 10 Jur. 68.

**2086. —]**HYATT v. GRIFFITHS, No. 2080, *ante*.

**2087. — Though no agreement to that effect.]—**If a person has held under the terms of a lease, & holds over after the lease is at an end, he is bound by the terms of it, although no new bargain to that effect is entered into between the parties; but if he comes in as an undertenant, before any lease was granted to the person of whom he took the premises, & that person afterwards take a lease, if there is no evidence that he know of the lease, it will be for the jury to say whether he is not an undertenant, & not an assignee of the lease.—TORRIANO v. YOUNG (1833), 6 C. & P. 8, N. P.

**Annotation:—**Refd. Martin v. Gilham (1837), 7 Ad. & El. 540.

**2088. — Whether binding on person other than lessor—Remainderman after death of tenant for life—Knowledge of acquiescence.]—**OAKLEY v. MONCK, No. 2069, *ante*.

**2089. — Executor of deceased tenant—Necessity for knowledge of terms of lease.]—**HUNT v. ARCHER (1886), 31 Sol. Jo. 27, C. A.

**2090. — Assignee of reversioner.]—**Premises were demised by indenture to a tenant

for a term of years. The lease contained a covenant by the lessee to repair. After the term had expired by effluxion of time, the tenant held over on an oral agreement as yearly tenant on the terms of the expired lease, so far as applicable to a yearly tenancy, & subsequently he or his extrix. & successor in title paid the rent first to the lessors, & after the assignment to the assignee of the reversion:—**Held:** the assignee of the reversion was not entitled to sue the tenant in respect of breaches of the repairing covenant contained in the expired lease, nor could she compel the tenant to execute a lease so that she could sue on the repairing covenant of the expired lease.—BLANE v. FRANCIS, [1917] 1 K. B. 252; 86 L. J. K. B. 364; 115 L. T. 850, C. A.

**Annotation:—**Consd. Cole v. Kelly, [1920] 2 K. B. 106.

**2091. — Terms of old lease must be proved.]—**Pltf. stated in his declaration a contract to hold certain land on the terms of a former expired agreement, except as to the rent which was to be raised, & alleged as a breach the non-performance of the agreement. Deft. pleaded *non assumpsit*. There was no proof of any express promise; but it was proposed to establish an implied contract to hold on the terms of the old lease, by evidence of the continued occupation:—**Held:** it was necessary for pltf. to prove the terms of the old lease, & as, when produced, it could not be read for want of a stamp, pltf. must fail.—WALLISS v. BROADBENT (1836), 4 Ad. & El. 877; 2 Har. & W. 40; 6 L. J. K. B. 269; 111 E. R. 1014.

**2092. — Special covenants.]—**KIMPTON v. EVE, No. 2072, *ante*.

**Payment of tillages by landlord.]—**See AGRICULTURE, Vol. II., p. 31, No. 180, p. 33, No. 187.

**Cultivation in specified manner.]—**See AGRICULTURE, Vol. II., pp. 20, 21, No. 122.

**That tenant shall have crop.]—**See AGRICULTURE, Vol. II., p. 34, Nos. 193, 194.

**That tenant shall leave manure.]—**See AGRICULTURE, Vol. II., p. 31, No. 180, p. 39, No. 210.

**2093. — As to repairs.]—**DIGBY v. ATKINSON, No. 2074, *ante*.

**2094. —]**JOHNSON v. ST. PETER, HEREFORD (CHURCHWARDENS), No. 2084, *ante*.

**2095. —]**Where a party has continued as assignee to hold until the end of a term created by a void lease, & paid the reserved rent, he is liable in *assumpsit* on an implied promise to keep the premises in repair pursuant to the covenants contained in the lease.—BEALE v. SANDERS (1837), 3 Bing. N. C. 850; 3 Hodg. 147; 5 Scott, 58; 6 L. J. C. P. 283; 132 E. R. 638.

**Annotations:—**Refd. Martin v. Smith (1874), 30 L. T. 268; Napier v. Williams, [1911] 1 Ch. 361.

**2096. —]**A tenant in possession of premises under an agreement for twenty-one years from Michaelmas, 1861, liquidated by arrangement in 1872, & got his discharge in 1880. The trustee took no steps with regard to the premises, which the tenant continued to occupy till Michaelmas, 1882:—**Held:** the tenant was bound to leave the premises in the state of repair required by the agreement.—PONSFORD v. ABBOTT (1884), Cab. & El. 225.

**2097. — As to payment of outgoings.]—**Pltfs., who were the owners of certain land, leased it for a term of seven years to deft., who occupied it as a market garden. The lease contained a covenant on the part of deft. "during the said

**2098 i. — As to repairs.]—**Where a lessee continues in possession as a yearly tenant after the expiry of a lease containing a covenant by him to repair, a similar obligation will be implied.—HETT v. JANZEN (1892), 22 O. R. 414.—CAN.

term to pay all taxes, rates, tithes, assessments, impositions, & outgoings now payable or hereafter to become payable by, or to be imposed upon, either landlord or tenant in respect of the premises except landlord's property tax." After the expiration of the term, while deft. continued in possession as tenant from year to year, the local authority required a payment from plffs. under Private Street Works Act, 1892 (c. 57). Plffs. made the payment & sued deft. to recover the amount. Deft. contended that the covenant did not apply to a tenancy created by holding over, & that under Agricultural Holdings Act, 1923 (c. 9), s. 16 (1), the matter must be referred to arb'n. & no action would lie:—*Held*: the covenant was not inconsistent with a tenancy from year to year, & as the covenant related to a matter collateral to the demise & lying outside the purpose of the Agricultural Holdings Act, 1923 (c. 9), plffs.' right of action was not taken away, & they were entitled to recover.—*LOWTHER v. CLIFFORD*, [1926] 1 K. B. 185; 95 L. J. K. B. 576; 135 L. T. 200; 42 T. L. R. 432; 70 Sol. Jo. 544; 90 J. P. Jo. 229. C. A.

2098. — Provisions as to rights & liabilities of tenant at end of tenancy—Proviso inconsistent with custom.]—One of the covenants in an expired lease was, that the tenant on quitting the farm "should not sell or take away any of the manure in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant." The custom of the country was similar, with this addition, that by it an outgoing tenant was entitled to be paid for the manure left:—*Held*: as by the lease an express stipulation on the subject was made, the custom was excluded, & an outgoing tenant who held under the terms of the lease, was not entitled to recover for the manure.—*ROBERTS v. BARKER* (1833), 1 Cr. & M. 808; 3 Tyr. 945; 2 L. J. Ex. 208; 149 E. R. 625.

**Annotations:—Distd.** *Re Constable & Cranswick* (1899), 80 L. T. 164. **Refd.** *Westacott v. Hahn*, [1917] 1 K. B. 605. **Mentd.** *Field v. Lelean* (1861), 6 H. & N. 617.

**2099.** — **Re-entry clause.**—A proviso in a lease for re-entry on non-payment of rent is a condition which attaches to the yearly tenancy created by the tenant holding over & paying rent after the expiration of the lease.—*THOMAS v. PACKER* (1857), 1 H. & N. 609; 26 L. J. Ex. 207; 28 L. T. O. S. 274; 21 J. P. 182; 3 Jur. N. S. 143; 5 W. R. 316; 156 E. R. 1370.

**2100.** — **As to user of premises.]**—A term contained in a demise for a period exceeding three years to keep open the shop & use best endeavours to promote the trade of it, is a term applicable to a tenancy from year to year.—**SANDERS v. KARNELL** (1858), 1 F. & F. 356.

2101. — As to option to purchase.]—An option contained in a lease to purchase the reversion & so destroy the tenancy is not one of the terms of the tenancy. It is a provision outside of the terms, which regulate the relations between the landlord as landlord & the tenant as tenant, & is not one of the terms of the original tenancy, which will be incorporated into the terms of the yearly tenancy created by the tenant holding over after the expiration of the lease.—*Re LEEDS & BATLEY BREWERIES & BRADBURY'S LEASE, BRADBURY v. GRIMBLE & Co.*, [1920] 2 Ch. 548; 89 L. J. Ch. 645; 124 L. T. 189; 65 Sol. Jo. 61.

*Annotations* :—*Apld.* *McIlroy v. Clements* (1923), 67 Sol. Jo.

402. **Distd.** Rider v. Ford, [1923] 1 Ch. 541. **Consd.** Sherwood v. Tucker, [1924] 2 Ch. 440. **Refd.** Batchelor v. Murphy, [1925] Ch. 220.

*(b) After Determination of Landlord's Interest.*

**2102. Covenants of tenancy agreement—Covenant to repair.**—A tenant for life of an estate for one thousand years demised from year to year, with six months' notice to quit, lessee covenanting to repair. After the death of the tenant for life the co-exor. assigned the reversion of the estate for one thousand years. The lessee continued to pay rent to the assignees of the reversion, & gave six months' notice to quit:—*Held*: this furnished evidence that the lessee held over upon the terms of the original agreement, & was bound by the covenant to repair.—*WYATT v. COLE* (1877), 36 L. T. 613.

*B. Tenant occupying under Agreement for Lease.*  
See Part II., Sect. 5, sub-sect. 1, B. (b).

**SUB-SECT. 5.—HOW DETERMINED.**

### A. In General.

**2103. Substitution of tenant.]** — *Semble*: an agreement between a landlord & tenant from year to year, that another tenant shall be substituted in his place, who is accordingly substituted, determines the tenancy of the first tenant.—**STONE v. WHITING (1817), 2 Stark. 235, N. P.**

*Annotations*: —**Reid**. *Doc d. Huddleston v. Johnston* (1825),  
M'Cle. & Yo. 141; *Lyon v. Reed* (1844), 13 M. & W. 285;  
*Nickells v. Atherstone* (1847), 10 Q. B. 944..

**2104. Absence of proof of rent—Paid or demanded — As evidence of termination.] —**The absence of proof of payment or demand of rent for sixteen years is evidence, though slight, of the determination of a tenancy from year to year.—*STAGG v. WYATT* (1838), 1 Arn. 327; 2 Jur. 802; *subsequent proceedings, sub nom.* *DOE d. WYATT v. STAGG* (1839), 5 Bing. N. C. 563.

*B. Notice to Quit.*

*See Part XXIII.*

### C. Determination of Landlord's Interest.

**2105. Death of landlord.—Landlord tenant for life.]—**Under a parol demise from year to year, by a tenant for life, with power to lease by deed, etc., the interest of the lessee determines with the life of the lessor, & the rent is apportionable.—*Re SMYTH, Ex p. SMYTH* (1818), 1 Swan. 337; 36 E. R. 412, L. C.

*Annotation* :—**Mentd.** Browne v. Amyot (1844), 3 Hare, 173.

2106. — [Under a parol demise from year to year, by a tenant for life, with power to lease by deed, etc., & under written agreements for leases not exceeding three years, signed by the lessees, but not by the tenant for life, though witnessed by his agent, the interest of the lessees determines with the life of the lessor, & the rents are apportionable.—*SYMONS v. SYMONS* (1821), 6 Madd. 207; 56 E. R. 1070.]

2107. **Claiming under original lessor—Original lessor tenant in fee.**—Tenant in fee demised by parol to tenants from year to year, devised the estates to one for life with remainders over, & died. Devisee for life did not determine the tenancies from year to year, & died:—*Held*:

**PART VIII, SECT. 6, SUB-SECT. 5.—A.**

q. *Increase of rent.*—An increase of the rent payable by a yearly tenant, by an arrangement during a year of

tenancy, does not *per se* operate to put an end to the old tenancy & create a new one.—**INCHQUIN (LORD) v. LYONS** (1887), 20 L. R. Ir. 474.—**IR.**

**PART VIII. SECT. 6, SUB-SECT. 5.—C.**

*r. Conveyance to purchaser.*]—**JOHN-SON v. REARDON** (1839), 2 L. Eq. R. 123.—**IB.**

**Sect. 6.—Tenancy from year to year: Sub-sect. 5, C.**  
**Sect. 7: Sub-sects. 1 & 2.]**

there was no apportionment of the rents between devisee for life & first remainderman.

A tenancy from year to year created by tenant in fee is not determined by the death of a tenant for life claiming under tenant in fee, the original lessor.

A tenant from year to year has a lease for a year certain, with a growing interest, during every year thereafter, springing out of the original contract & parcel of it.—*CATTLEY v. ARNOLD, BANKS v. ARNOLD* (1859), 1 John. & H. 651; 28 L. J. Ch. 352; 5 Jur. N. S. 361; 7 W. R. 245; 70 E. R. 905; *sub nom. CATLEY v. ARNOLD*, 32 L. T. O. S. 369.

*Annotation:—Mentd. Jodrell v. Jodrell* (1869), 20 L. T. 349.

**2108. Expiration of landlord's lease—Agreement for tenancy during continuance of landlord's interest—Landlord continuing in possession under new lease.]**—An agreement to hold premises for twelve months certain, & to continue for the continuance of the term of the lessor's interest in the premises, determines with the determination of the lessor's own lease after such twelve months, though the lessor continues in possession under a fresh lease.—*COLLETT v. CURLING* (1850), 15 L. T. O. S. 349, N. P.; *previous proceedings* (1847), 10 Q. B. 785.

**SECT. 7.—WEEKLY, MONTHLY AND OTHER PERIODIC TENANCIES.**

**SUB-SECT. 1.—NATURE OF.**

**2109. Weekly tenancy—Effect of collateral stipulation—Enlarging term on happening of event.]**—Pltfs., a railway co., let premises, through an agent, to defts., on the terms, which were reduced to writing & signed by both parties, of a weekly tenancy to be determined by a week's notice on either side. At the same time the agent wrote, signed, & handed to defts. the following memorandum: "You may have the premises as per agreement until the railway co. require to pull them down." Defts. took possession of the premises, & pltfs., who subsequently required them for their own occupation, but had no intention of pulling them down, gave defts. a week's notice to quit, & after the notice had expired brought ejectment. Defts. pleaded that pltfs. did not require the premises in order to pull them down, & by counterclaim, asked for a declaration that the representation by the agent was binding upon pltfs., & for an injunction restraining them from acting upon the notice or determining the tenancy until they required the premises for the purpose of pulling them down:—*Held*: pltfs. were entitled to maintain the action, & defts. were not entitled to any of the equitable relief claimed.—*CHESHIRE LINES COMMITTEE v. LEWIS & CO.* (1880), 50 L. J. Q. B. 121; 44 L. T. 203; 45 J. P. 404, C. A.

*Annotations:—Consd. Zimble v. Abrahams*, [1903] 1 K. B. 577. *Mentd. Duxbury v. Sandford* (1898), 80 L. T. 552.

**2110. —Whether a reletting at beginning of each successive week.]**—Pltf. was injured by reason of the defective & dangerous condition of a plate of a coal cellar belonging to a house which had been let on a tenancy from week to week by deft. to the tenant for about two years before the accident occurred. Pltf. brought her action

for damages, & the county ct. judge before whom it was tried non-suited her, on the ground that deft. was not liable unless it could be proved that the premises were in the dangerous & defective condition complained of at the beginning of the demise, which proof was not forthcoming at the trial:—*Held*: a new trial ought to be granted, as a weekly tenancy was a re-letting by the landlord at the beginning of each successive week; & if his premises were in a defective condition at the beginning of the week in which pltf. was injured, the landlord would be liable to her in damages.—*SANDFORD v. CLARKE* (1888), 21 Q. B. D. 398; 57 L. J. Q. B. 507; 59 L. T. 220; 52 J. P. 773; 37 W. R. 28, D. C.

*Annotations:—Expld. Bowen v. Anderson*, [1894] 1 Q. B. 164. *Consd. Queen's Club Gardens Estates v. Bignell*, [1924] 1 K. B. 117.

**2111. ———.]**—Pltf. was injured through a defect in the condition of a coal plate in the pavement in front of a house let by deft. on a weekly tenancy. The evidence showed that the defect had existed for some months before the accident, but was conflicting as to whether the accident was owing to the neglect of the tenant to secure the plate properly, or to the defective state of the flagstone, or to the presence of clay, which prevented the plate from fitting. The county ct. judge directed a verdict for pltf., the amount of damages being agreed. On appeal:—*Held*: a weekly tenancy does not determine without notice at the end of each week, but some notice is required to determine such a tenancy, the continuance of the tenant's occupation on the expiration of each week did not render deft. liable for defects then existing, as if there had been a re-letting, it was a question for the jury whether the injury was caused by the negligence of the tenant, or by a structural defect existing at the date of the original letting, for which deft. would be liable, & there must be a new trial.—*BOWEN v. ANDERSON*, [1894] 1 Q. B. 164; 58 J. P. 213; 42 W. R. 236; 38 Sol. Jo. 131; 10 R. 47, D. C.

*Annotations:—Consd. Simmons v. Crossley*, [1922] 2 K. B. 95. *Queen's Club Gardens Estates v. Bignell*, [1924] 1 K. B. 117. *Refd. Mellows v. Low*, [1923] 1 K. B. 522.

**2112. Quarterly tenancy—Tenancy "for a term."]**—A tenancy by virtue of an agreement in writing, for three months certain, is a tenancy "for a term," within the meaning of 1 Geo. 4, c. 87.—*DOE d. PHILLIPS v. ROE* (1822), 5 B. & Ald. 766; 1 Dow. & Ry. K. B. 433; 106 E. R. 1371.

**SUB-SECT. 2.—HOW CREATED.**

**2113. Weekly tenancy—Receipt for rent from May 8 to August 1.]**—Where the only evidence of the terms on which a furnished house was taken was the following receipt put in by the landlord, "Received from C. £126 for rent of furnished house, from May 8 to Aug. 1, 1846":—*Held*: the jury might properly infer that the tenancy was weekly. *Qu.*: whether in the absence of any other evidence of the contract, a notice to quit, from the tenant, was necessary.—*TOWNE v. CAMPBELL* (1847), 3 C. B. 921; 16 L. J. C. P. 128; 8 L. T. O. S. 366; 11 J. P. 390; 136 E. R. 369.

*Annotation:—Refd. Jones v. Mills* (1861), 8 Jur. N. S. 387.

**2114. —Tenancy "till premises required to be pulled down."]**—*CHESHIRE LINES COMMITTEE v. LEWIS & CO.*, No. 2109, *ante*.

**PART VIII. SECT. 7, SUB-SECT. 2.**  
**t. Monthly tenancy—Reservation of monthly rent.]**—*McPHERSON v. NORRIS*

(1856), 13 U. C. R. 472.—*CAN.*

**a. ———.]**—*ORSER v. VERNON* (1864), 14 C. P. 573.—*CAN.*

**b. ———.]**—*EASTMAN v. RICHARD & CO.* (1899), 29 S. C. R. 438.—*CAN.*  
**c. ———.]**—In a summary pro-

**2115. — Reservation of weekly rent**—"Rent not to be raised" during continuance of lessor's interest.]—On Jan. 11, 1900, a shop demised to pltf. under a written agreement as follows, "I shall be pleased to accept you as tenant for barber's shop at the rental of 7s. per week, the rent not to be raised during my present tenancy." The landlord was the lessee of the shop under a lease which would expire on June 24, 1901:—*Held*: pltf. was not a mere tenant from week to week, but was entitled to a term which would expire on June 24, 1901.—*ADAMS v. CAIRNS* (1901), 85 L. T. 10; 17 T. L. R. 662, C. A.

**2116. Quarterly tenancy**—Tenancy "always to be subject to three months' notice."—Where premises are taken under an agreement by which the "tenant is always to be subject to quit at three months' notice," this constitutes a quarterly tenancy, which may be determined by a three months' notice to quit, expiring at the same time of the year it commenced, or any corresponding quarter day. But although the tenant under such an agreement enters in the middle of one of the usual quarters, if there appears to be no agreement to the contrary, he will be presumed to hold, from the day he enters; & the tenancy can only be determined by a notice expiring that day of the year, or some other quarter day calculated from thence.—*KEMP v. DERRITT* (1814), 3 Camp. 510, N. P.

*Annotations*:—*Expld.* R. v. St. Giles without Cripplegate (1863), 4 B. & S. 509. *Consd.* Sidebotham v. Holland, [1895] 1 Q. B. 378; *King v. Eversfield*, [1897] 2 Q. B. 475; *Simmons v. Crossley*, [1922] 2 K. B. 95. *Refd.* Doe d. Pombury v. Gower (1851), 16 Jur. 100; Doe d. King v. Grafton (1852), 16 Jur. 833; Jones v. Mills (1861), 10 C. B. N. S. 788; Queen's Club Gardens Estates v. Bignell, [1924] 1 K. B. 117. *Mentd.* Croft v. Blay, [1919] 2 Ch. 343.

**2117. — Reservation of quarterly rent**—Payable in advance.]—Defts. entered into the following agreement, "That they should become tenants of Botolph Wharf at £375 a quarter, the tenancy to commence on June 14, they paying a quarter's rent on that day; & that they should give security to pay one quarter's rent in advance as long as they should continue tenants; & in a bond given as a security for the rent it was recited, 'That defts. had become tenants of Botolph Wharf at the rent of £375 a quarter, & had paid the first quarter's rent, & had agreed to pay the said sum of £375 on or before the first day of every quarter during which they should hold the premises':—*Held*: this was a quarterly tenancy.—*WILKINSON v. HALL* (1837), 3 Bing. N. C. 508; 3 Hodg. 56; 4 Scott, 301; 6 L. J. C. P. 82; 132 E. R. 506.

*Annotations*:—*Mentd.* Alderman v. Neate (1839), 8 L. J. Ex. 89; Doe d. Lyster v. Goldwin (1841), 2 Q. B. 143; Doe d. Roylance v. Lightfoot (1841), 8 M. & W. 553; Gibson v. Kirk (1841), 1 Q. B. 850; Chapman v. Beecham (1842), 3 Gal. & Dav. 71; Doe d. Parsley v. Day (1842), 2 Q. B. 147; Manders v. Williams (1849), 4 Exch. 339; Duxbury v. Sandford (1898), 80 L. T. 552.

**2118. — Provision for continuance from quarter to quarter.**—P. took a public-house for the term of three calendar months at the rent of £15 per quarter, the landlord agreeing that he might continue from quarter to quarter till three months' notice to quit was given by either party, ending at a usual quarter day. P. occupied for one year & nine months, & was assessed to & paid rates:—*Held*: this not a renting for one whole year at least, & P. had not gained a settlement by renting within 6 Geo. 4, c. 57, s. 2.—*R. v.*

*NORWICH INCORPORATION* (1874), 30 L. T. 704; 38 J. P. 677.

**2119. — Agreement to let furnished apartments**—Subsequent agreement to let unfurnished "on the same terms"—"At the rate of" sum per year.]—Where deft. agreed by letter to occupy certain furnished apartments of pltf., from Mar. 4 to Sept. 4, for fifty guineas, & afterwards to take them from Sept. 4 to Dec. 4, on the same terms, viz. twenty-five guineas for the three months, or to take them unfurnished, at the rate of eighty guineas per annum:—*Held*: in the event of deft.'s not occupying the apartments furnished, there was a taking of the unfurnished apartments for the quarter, & not for the year.—*ATHERSTONE v. BOSTOCK* (1841), 2 Man. & G. 511; Drinkwater, 96; 2 Scott, N. R. 637; 10 L. J. C. P. 113; 5 J. P. 259; 133 E. R. 850.

**2120. — Receipt for rent from May 8 to August 1.**—*TOWNE v. CAMPBELL*, No. 2113, ante.

**2121. Half-yearly tenancy**—Reservation of yearly rent payable quarterly—Habendum "until one party shall give six months' notice."—By agreement in writing, dated Apr. 10, 1841, rooms in a dwelling-house were let to G. "at the yearly rent of £42, payable quarterly, the first payment, £7 13s. 6d. to be made on June 24 next, being the proportion of rent from Apr. 19, 1841, to that date." G. was to have the rooms "at the said rent until one of the said parties shall give unto the other six calendar months' notice in writing to quit. At the expiration of any such notice, G. shall leave the premises, with the fixtures, in as good condition as the same now are":—*Held*: the agreement created a half-yearly tenancy, commencing from June 24, 1841, which might be determined by a six months' notice to quit, expiring at Christmas. — *DOE d. KING v. GRAFTON* (1852), 18 Q. B. 496; 21 L. J. Q. B. 276; 19 L. T. O. S. 108; 16 Jur. 833; 118 E. R. 188.

*Annotations*:—*Expld.* Bridges v. Potts (1864), 17 C. B. N. S. 314; Sidebotham v. Holland, [1895] 1 Q. B. 378. *Consd.* King v. Eversfield, [1897] 2 Q. B. 475; Dixon v. Bradford & District Ry. Servants' Supply Soc., [1904] 1 K. B. 444; Lewis v. Baker, [1906] 2 K. B. 599. *Expld.* Croft v. Blay, [1919] 2 Ch. 343. *Refd.* Florence v. Robinson (1871), 21 L. T. 705.

**2122. Tenancy for one year**—Lease for one year—"& so on for two or three years"—Or such terms as parties think fit.]—*HARRIS v. EVANS*, No. 2049, ante.

**2123. — Letting "for six months"**—"& so on for six months to six months"—Proviso for six months' notice.]—A house & land were taken by lease "for the term of six months from Jan. 1, next, & so on for six months to six months, until one of the said parties shall give to the other of them six calendar months' notice in writing to determine the tenancy, at & under the rent of £13, for every six months; the first payment to be made on July 1, 1830":—*Held*: the months here spoken of were shown by the context to be calendar months, & this was a taking for a year at least, by which a settlement might be gained under 6 Geo. 4, c. 57, s. 2.—*R. v. CHAWTON (INHABITANTS)* (1841), 1 Q. B. 247; Arn. & H. 162; 4 Per. & Dav. 525; 10 L. J. M. C. 55; 5 J. P. 290; 5 Jur. 245; 113 E. R. 1123.

*Annotations*:—*Refd.* Doe d. Clarke v. Smaridge (1845), 7 Q. B. 957; R. v. St. Giles without Cripplegate (1863), 10 Jur. N. S. 205; Bruner v. Moore, [1904] 1 Ch. 305; Schiller v. Petersen, [1924] 1 Ch. 394. *Mentd.* Simpson v. Marjison (1847), 11 Q. B. 23.

ceeding to recover possession of demised premises it was shown that an agreement had been entered into to rent the premises at a rental of \$25 a month for

the first three months, \$30 a month for the next three months, & the months after to be \$35 a month:—*Held*: the tenancy was a monthly

one.—*METHODIST CHURCH v. ROACH* (1908), 9 W. L. R. 23.—*CAN.* d. — — —.]—*BEAMISH v. COX* (1885), 16 L. R. Ir. 458.—*IR.*

**Sect. 7.—Weekly, monthly and other periodic tenancies: Sub-sect. 3. Sects. 8 & 9: Sub-sects. 1, 2, 3 & 4.]**

**SUB-SECT. 3.—HOW DETERMINED—NOTICE TO QUIT.**

See Part XXIII., *post*.

**SECT. 8.—TERM OF YEARS.**

See Part III., *ante*.

**SECT. 9.—LEASE FOR LIVES.**

**SUB-SECT. 1.—IN GENERAL.**

See, *now*, Law of Property Act, 1925 (c. 20), s. 149 (6).

**2124. Grant to lessees in succession—Whether joint tenancy.]—ANON. (1538), Bro. N. C. 116; 73 E. R. 897.**

**2125. ———.]—ANON. (1561), Dal. 30; 123 R. R. 248.**

**2126. ———. Proviso against joint tenancy.]—Lease to two, *habendum* to them for their lives, & the life of the longest liver, successively one after the other & not jointly, is no joint tenancy, but they must take in succession.—ANON. (1577), 3 Dyer, 361 a; 73 E. R. 809.**

**Annotations:—***Distd.* Mellow v. May (1600), Moore, K. B. 636. *Refd.* Greenwood v. Tyber (1620), Cro. Jac. 563.

**2127. ———.]—A lease is made to A., B. & C. for their lives, "proviso & it is covenanted & granted that the second shall not occupy during the life of the first, & the third shall not occupy during the life of the second." This is but a collateral covenant, which shall not alter the estate given by the premises. Adjudged for pltf. that it is a joint estate, & that the proviso shall not sever it.—SCOVILL v. CABEL (1588), Cro. Eliz. 89, 107; 78 E. R. 347, 365; *sub nom.* LEVERSAUGE v. CABELS, Moore, K. B. 267.**

**Annotations:—***Refd.* Allen v. Hill (1591), Cro. Eliz. 238. *Mentd.* Goodall's Case (1597), 5 Co. Rep. 95 b; Lee v. Elkins (1701), 12 Mod. Rep. 585; Lodge v. Jennings (1727), Gilb. Ch. 255.

**2128. ——— & to assignee of survivor for a term.]—CLERK v. SYDENHAM (1606), 1 Brownl. 136; 123 E. R. 714; *sub nom.* CLARK v. SYDENHAM, Yelv. 85.**

**2129. Grant in remainder—Acceptance of rent from remainderman.]—If husband & wife make a lease for life, rendering rent, remainder for life, the husband dies, the wife accepts the rent, if she shall oust him in remainder after the death of the first lessee, is the question. It seems that she shall not, because the whole is but the same estate, & by her acceptance she affirmed the whole, for she agreed to it, & an agreement cannot be to part of an estate, & not to the residue.—ANON. (undated), Plowd. Queries 44; 75 E. R. 920.**

**2130. ———.]—Lease is made to husband & wife for their lives, remainder to A., their son, for life, & if he die, living the husband & wife, that then it shall remain to B. another of their sons for life, *si ipse vellet inhabitare*, etc. This is a good remainder on contingency, viz. if A. dies before the husband & wife.—COLTHIRST v. BEJUSHIN (1550), 1 Plowd. 21; 75 E. R. 33.**

**Annotations:—***Refd.* Cogan v. Cogan (1594), Cro. Eliz. 360; Roberts v. Roberts (1613), 2 Bulst. 123; Arundel v. Mead (1621), Cro. Jac. 422. *Mentd.* Strata Mercella's Case (1591), 9 Co. Rep. 24 a; Ughtred's Case (1591), 7 Co. Rep. 9 B; Dillam v. Fraim (1594), 1 And. 309; Rogers v. Parrey (1613), 2 Bulst. 136; Fox v. Whitchocke (1614), 2 Bulst. 290; Lovies's Case (1614), 10 Co. Rep. 78 a; Blamford v. Blamford (1615), 3 Bulst. 98; Liford's Case (1615), 11 Co. Rep. 46 b; Blunket v. Holmes (1661), 1 Keb. 119; Petty v. Goddard (1662), O. Bridg.

35; Bearcroft v. Geery (1667), 2 Keb. 285; R. v. Hornby (1694), 5 Mod. Rep. 29; Wynne v. Wynne (1840), 2 Man. & G. 8; Van Saudau v. Turner (1845), 14 L. J. Q. B. 154; Brooke v. Spang (1846), 15 M. & W. 153; Jeffries v. Alexander (1860), 8 H. L. Cas. 595; Kennedy v. Broun (1863), 13 C. B. N. S. 677.

**2131. ———. Whether void for uncertainty.]—Where a lease is made unto husband & wife for their lives, the remainder to the heirs of the survivor of them, same is a good remainder notwithstanding the uncertainty (POPHAM, C.J.).—ANON. (1587), 4 Leon. 185; 74 E. R. 809.**

**2132. S. P. ANON. (1598), Godb. 130; 78 E. R. 84.**

**2133. ———.]—HILL & GRUBHAM'S CASE (1613), Godb. 220; 78 E. R. 134; *sub nom.* GRUBHAM'S CASE, 4 Leon. 246.**

**Right to require production of cestui que vie.]—See REAL PROPERTY.**

**SUB-SECT. 2.—HOW CREATED.**

**2134. Necessity for deed.]—An agreement to lease at a certain rent, & that the lessor should not turn out the tenant so long as he paid the rent, & did not sell, etc., any article injurious to the lessor's business, either purports to be a lease for life, & would then be void, as not being creatable by parol, or if it operate as a tenancy from year to year, it must necessarily be determinable by either party giving the regular notice to quit.—DOE d. WARNER v. BROWNE (1807), 8 East, 165; 103 E. R. 305; *subsequent proceedings, sub nom.* BROWNE v. WARNER, 14 Ves. 156, 1 L. C.; (1808), 14 Ves. 409, L. C.**

**Annotations:—***Appld.* Doe d. Skrine v. Watson (1829), 8 L. J. O. S. K. B. 12. *Consd.* Wood v. Beard (1876), 2 Ex. D. 30; Cheshire Lines Committee v. Lewis (1880), 50 L. J. Q. B. 121. *Distd.* Adams v. Cairns (1901), 85 L. T. 10; Allison v. Scargall, [1920] 3 K. B. 443. *Refd.* *Re King's Leasehold Estates, Ex p. East of London Ry.* (1873), L. R. 16 Eq. 521.

**2135. ———.]—Lease for life must be by deed.—BROWNE v. WARNER (1807), 14 Ves. 156; 33 E. R. 480, 1 L. C.; *subsequent proceedings* (1808), 14 Ves. 409, L. C.**

**Annotations:—***Consd.* *Re King's Leasehold Estates, Ex p. East of London Ry.* (1873), L. R. 16 Eq. 521; Wood v. Beard (1876), 2 Ex. D. 30; Cheshire Lines Committee v. Lewis (1880), 50 L. J. Q. B. 121; Zimble v. Abrahams, [1903] 1 K. B. 577. *Refd.* Kusel v. Watson (1879), 11 Ch. D. 129.

**2136. ———.]—DOSSEE v. DOE d. EAST INDIA CO., No. 1846, *ante*.**

**2137. ———.]—The agent of the owners of a house signed a document by which he purported to "have let" the house to deft. at a weekly rental, & which continued: "I agree not to raise Mr. A. any rent as long as he lives in the house & pays rent regular. I shall not give him notice to quit. Any time Mr. A. wishes to move out, I promise to return to him the £6 he has paid me on taking possession of the house." Pltfs., treating deft. as a weekly tenant, gave him notice to quit, & brought this action to recover possession of the house:—*Held*: the document could not, having regard to its terms, be treated as creating a weekly tenancy, & whether it purported to be an attempt to create an immediate demise for the life of deft., which was void at law as not being by deed, or an agreement to grant a lease for the life of deft., he was entitled to specific performance.—ZIMBLER v. ABRAHAM, [1903] 1 K. B. 577; 72 L. J. K. B. 103; 88 L. T. 46; 51 W. R. 343; 19 T. L. R. 189, C. A.**

**Annotation:—***Refd.* Gray v. Spyer, [1922] 2 Ch. 22.

**Agreements for leases.]—See Part II., *ante*.**

**2138. Order of lives must be stated.]—WENDEN v. SNIGG (1618), 1 Brownl. 175; 123 E. R. 738.**

**2139. Who may grant—Lessee for years.]—**

A lessee for years may make a grant for lives, which will be good during the term.—**SAFFERY v. ELGOOD** (1834), 1 Ad. & El. 191; 3 Nev. & M. K. B. 346; 3 L. J. K. B. 151; 110 E. R. 1180.  
*Annotation* :—**Mentd.** *Johnson v. Faulkner* (1842), 2 Q. B. 925.

**2140. Whether lease may commence in futuro.]—**  
**BURY v. CONISBY** (1581), Toth. 115; 21 E. R. 140.

**2141. —.]—**A lease for years may begin *in futuro* but not a lease for life (*per Cur.*).—**BARWICK'S CASE** (1597), 5 Co. Rep. 93 b; 77 E. R. 199.

*Annotations* :—**Mentd.** *St. Saviour's, Southwark Case* (1613), 10 Co. Rep. 66 B; *Fox v. Whitechocke* (1614), 2 Bulst. 290; *Cornish v. Cawsey* (1618), Aleyn. 74; *Hemming v. Brabason* (1660), O. Bridg. 1; *Holland v. Fisher* (1662), O. Bridg. 181; *Phillips v. Bury* (1694), Skin. 447; *R. v. Kemp* (1695), 12 Mod. Rep. 77; *R. v. Chester (Bp.)* (1697), 1 Ld. Raym. 292; *Pugh v. Leeds* (1777), 2 Cowp. 714; *Savill v. Bethell*, [1902] 2 Ch. 523.

**2142. —.]—**A lease for lives made by husband & wife whereof the husband is seised in right of his wife to commence from Michaelmas following, & of which livery is made after Michaelmas by the lessors in person is good.—**GREENWOOD v. TYBER** (1620), Cro. Jac. 563; Hob. 314; 79 E. R. 482.

*Annotations* :—**Refd.** *Geary v. Bearcroft* (1666), Cart. 57; *Machill v. Clark* (1702), 2 Salk. 619.

**2143. Commencement of term—Includes the day of the date.]—**A freehold lease to commence from the date includes the day of the date.—**HATFIELD v. ASH** (1696), 1 Ld. Raym. 84; 3 Lev. 438; 91 E. R. 953; *sub nom.* **HATFIELD v. ASH**, 2 Salk. 413.

*Annotations* :—**Consd.** *Pugh v. Leeds* (1777), 2 Cowp. 711. **Refd.** *Ackland v. Lutley* (1839), 9 Ad. & El. 879.

**2144. Lease for lives of lessee & others.]—**(1) A lease is made to a man for the lives of S. & D., the lessee makes a lease for the life of S. only, it seems that he hath the reversion, notwithstanding this lease, for he has given a lesser estate than he had, for he claimed for the term of their two lives, & of the longest liver of them, & he has not given the whole estate.

(2) If land is leased to me during my life & the life of S. this is but for my life only, for that is the greater estate, which merges the other life.

(3) If a lease is made to two for forty years, if they so long live, & the one dies, the whole term ceases, for it was a condition, & not a limitation of the estate.—**ANON.** (undated), Plowd. Queries 11; 75 E. R. 872.

**2145. —.]—**Here the greater estate precedes the lesser; I hold that a lease made to one for his life, the remainder to him for another's life, is good, for he may it grant over: & so I think in this case, that so long as any of the lives remain living, that the estate remains (**GAWDY, J.**).—**ROSSE v. ARDWICK** (1598), Gouldsb. 157; Cro. Eliz. 491; 75 E. R. 1062; *sub nom.* **ROOS v. ARDWICK**, Moore, K. B. 398; *sub nom.* **ROSSE'S CASE**, 5 Co. Rep. 13 a.

*Annotations* :—**Refd.** *Windsore v. Hubbard* (1587), Cro. Eliz. 58; *Bowles v. Poor* (1611), 1 Bulst. 135; *Geary v. Bearcroft* (1666), Cart. 57. **Mentd.** *Pinker v. Litcott* (1665), O. Bridg. 373.

**2146. —.]—**A lease to A. for his own life, & the lives of two others, is good.—**BOWLES v. POORE** (1611), Cro. Jac. 282; 1 Bulst. 135; 79 E. R. 242.

*Annotation* :—**Mentd.** *Gravenor v. Woodhouse* (1824), 2 Bing. 71.

## SUB-SECT. 3.—CONSTRUCTION OF LEASES.

**2147. Habendum to A. for life & his three sons—Sons omitted from premises—Lease to A. only.]—**

A lease to one for life *habendum* to his three sons successively, but omitting to mention them in the premises of the deed, shall be for the life of the father only, & the sons shall not take in possession nor by way of remainder; nor can there be an occupant to such an estate.—**WINDSMORE v. HUBBARD** (1587), Cro. Eliz. 58; 78 E. R. 319.

*Annotation* :—**Distd.** *Greenwood v. Tyber* (1620), Cro. Jac. 563.

**2148. Demise to A. for his life—Whether "his" referable to lessor or lessee.]—****DOE d. PRITCHARD v. DODD**, No. 2003, *ante*.

**2149. Ultra vires lease for lives—Covenant for quiet enjoyment.]—**A. being seised in fee of an estate, by lease & release executed upon his marriage, settled same upon himself for life, remainder to his first & other sons in tail, with a power to the tenant for life to grant leases for years, determinable on three lives. A. afterwards granted a lease of part of the estate in question for the lives of three persons therein named, & the life of the survivor; & there was a covenant that the lessee should quickly hold & enjoy the premises for & during the term, without interruption of the lessor, his heirs or assigns, or any other person, claiming any estate, right, or interest by, from, or under him or any of his ancestors. The lease being for three lives absolutely, was not conformable to the power, & became void on the death of A., & his eldest son brought an ejectment & evicted the lessee, two of the *cestuis que vie* being then living.—**Held**: (1) the eldest son was a person claiming under the lessor within the meaning of the covenant for quiet & enjoyment; (2) by the words, during "the term" in that covenant, the parties intended a term to continue so long as any of the *cestuis que vie* survived, & not a term to continue only for the life of the grantor.—**EVANS v. VAUGHAN** (1825), 4 B. & C. 261; 6 Dow. & Ry. K. B. 319; 3 L. J. O. S. K. B. 213; 107 E. R. 1056.

*Annotation* :—*As to* (1) **Consd.** *Carpenter v. Parker* (1857), 3 C. B. N. S. 206.

**2150. Demise to A. for three lives—One life not in being at date of deed—Lease valid as to two lives.]—**By an indenture of lease certain premises were demised to M. & her heirs, *habendum* to her & her heirs for & during the natural lives of M.'s son, J., her daughter, M., & A.'s granddaughter, & the life of the survivor of them. A. had a daughter, but he had not any granddaughter at the time of making the indenture, nor previously thereto, though subsequently he had several granddaughters.—**Held**: the lease was good for the lives of J. & M. only.—**DOE d. PEMBERTON v. EDWARDS** (1836), 1 M. & W. 553; 2 Gale, 137; Tyr. & Gr. 1006; 5 L. J. Ex. 258; 150 E. R. 555.

## SUB-SECT. 4.—HOW DETERMINED.

**2151. Lease for two or more lives—Death of one.]—**(1) If a lease is made for the life of A. & B. & A. dies, yet the lessee shall have it during

## PART VIII. SECT. 9, SUB-SECT. 3.

• *Demise to A. for "his" life.]—*A. died, leaving *plff.*, his widow, & *def.*, his heir-at-law. *Plff.* being in possession of part of the property, *def.* executed the following instrument

under seal: "Know ye, all men, that I, J., do bind myself, my heirs, etc., in the sum of £300 to let my mother, L., retain quiet & peaceable possession of the lot of land now in her possession, the same being fifty acres more or less, for the term of her natural life":

—**Held**: a lease for life.—**HALL v. HALL** (1858), 15 U. C. R. 637.—**CAN.**

## PART VIII. SECT. 9, SUB-SECT. 4.

1. *Lease created by tenant in tail—Death of tenant in tail.]—*Where a tenant in tail makes a lease for lives &

**Sect. 9.—Lease for lives: Sub-sect. 4. Part IX.**  
**Sect. 1: Sub-sect. 1, A. & B.; sub-sect. 2.**  
**Sect. 2: Sub-sect. 1, A., B. & C.; sub-sects. 2**  
**& 3.]**

the life of B. in the same manner as if a lease is made to two, they shall have it during their lives or the life of the survivor of them, & if they grant it over, the lessee shall have it during the life of either of them (*per CUR.*).

(2) If two make a lease for sixty years, if they so long live, there if either of them dies, the estate is determined, for this is not a limitation, but a condition (*per CUR.*).—ANON. (undated), Plowd. Queries 31; 75 E. R. 902.

**2152.** ———.]—If a lease be made to A. during the life of several, upon the death of one of the *cestuis que vie*, the estate is not determined, but A. shall have the land during the life of the survivor of them. But if a man lease land for one hundred years, if A. & B. shall so long live, if one

died the lease is ended.—BRUDNEL'S CASE (1592), 5 Co. Rep. 9 a; 77 E. R. 61.

**Annotations:—***Apld.* Hughes & Crowther's Case (1610), 13 Co. Rep. 66. *Refd.* Daniel v. Waddington (1615), 3 Bulst. 130; Quick & Harris v. Ludborough (1615), 3 Bulst. 29; Sacheverel v. Frogate (1671), 1 Vent. 161; Day v. Day (1854), Kay, 703. *Mentd.* Gee v. Freedland (1626), Cro. Car. 47; Crabbe v. Tooker (1627), Poph. 204; Slater v. Carew (1674), 1 Mod. Rep. 187; Jones v. Strafford (1730), 3 P. Wms. 79; Cowper v. Cowper (1734), 2 P. Wms. 720; Hudson v. Hudson (1735), Cas. temp. Talb. 127.

**2153.** ———.]—If a lease be made for the lives of A. & B., the freehold is not determined by the death of one of them.—HUGHES & CROWTHER'S CASE (1610), 13 Co. Rep. 66; 77 E. R. 1476.

*See, further, REAL PROPERTY.*

**2154. Lease for lives of lessee & others—Death of lessee.**—A lease to A. for life, & for the lives of B. & C. is an estate *pur autre vie*, & does not determine on the death of A.—DALE'S CASE (1590), Cro. Eliz. 182; 78 E. R. 439.

**Annotation:—***Refd.* Geary v. Bearcroft (1666), Cart. 57.

## Part IX.—Renewal of Tenancies.

### SECT. 1.—AGREEMENTS TO RENEW.

#### SUB-SECT. 1.—EXPRESS AGREEMENT.

##### A. By Deed.

*See Sect. 2, post.*

##### B. Not by Deed—Consideration.

*See Sect. 3, post.*

#### SUB-SECT. 2.—IMPLIED AGREEMENTS.

**2155. Right of lessee to renewal—Inferred from conduct of lessor.**—If any lessor so treats his tenant as to make him believe that he will renew his term; if, on a faith so superinduced, the tenant expends his money, or in any other way becomes a loser, the lessor will be compelled to give him such renewal as his own conduct may have led the tenant to reckon upon, especially if the thing done by the tenant in any way redounds to the advantage of the lord (LORD BROUGHAM, C.).—CLAYTON v. A.-G. (1834), 1 Coop. temp. Cott. 97; 47 E. R. 766, L. C.

**Annotation:—***Mentd.* Kirk v. R., A.-G. v. Kirk (1872), L. R. 14 Eq. 538.

### SECT. 2.—COVENANTS AND OPTIONS FOR RENEWAL.

#### SUB-SECT. 1.—NATURE OF COVENANT.

##### A. In General.

**2156. Consistent with covenant to let & manage to best advantage—For benefit of creditors.**—A renewable lease is not inconsistent with a

covenant to let & manage to the best advantage; with reference to the subject, a trust for creditors.—KIRKHAM v. CHADWICK (1807), 13 Ves. 547; 33 E. R. 399.

**2157. Not a perpetuity.**—MULLER v. TRAFFORD, No. 2272, *post*.

**2158.** ———.]—RIDER v. FORD, No. 2168, *post*.

##### B. Whether Running with the Land.

Covenants running with the land generally, *see* Part XI., sect. 6, *post*.

**2159. General rule.**—FURNIVAL v. CREW, No. 2255, *post*.

**2160.** ———.]—A covenant by a lessor that he would renew at the end of his term has been adjudged to run with the land & to bind the grantee of the reversion; & there is no substantial difference, in point of construction, between a stipulation for extending the term, & a stipulation for shortening it (LORD ELLENBOROUGH, C.).—ROE d. BAMFORD v. HAYLEY (1810), 12 East, 464; 104 E. R. 181.

**Annotations:—***Refd.* Simpson v. Clayton (1838), 4 Bing. N. C. 758; Williams v. Earle (1868), L. R. 3 Q. B. 739; Muller v. Trafford, [1901] 1 Ch. 51. *Mentd.* Kennedy v. Liddy (1867), 15 W. R. 431.

**2161.** ———.]—Lands held under letters patent from the Duchy of Cornwall for a term determinable on the deaths of three parties named therein, were leased for sixty five & a quarter years if the *cestuis que vie* should so long live, with a covenant on the part of the lessor, his exors., etc., in case of the death of those parties during the term by the indenture granted to "apply for, & do his & their utmost endeavours to procure a renewal or renewals of such letters patent for another life or lives, so as the lessees, their exors., etc., might hold & enjoy the premises for the whole term, subject only to the rents &

dies without issue, the lease is determined by his death.—DOE d. GRAHAM v. NEWTON (1846), 3 U. C. R. 249.—CAN.

**g. Whether by conveyance in fee—By lessee.**—BERRY v. BERRY (1892), 16 N. S. R. (4 R. & G.) 66.—CAN.

#### PART IX. SECT. 1, SUB-SECT. 2.

**2155 i. Right of lessee to renewal—Inferred from conduct of lessor.**—DUCHEMIN v. DES BARRES (1891), 7

Nfld. L. R. 522.—NFLD.

**2155 ii.** ———.]—*Er p.* CLARKE (1871), 6 I. R. Eq. 51.—IR.

#### PART IX. SECT. 2, SUB-SECT. 1.—A.

**2157 i. Not a perpetuity.**—HOADLEY v. BAYNTUM (1915), 31 W. L. R. 751.—CAN.

**h. Does not extend term.**—DOE d. KINGSTON BUILDING SOCIETY v. RAINSFORD (1853), 10 U. C. R. 236.—CAN.

#### PART IX. SECT. 2, SUB-SECT. 1.—B.

**2159 i. General rule.**—IRVIN v. SIMONDS (1864), 6 All. 190.—CAN.

**2159 ii.** ———.]—HAMILTON v. PATTEN (1839), 1 I. Eq. R. 341.—IR.

**2159 iii.** ———.]—*Re* HOUGHTON (1860), 11 I. Ch. R. 136; 13 I. Jur. 113.—IR.

**2159 iv.** ———.]—A covenant to renew a lease is one which runs with & binds the land.—GILMER v. CRAWFORD (1906), 26 N. Z. L. R. 657.—N.Z.

covenants in the indenture mentioned, & without being compelled or compellable or liable to pay any part of the fine or fines that should be paid on such renewal." Two of the lives having dropped, the grantee of the letters patent applied for a renewal. The Duchy demanded for such renewal a fine which was found by a special verdict to have been a reasonable fine, if such fine ought to be calculated on the annual value of the premises taken at rack rent, two & a half & three years' value:—*Held*: (1) this was a proper mode of valuation, & the fine not unreasonable; & the lessor, having declined to pay such fine, had failed to perform his covenant to do his utmost endeavours to procure a renewal of the letters patent; (2) the above was a covenant running with the land; & the fact of plff. being assignee only of a part of the interest created by the lease, did not preclude him from suing for & recovering damages in respect of the breach of covenant.—*SIMPSON v. CLAYTON* (1838), 4 Bing. N. C. 758; 1 Arn. 299; 6 Scott, 469; 8 L. J. C. P. 59; 2 Jur. 892; 132 E. R. 981.

*Annotations*:—As to (2) *Reid*. *Thompson v. Hawke* (1865), 11 Jur. N. S. 732; *Williams v. Earle* (1868), 19 L. T. 238.

2162. —.]—*MULLER v. TRAFFORD*, No. 2272, *post*.

2163. **Whether personal to covenantor.**—If a leasehold interest is assigned by way of mtge., the assignee, unless there is a special provision to the contrary, takes the interest, subject to all the covenants & obligations of the original lessee.

B. having an interest in lands, which he held, subject to head rents, under the see of Kilmore, for terms of years, renewable periodically on the payment of fines, granted underleases at certain annual rents, & subject to fines for renewal; & he covenanted with the sub-lessees to renew the underleases as often as he should obtain renewals from the see of Kilmore, the sub-lessees paying all head rents & renewal fines. The interest in these underleases vested in R., who assigned & conveyed to a trustee his interest in the terms, together with other lands, to secure the payment of annuities which he had granted to F. The trust as to the leases was first to pay the rents & fines, & then the annuities. The interest of B. in the leaseholds was mortgaged & sold under a decree of foreclosure, & finally assigned to H. in Aug. 1814. In Sept. 1814, the interest of R. in the underleases was assigned to H., as purchaser, under a commission of bkpt. In such a case the covenant does not run with the land, but is personal, & the right under the lease to deduct the rent & fines is not merged by the union of the principal & underleases in the same person.—*HAIG v. HOMAN* (1830), 4 Bli. N. S. 380; 5 E. R. 130, H. L.

**Upon whom binding.**—See Sub-sect. 4, *post*.

**Perpetual covenants.**—See Sub-sect. 11, *post*.

### C. Covenants with Penalty for Breach.

2164. **Whether penalty option for breach.**—Sub-lease at a fixed rent with covenant of perpetual

renewal under a penalty of £70 made of a church lease held by an administratrix for the benefit of her children & herself. *Qu.*: whether such a lease can be supported, except by considering the option to pay the penalty as of the essence of the contract.—*MAGRANE v. ARCHBOLD* (1813), 1 Dow. 107; 3 E. R. 639, H. L.

*Annotation*:—*Mentl*. *Oceanic Steam Navigation Co. v. Sutherland* (1880), 16 Ch. D. 239, n.

2165. —.]—*REID v. BLGRAVE*, No. 2210, *post*.

### SUB-SECT. 2.—NECESSITY FOR DEED.

2166. **Renewal for more than three years—Original term less than three years.**—Action to recover a quarter's rent due under the following agreement, not under seal: "A. agrees to let & B. to take" certain premises "from Feb. 14 next until the following Midsummer twelve months, with a right at the end of that term for the tenant by a month's previous notice to remain on for three years & a half more":—*Held*: the agreement constituted a valid demise of the premises from Feb. 14 to the following Midsummer twelve months, followed, but not invalidated, by an invalid collateral agreement as to the tenant's option to remain on.—*HARD v. HALL* (1877), 2 Ex. D. 355; 46 L. J. Q. B. 603; 36 L. T. 765; 42 J. P. 133; 25 W. R. 734, C. A.

*Annotation*:—*Reid*. *Gray v. Spyer*, [1922] 2 Ch. 22.

### SUB-SECT. 3.—TIME FOR EXERCISE OF OPTION.

2167. **During relationship of landlord & tenant—Though original tenancy expired.**—Under an agreement to let a house for three years at a yearly rent, by which the landlord agreed, at the request of the tenant, to grant him a lease for a term from the expiration of the three years' occupancy at the same rent, the tenant undertaking to keep the house in repair:—*Held*: the tenant was entitled, four years after the expiration of the three years' occupancy, to have the agreement for a lease specifically performed, & neither an application made by him two years previously for a lease at a reduced rent, which was refused, nor an application to the landlord for payment of an amount expended in repairs, which had been allowed to the tenant, amounted to a waiver of his rights, though plff. was bound to refund the cost of the repairs.—*MOSS v. BARTON* (1866), L. R. 1 Eq. 474; 35 Beav. 197; 13 L. T. 623; 30 J. P. 243; 55 E. R. 870.

*Annotations*:—*Reid*. *Buckland v. Papillon* (1866), L. R. 1 Eq. 477; *Mellroy v. Clements* (1923), 67 Sol. Jo. 402; *Rider v. Ford*, [1923] 1 Ch. 541.

2168. —.]—An agreement for a lease provided that the prospective tenant should "take the house for three, five, or seven years, & have the option of purchasing either the freehold or a lease of ninety-seven years." The tenant

2163 i. **Whether personal to covenantor.**—A covenant for renewal is in itself a more personal contract; but a substantive independent covenant binds the covenantor & his representative in respect of the assets transmitted.—*CHANDOS v. BROWNLOW* (1791), 2 Ridg. Parl. Rep. 345.—*IR*.

2163 ii. —.]—*KENT v. STONEY* (1858), 9 L. Ch. R. 249.—*IR*.

2163 iii. —.]—*SHERLOCK v. KENNEDY* (1863), 15 L. Ch. R. 160.—*IR*.

2163 iv. —.]—*HANNAGAN v. SMITH* (1892), 11 N. Z. L. R. 474.—*N.Z.*

### PART IX. SECT. 2, SUB-SECT. 1.—C.

k. **Whether relief granted.**—Where there is a lease of lives renewable for ever, with a *nomine pænae*, in case of neglect to renew, equity will not relieve, except upon the terms of paying *nomine pænae*.—*DONERAILLE (LORD) v. CHARTRES* (1784), 1 Ridg. Parl. Rep. 122.—*IR*.

### PART IX. SECT. 2, SUB-SECT. 3.

2167 i. **During relationship of landlord & tenant—Though original tenancy expired.**—*ALLEN v. MURPHY*, [1917] 1 L. R. 484.—*IR*.

l. —.]—Deft. held under lease for five years, containing a covenant by the lessor to grant him a renewal for five years at a rent named, if requested. The first term having expired, & no request made:—*Held*: the lessor might eject without any demand.—

**Sect. 2.—Covenants and options for renewal: Sub-sects. 3, 4, 5, 6 & 7.]**

entered into possession, but no lease was ever executed:—*Held*: (1) the option to purchase the freehold being unlimited as to time was void, under the rule against perpetuities, but that the option to purchase the lease, being in fact an option to call for a lease, was outside the rule against perpetuities, & was exercisable so long as the relationship of landlord & tenant existed; (2) an option to call for a lease was outside the rule against perpetuities, although the terms of the new lease were not the same as the terms of the original lease.

It is not disputed that under the authorities a covenant for what is called the renewal of a lease is outside the rule against perpetuities (RUSSELL, J.).—*KIDER v. FORD*, [1923] 1 Ch. 541; 92 L. J. Ch. 565; 129 L. T. 347; 67 Sol. Jo. 484.

**2169. Within reasonable time.]—NEVER-STOP Rty. (WEMBLEY), LTD. v. BRITISH EMPIRE EXHIBITION (1924) INCORPORATED**, No. 3390, *post*.

**Where time stipulated.]—See Sub-sect. 9, B. (b), *post*.**

**SUB-SECT. 4.—UPON WHOM BINDING.**

**2170. Assignee of reversion.]—ISTEED v. STONLEY (1580)**, 1 And. 82; 123 E. R. 365.

**2171. —.]—ANON. (1584)**, Moore, K. B. 159; 72 E. R. 504.

*Annotations*:—**Consd.** Bally v. Wells (1769), Wilm. 341; Vernon v. Smith (1821), 5 B. & Ald. 1. **Refd.** Minshall v. Oakes (1858), 2 H. & N. 793.

**2172. —.]—A** lessor covenanted to add three years to the term of the lease & assigned the reversion to an assignee who took with notice of the covenant:—*Held*: the assignee must give effect to the covenant.—**FINCH v. SALISBURY (EARL) (1675)**, Cas. temp. Finch, 212; 23 E. R. 117.

**2173. —.]—A** makes a lease for three years, & in consideration of the lessees laying out £100 in improvements, covenants at the end of the term to grant a new lease at the same rent & covenants. Purchaser of the inheritance decreed to make good this covenant.—**RICHARDSON v. SYDENHAM (1703)**, 2 Vern. 447; 1 Eq. Cas. Abr. 47; 23 E. R. 885.

**2174. —.]—WINGED v. LEFEVRE (1724)**, 2 Eq. Cas. Abr. 32; 22 E. R. 28, 1. C.

**2175. —.]—Purchaser from tenant in tail with notice of agreement by him to renew a lease, which the father tenant for life had covenanted to renew, is bound to renew.**—**BROOK (EARL) v. BULKLEY (1754)**, 2 Ves. Sen. 498; 28 E. R. 319, 1. C.

*Annotation*:—**Refd.** Blakeney v. Bagott (1829), 3 Bl. N. S. 237.

**2176. —.]—Purchaser with notice is bound in all respects as the vendor; therefore where tenant for life granted leases for lives under a power, & bound himself upon the dropping of a life to grant a new lease with the same provision for renewal on the death of any person to be named**

in any future lease, & afterwards joined in a sale, though the power is exceeded, yet if a life drops in the life of the lessor, the purchaser having notice must specifically perform by granting a new lease with the same provision.—**TAYLOR v. STIBBERT (1794)**, 2 Ves. 437; 30 E. R. 713, 1. C.

*Annotations*:—**Expld.** Skoels v. Shearly (1836), 8 Sim. 153. **Consd.** Clark v. Smith (1842), 9 Cl. & Fin. 126; Grosvenor v. Green (1858), 28 L. J. Ch. 173; Lewis v. Stephenson (1898), 67 L. J. Q. B. 296. **Refd.** Hiern v. Mill (1806), 13 Ves. 114; Hall v. Smith (1808), 14 Ves. 426; Daniels v. Davison (1809), 16 Ves. 249; Barnhart v. Greenshields (1853), 9 Moo. P. C. C. 18; Carroll v. Kears, Kears v. Carroll (1873), 22 W. R. 243; Green v. Rheinberg (1911), 104 L. T. 149. **Mentd.** Robinson v. Carrington (1833), 1 Mont. & A. 1; Jones v. Smith (1841), 1 Hare, 43; Holmes v. Powell (1856), 8 De G. M. & G. 572; Knight v. Bowyer (1857), 23 Beav. 609; Phillips v. Miller (1875), L. R. 10 C. P. 420; Hunt v. Luck, [1901] 1 Ch. 45.

**2177. —.]—ROE d. BAMFORD v. HAYLEY**, No. 2160, *ante*.

**2178. —.]—On Aug. 30, 1894, C. agreed to let for three years to deft. S. certain premises at a fixed yearly rent, "with the option of renewal." In July 1896 plff. L. purchased C.'s interest in the premises, & knew that S. was in possession under an agreement, but, till early in 1897, was not aware of the clause giving the option of renewal. At the expiration of the three years L. commenced an action of ejectment, & S. counter-claimed for specific performance of the agreement to renew:—*Held*: (1) L., as purchaser, must be fixed with notice of the contents of the agreement with S.; (2) the words in the agreement relating to the renewal were sufficiently definite to enable a decree for specific performance to be made to grant a renewal agreement for a lease for the same period & on the same terms, except as to renewal, as contained in the agreement of Aug. 30, 1894.—**LEWIS v. STEPHENSON (1898)**, 67 L. J. Q. B. 296; 78 L. T. 165.**

**2179. Tenant for life.]—A** testator being possessed of a leasehold, subject to a nominal yearly rent, under an ecclesiastical corporation (who were not bound to renew, but were in the habit of renewing every fourteen years, upon the payment of fines, leases of houses held under them), bequeathed it to A. for life, subject to the payment of all fines & rents as they became due, yearly & for every year, & after the death of A., to B. absolutely:—*Held*: that A. was not bound to renew the lease during her life.—**CAPEL v. WOOD (1828)**, 4 Russ. 500; 3 L. J. O. S. Ch. 91; 38 E. R. 894, 1. C.

**2180. Devisee in trust.]—On a bill for specific performance of an agreement entered into by testator to grant a lease to plff. of certain premises for twenty-one years, which lease was to contain a covenant for the renewal of the lease for two further successive terms of twenty-one years each:—*Held*: a devisee in trust, who had no beneficial interest, could not be compelled to enter into any covenant for renewal of the lease, nor to enter into any other than the usual trustee's covenant, that he had done no act to incumber.—**WHELEY v. FRAMPTON (1846)**, 5 Hare, 560; 16 L. J. Ch. 102; 8 L. T. O. S. 292; 10 Jur. 1092; 67 E. R. 1033.**

**Dewson v. St. Clair (1856)**, 14 U. C. R. 97.—**CAN.**

**m. —.]—GARDINER v. WARK (1913)**, 25 W. L. R. 153; 4 W. W. R. 1356; 13 D. L. R. 151; 6 Sask. L. R. 110.—**CAN.**

**n. —.]—Where in a lease there is an option to renew, & no time is specified within which it may be exercised, the person having the option**

may exercise it at any time while he remains tenant of the property unless the landlord calls upon him either to exercise or decline it at an earlier period.—**BAIN v. BARTLETT, BARTLETT v. BAIN**, [1922] N. Z. L. R. 790.—**N.Z.**

**PART IX. SECT. 2, SUB-SECT. 4.**

**o. Assignee of another reversion subsequently acquired by lessor.]—A**

covenant by a middleman, whose lease contained a *talies quates* covenant for renewal by his lessor, to renew a lease as often as his own lease is renewed, or any extended interest granted, does not bind a purchaser from the covenantor in respect of any further interest in the premises acquired by such purchaser.—**CORY v. PASCOE**, [1899] 1 L. R. 125.—**IR.**

## SUB-SECT. 5.—WHO MAY EXERCISE OPTION.

**2181. Assignee of lessee.]—**A. leases land for 21 years, & covenants with the lessee to make to him & to his assigns a good lease for 21 years, to commence after the end of the first term, the lessee makes his extrix. & dies, the extrix. makes her exor. & dies, the first term expires, the exor. of the extrix. being exor. to the first testator, shall have an action of covenant for the second lease, & it shall be assets in his hands.—*CHAPMAN v. DALTON* (1565), 1 Plowd. 284; 75 E. R. 434.

*Annotations:—***Refd.** Shelley's Case (1581), 1 Co. Rep. 93 b; Havergil v. Hare (1616), 3 Bulst. 250. **Mentd.** Windham's Case (1589), 5 Co. Rep. 7 a; Mallory's Case (1601), 5 Co. Rep. 111 b; Hankinson v. Sandlands (1613), 1 Brownl. 121; Hole v. Bradford (1662), 1 Keb. 344; R. v. Beare (1698), 1 Ld. Raym. 414; Wankford v. Wankford (1703), 1 Saik. 299.

**2182. —.]—**An agreement for a lease, & even an option to require a lease or a renewal of a lease, is assignable in equity even although there is no mention of exors., administrators, or assigns (*LINDLEY, L.J.*).—*TOLLURST v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS* (1900), *TOLLURST v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS* (1900) & *IMPERIAL PORTLAND CEMENT CO.*, [1903] A. C. 414; 72 L. J. K. B. 834; 89 L. T. 106; 52 W. R. 143; 19 T. L. R. 677, H. L.

*Annotations:—***Refd.** Dawson v. G. N. & City Ry., [1905] 1 K. B. 260; Kemp v. Baerselman, [1906] 2 K. B. 604; Cooper v. Micklefield Coal & Lime Co., Cooper v. Raynor (1912), 107 L. T. 457; County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251; Whiteley v. Hill, [1918] 2 K. B. 808; Ellis v. Torrington, [1920] 1 K. B. 399. **Mentd.** Fitzroy v. Cave (1905), 93 L. T. 499; Hubbard v. Weldon (1909), 25 T. L. R. 356; Bennett v. White, [1910] 2 K. B. 643; Fratelli Sorrentino v. Buerger, [1915] 1 K. B. 307.

**2183. Representative of lessee—Executor of executrix.]—***CHAPMAN v. DALTON*, No. 2181, *ante*.

**2184. —. Executor.]—***ISTEED v. STONELEY* (1580), 1 And. 82; 123 E. R. 365.

**2185. —.]—***HYDE v. SKINNER*, No. 2231, *post*.

**2186. —.]—***WINGED v. LEFEBURY* (1724), 2 Eq. Cas. Abr. 32; 22 E. R. 28, L. C.

**2187. Purchaser from assignee in bankruptcy.]—**The owner of a long term in land agreed to let it for three years, also, when called upon by the tenant, to grant him a lease for three years, seven years, or the whole term. The tenant continued in the occupation beyond the three years, & became bkpt. The assignee sold the bkpt.'s estate & interest in the leasehold to a purchaser:—**Held:** (1) the option of the tenant to take a lease was not gone at the end of the three years, it passed to the assignee in bkpy., the option had passed to the purchaser.

(2) A covenant against alienation is not a usual covenant.—*BUCKLAND v. PAPILLON* (1866), 2 Ch. App. 67; 36 L. J. Ch. 81; 15 L. T. 378; 12 Jur. N. S. 992; 15 W. R. 92, L. C.

*Annotations:—***As to (1)** *Consd.* Mason v. Schuppisser (1899), 81 L. T. 147; *Itc* Leeds & Batley Breweries & Bradbury's Lease, Bradbury v. Grimble, [1920] 2 Ch. 548; *Mellroy v. Clements* (1923), 67 Sol. Jo. 402. **Refd.** *Tollurst v. Associated Portland Cement Manufacturers* (1900).

## PART IX. SECT. 2, SUB-SECT. 5.

**2181 i. Assignee of lessee.]—***DALTON v. CITY FREEHOLD INVESTMENT CO.* (1888), 9 N. S. W. Eq. 129.—**AUS.**

**2181 ii. —.]—**The assignee of lease, or part thereof, is entitled *pro tanto* to the benefit of a covenant for renewal.—*McVEAN v. WOODKILL* (1844), 2 O. S. 33.—**CAN.**

**2181 iii. —.]—***ROGERS v. NATIONAL DRUG & CHEMICAL CO.* (1911), 18 O. W. R. 686; 2 O. W. N. 763; 23 O. L. R. 234.—**CAN.**

*Tollurst v. Associated Portland Cement Manufacturers* (1900), & *Imperial Portland Cement Co.*, [1903] A. C. 414; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251; *Rider v. Ford*, [1923] 1 Ch. 541.

## SUB-SECT. 6.—FOR WHOSE BENEFIT RENEWAL ENURES.

**2188. Renewal by personal representative—Enures for benefit of estate.]—**Testator devises leaseholds for lives to his daughter F., & the heirs of her body; &, in default of such issue, to A. & her heirs; the daughter being at the time of his death a married woman, & of unsound mind, her husband took out administration to testator, with his will annexed, & as such administrator, renewed the leases & assigned them to a trustee for his own benefit. F. survived her husband:—**Held:** upon the death of F., A. became entitled to the renewed leases.—*FITZROY v. HOWARD* (1828), 3 Russ. 225; 7 L. J. O. S. Ch. 16; 38 E. R. 561, L. C.

*Annotation:—***Mentd.** *Weikall v. Bromie* (1833), 6 Sim. 99.

—.]—*See* EXECUTORS, Vol. XXIV., p. 692, Nos. 7178–7180.

**Renewal by mortgagor or mortgagee.]—***See* MORTGAGE.

**Renewal by partner.]—***See* PARTNERSHIP.

**Renewal by trustee.]—***See* TRUSTS & TRUSTEES.

## SUB-SECT. 7.—FOR WHAT TERM RENEWAL GRANTED.

*See, now*, Law of Property Act, 1925 (c. 20), s. 149 (6).

**2189. Lease for twenty-one years renewable from twenty-one years to twenty-one years till ninety-nine years completed—First twenty-one years excluded.]—**If a lease be made for twenty-one years with a further covenant by the lessor, "that the lessee shall have same for twenty-one years more after the expiration of the term & so from twenty-one years to twenty-one years until ninety-nine years thence next ensuing shall be complete & ended," the first twenty-one years shall not be reckoned part of the ninety-nine years.—*MANCHESTER COLLEGE v. TROTTER* (1679), 2 Lev. 241; 2 Show. 31; 83 E. R. 538.

**2190. No period specified—Twenty-one years or lesser term at option of lessee.]—***HYDE v. SKINNER*, No. 2231, *post*.

**2191. —. Similar term to old lease.]—***Semble:* in an agreement to renew a lease without specifying the duration of it, it will be implied that the new shall be co-extensive in duration with the old lease.—*PRICE v. ASSHETON* (1834), 1 Y. & C. Ex. 82; 4 Y. & C. Ex. 562; 4 L. J. Ex. Eq. 3; 160 E. R. 34, 1131; *subsequent proceedings* (1835), 1 Y. & C. Ex. 441.

*Annotations:—***Consd.** *Lewis v. Stephenson* (1898), 67 L. J. Q. B. 296. **Refd.** *Rickards v. Rickards* (1844), 13 L. J. Ch. 344.

**2181 iv. —.]—***PATERSON'S EXECUTORS v. WEBSTER, STEEL & CO.* (1882), 1 S. C. 350.—**S. AF.**

**p. Lessee—Or person duly authorised.]—**Where a lessee has a right of renewal of his term the right of renewal can only be exercised by the lessee himself, or by some one duly authorised on his behalf.—*BAIN v. BARTLETT, BARTLETT v. BAIN*, [1922] N. Z. L. R. 790.—**N.Z.**

## PART IX. SECT. 2, SUB-SECT. 7.

**2191 i. No period specified—Similar**

*term to old lease.]—**DAWSON v. GRAHAM* (1877), 41 U. C. R. 532.—**CAN.**

**2191 ii. —.]—**A right of renewal in a lease where no term of renewal is specified means *prima facie* a right to renew for the same term as is granted by the original lease.—*PROUDFOOT v. OTAGO HARBOUR BOARD* (1879), O. B. & F. 119.—**N.Z.**

**q. Tenancy for one year with option of lease after that term.]—**An agreement was entered into for a lease of land for one year, the lessee to have the option of continuing to lease the

**Sect. 2.—Covenants and options for renewal: Sub-sects. 7, 8 & 9, A. & B. (a).]**

**2192. Renewal for one life.]**—Premises were demised for three lives & for twenty-one years after the death of the last survivor. The lessor covenanted with the lessee that if he should "lose a life & think proper to have a new life put in, then, within six months after the death of the first life, & so on continuing the term & estate thereby demised" the lessor "would put in a new life":—**Held:** the lessee had power to introduce one new life only, & that one in the place of the first life dropping, but with a new term of twenty-one years, commencing with the death of the survivor of the two survivors & the new life.—**WALMESLEY v. PILKINGTON** (1866), 35 Beav. 362; 55 E. R. 936.

**2193. Life of lessee or such period as he should think fit—Renewal confined to life of lessee.]**—Where a lessor covenanted that upon or at any time before the expiration of the term granted by the lease, he would, at the request of the lessee, his exors., administrators, or assigns, grant a new lease "for & during the life of the lessee or his nominee, or for & during such a period or number of years as the lessee, his exors., administrators, or assigns should think fit." On it appearing that it was the intention of the lessor to renew the lease only for the life of the lessee & that at the time of the execution of the lease he was kept in ignorance of the full effect of the covenant:—**Held:** the lessee could only enforce a renewal for life.—**PRICE v. POWER** (1868), 19 L. T. 442.

**2194. Tenancy for one year with opt. on of lease after that term—Lease for at least one year.]**—A tenant entered into possession of premises under an agreement of tenancy "for a period of twelve months with the option of a lease after the aforesaid time at a rental of £30 per annum":—**Held:** under that agreement the tenant had a right to claim a lease for a further period of at least one year after the expiry of the first twelve months. **Seemle:** he had a right to claim a lease for his life.—**AUSTIN v. NEWHAM**, [1906] 2 K. B. 167; 75 L. J. K. B. 563; 95 L. T. 490, D. C.

#### SUB-SECT. 8.—CONSIDERATION.

See Sect. 3, *post*.

#### SUB-SECT. 9.—PERFORMANCE.

##### A. In General.

**2195. Prejudicial user of land by lessor—Prior to renewal.]**—(1) A. makes a lease for twenty-one years by indenture to B., & covenants at any time during the life of B., upon surrender of his lease, to make a new lease; after the lease, & during the life of B., A. accepts a fine, *sur convenans de droit come ceo*, etc., & by the same fine grants the land to the conusee for eighty years:—**Held:** a breach of covenant, A. had broken his covenant, though no surrender was made by B.

(2) If a man seised of lands in fee, covenants to enfeof J. of them upon request, & afterwards makes a feoffment in fee of the lands, J. shall have an action of covenant without request.

same for six years. The lessee exercised his option of leasing for the longer term:—**Held:** he was entitled to an additional six years.—**SMITH v. BARNITT** (1893), 12 N. Z. L. R. 419.—**N.Z.**

(3) If the term of eighty years were but an interest of a future term, yet B. should have an action of covenant without making any surrender.—**MAIN'S CASE** (1596), 5 Co. Rep. 20 b.; Jenk. 256; 77 E. R. 80; *sub nom.* **MAINE v. SCOT**, Moore, K. B. 452; *sub nom.* **MAYNIE v. SCOT**, Cro. Eliz. 479; *sub nom.* **SCOT v. MAYN**, Cro. Eliz. 449; 2 And. 18.

**Annotations:**—As to (1) **Refd.** **Newton v. Wilmot** (1841), 8 M. & W. 711. As to (2) **Consd.** **Newton v. Wilmot** (1841), 8 M. & W. 711; **Sands v. Clarke** (1849), 8 C. B. 751. **Refd.** **Bradley v. Copley** (1845), 14 L. J. C. P. 222. As to (3) **Consd.** **Sands v. Clarke** (1849), 8 C. B. 751. **Generally, Mentd.** **Luxmore v. Robson** (1818), 1 B. & Ald. 584.

**2196. ———.]**—A lessee of land with covenant for renewal obtained a renewal of the lease. The new lease did not contain the whole of the land demised by the former lease. Prior to renewal the lessor had given the Govt. a licence to execute certain work by which the land demised was injuriously affected:—**Held:** the new lease was a fulfilment of the covenant for renewal, though the subject-matter was not identical, & the right of the lessee to compensation was not affected by the licence given by the lessor.—**A.-G. OF STRAITS SETTLEMENT v. WEMYSS** (1888), 13 App. Cas. 192; 57 L. J. P. C. 62; 58 L. T. 358, P. C.

**Annotations:**—**Mentd.** **Shenton v. Smith**, [1895] A. C. 229; **Mellor v. Walmsley**, [1905] 2 Ch. 164; **A.-G. for Straits Settlements v. Pang Ah Yew**, [1925] A. C. 555.

**2197. Insertion by lessor of own life.]**—If a lease for ninety-nine years determinable on three lives be conveyed in trust for A. for life, & A. covenant to use his utmost endeavours, as often as any of the persons on whose lives the premises are held, shall die, to renew same by purchasing of the lord of the fee a new life in the room of such as shall fail, it is no breach of the covenant, if, upon one of the lives failing he procure a renewal upon his own life.—**SCUDAMORE v. STRATTON** (1709), 1 Bos. & P. 455; 126 E. R. 1007.

**2198. Lease of part of land contained in original lease.]**—**A.-G. OF STRAITS SETTLEMENT v. WEMYSS**, No. 2196, *ante*.

**2199. Demand for renewal by lessor—On whom made.]**—Where the tenant has assigned his whole interest by way of mtge., of which no notice is given to the landlord, but remains in possession, a demand on him to renew is sufficient, & if payment of the fine is unreasonably neglected, neither the mtgor. nor mtgee. can come to equity for relief. The demand ought not to be made, at the option of the landlord, on the tenant or his assign, but on him whom the landlord would, under existing facts, reasonably consider as the person entitled to ask for a renewal (**LORD WENSLEYDALE**).—**GALBRAITH v. COOPER** (1860), 8 H. L. Cas. 315; 11 E. R. 450, H. L.

**2200. Enforcement of performance—Specific performance.]**—A lease contained a covenant by the lessor to grant a further lease, & a stipulation that the lease should be prepared by the lessor's solr. The lessor's solr. raised various untenable objections, & put the lessee to considerable expense. The lessee required the lessor to pay the costs occasioned thereby, & threatened to file a bill for specific performance of the covenant. The lessor then wrote, withdrawing all his objections, but refused to pay the costs occasioned by them. The pltf. filed his bill the day after:—**Held:** deft.'s

#### PART IX. SECT. 2, SUB-SECT. 9.—A.

**2200 i. Enforcement of performance—Specific performance.]**—**POLLEYKETT v. GEORGESEN** (1878), 4 V. L. R. (Eq.) 207.—**AUS.**

**2200 ii. ———.]**—**PURVIS v. HUME** (1856), 3 All. 299.—**CAN.**

**2200 iii. ———.]**—**SEARS v. ST. JOHN CITY** (1889), 18 S. C. R. 702.—**CAN.**

solr. was bound to prepare a proper lease, & deft. was ordered to pay the costs of the suit, & of the dispute occasioned by deft.—*MAPPIN v. SAVORY* (1869), 20 L. T. 777.

**2201. Effect of subsequent notice to determine by lessor.**—By an indenture of lease dated June 12, 1912, certain premises were demised for a term of twenty-one years from Mar. 25, 1910, to deft. at a rent of £65 for the first seven years & of £75 for the last seven years of the term. It was provided that the tenancy should be determinable at the end of the first seven or fourteen years by either party on giving to the other six months' previous notice in writing, expiring at the end of either of such periods of seven or fourteen years, & it was also provided that if the lessee should give six months' notice to the lessor prior to the expiration of the term of twenty-one years that he desired a further lease of the premises for a term of seven years, the lessor would grant a further lease of the premises accordingly, the lease to be in the same form as the existing lease with such modifications as the lessor's solrs. might approve & to be considered as commencing on Mar. 25, 1931, at the rent of £80. By a notice dated Aug. 20, 1923, deft. gave notice to pltf. that he was desirous of exercising his option to have a further term granted to him of seven years, & on Aug. 23, 1923, pltf. gave deft. notice to determine the tenancy as from Mar. 25, 1924. This summons was issued for a declaration that the tenancy created was duly determined on Mar. 25, 1924, by the notice of Aug. 23, 1923, notwithstanding that deft. had by the notice of

Aug. 20, 1923, expressed his desire to have a further lease for the term of seven years from Mar. 25, 1931:—*Held*: the clause in the lease giving the lessee an option to have a further term of seven years was subject to the operation of the clause giving either party power to determine the term at the end of the first seven or fourteen years, & it would not be a reasonable construction that though the lessor had determined the term in 1924 the lessee still had a right to demand a reversionary lease for seven years commencing from Mar. 25, 1931.—*STEWART v. MASSETT* (1924), 132 L. T. 301; 69 Sol. Jo. 72.

## B. Observance of Conditions by Lessee.

### (a) In General.

**2202. General rule.**—A lessee had under his lease an option of renewal if he performed & observed all the covenants contained in the lease. The lessee was guilty of divers breaches of his covenants:—*Held*: the performance of the covenants was a condition precedent to the lessee's right to a renewal of the lease & the condition precedent not having been performed, he was not entitled to a renewal.—*GREVILLE v. PARKER*, [1910] A. C. 335; 79 L. J. P. C. 86; 102 L. T. 380; 26 T. L. R. 375, P. C.

**2203. Breach of covenants entailing forfeiture—Right of lessor to refuse renewal.**—A. granted a lease for twenty-one years to B. with a proviso determining the lease & giving A. a right of re-entry on non-performance of any of the covenants in the lease, & A. covenanted that at the end of the

**2200 iv.** —.—J.—On service of notice of desire to renew, a covenant to renew ceases to be merely unilateral, & can be enforced in a suit for specific performance by the lessor or his legal representatives.—*DAWSON v. LEPPER* (1892), 29 L. R. Ir. 211.—*IR.*

**r.** —.—*Where term severed.*—A lease contained a covenant for renewal. Part of the leasehold premises were sold by the lessee & the balance became vested in appts. who gave the required notice for renewal as to their portion:—*Held*: the covenant could only be enforced for the whole of the lands & not for the part held by appts.—*ALEXANDER BROWN MILLING & ELEVATOR CO. v. CANADIAN PACIFIC RY. CO.* (1910), 30 C. L. T. 335; 42 S. C. R. 407.—*CAN.*

**t. Covenant to renew at rent to be arranged—No agreement as to rent.**—*EUUNDIA FARMERS CO-OPERATIVE SOCIETY, LTD. v. MATTISKE*, [1920] S. A. L. R. 399.—*AUS.*

**a.** —.—J.—Pltf. granted to the deft. a lease of premises for five years, with an option of renewal for a further term of five years "at a rental to be agreed upon by the lessor":—*Held*: no contractual obligation at all attached to the lessor in regard to renewal, the promise being illusory; & there was no implied term that in the absence of agreement the old rental should stand unaffected on the exercise by the lessee of the option, or that, on such exercise, the lessee should be under obligation to pay a rental which the ct. should fix as reasonable or which the ct. should fix as that which the lessor, acting *bona fide*, would, or ought to, have agreed to.—*HEATHIE v. FINE*, [1925] V. L. R. 363; 47 A. L. T. 19; 31 Argus L. R. 331.—*AUS.*

**b. Covenant to renew or pay for improvements.**—Where the lessor covenants for a renewal of the term, or in default for payment for improvements, the option rests with the lessor either to renew or pay for the improve-

ments; & the lessee cannot compel a specific performance of the contract to renew.—*HUTCHINSON v. BOULTON* (1852), 3 Gr. 391.—*CAN.*

**c.** —.—J.—*NUDELL v. WILLIAMS* (1865), 15 C. P. 348.—*CAN.*

**d.** —.—J.—*SEARS v. ST. JOHN CITY* (1889), 18 S. C. R. 702.—*CAN.*

**e.** —.—J.—*WARD v. TORONTO CITY* (1899), 26 A. C. 225.—*CAN.*

**f.** —.—J.—*WARD v. HALL* (1899), 34 N. B. R. 600.—*CAN.*

**g.** —.—J.—*McGOLDRICK v. R.* (1902), 23 C. L. T. 99; 8 Exch. C. R. 169.—*CAN.*

**h.** —.—J.—*DALTON v. TORONTO CITY* (1906), 12 O. L. R. 582; 8 O. W. R. 151.—*CAN.*

**k.** —.—J.—*PORTER v. PURDY* (1909), 41 S. C. R. 471; 6 E. L. R. 440.—*CAN.*

**l.** —.—J.—*R. v. ST. CATHARINES HYDRAULIC CO.* (1910), 30 C. L. T. 1038.—*CAN.*

**m.** —.—J.—*ST. JOHN CITY v. GORDON, ST. JOHN CITY v. QUINLAN* (1912), 32 C. L. T. 599; 46 S. C. R. 101.—*CAN.*

**n.** —.—J.—A lease renewable on terms to be agreed upon provided that in case the renewal was not granted the lessor was to pay the lessee the cost of alterations. The parties failed to agree on terms of renewal & the lessee claimed for the cost of alterations made:—*Held*: he was entitled to recover.—*BURNS (P.) & CO., LTD. v. GORSON*, [1919] 1 W. W. R. 818.—*CAN.*

**o. Impossibility of performance—Lack of title in lessor.**—*WADE v. BRANTFORD TOWN CORPN.* (1860), 19 U. C. R. 207.—*CAN.*

**p.** —.—J.—*VAN BROCKLIN v. BRANTFORD TOWN CORPN.* (1861), 20 U. C. R. 347.—*CAN.*

**q. What amounts to exercise of option—Keys not returned to lessor—Sub-tenant of lessee continuing in possession.**—Upon the expiry of a

parol lease for a term certain, with an option in the lessee to renew for a fixed period, the facts that the keys of the demised premises were not delivered by the lessee to the lessor for two or three days after the expiry of the term, & that a sub-tenant of the lessee continued thereafter in possession of a portion of the premises, are not sufficient to constitute an exercise by the lessee of their option to renew.—*LINDSAY v. ROBERTSON* (1899), 30 O. R. 229.—*CAN.*

**aa. Necessity for notice.**—Under a covenant in a lease that the lessor would, at the expiration of the term thereby granted, grant another lease, "provided the lessee should desire to take a further lease of the premises," no notice or demand by the lessee is necessary. The existence in fact of a desire for the further lease is all that is essential, & that desire may be indicated by conduct & circumstances.—*BREWSTER v. CONGER* (1900), 27 A. R. 10.—*CAN.*

**bb.** —.—J.—*HOADLEY v. BAYNTUM* (1915), 31 W. L. R. 751.—*CAN.*

**cc. Effect of subsequent attempt to cancel.**—*YUKON TRUST CO. v. MURPHY* (1905), 2 W. L. R. 298.—*CAN.*

**dd. Whether lessee entitled to have lands encroached upon included in new lease.**—*Held*: the lessee could not claim to have lands encroached upon included in the new lease to be given him under the covenant for renewal, for under that covenant he would only be entitled to a lease of the lands actually comprised in the old lease.—*TORONTO CITY v. WARD* (1908), 18 O. L. R. 214; 13 O. W. R. 312.—*CAN.*

## PART IX. SECT. 2, SUB-SECT. 9.—B. (a).

**2203 i. Breach of covenants entailing forfeiture—Right of lessor to refuse renewal.**—A breach of a covenant in a lease not to assign without leave causes a forfeiture of the right to renewal.—

**Sect. 2.—Covenants and options for renewal: Subsect. 9, B. (a) & (b) i.]**

term, if it should not be sooner determined by B.'s acts or defaults, he would grant to B. a lease for a further term of fourteen years. B. paid all his rent & continued in possession after the term had expired. A. then brought an ejectment against him for breaches of covenant during the term. B. filed a bill for a specific performance of the covenant to renew, & for an injunction to restrain the action. A. in his answer set up the breaches of covenant, & denied having had notice of them till after the end of the term. Motion for the injunction refused.

If during the existence of a lease, such a breach of covenant is committed by the tenant, as that a ct. of equity would not have interfered to prevent the landlord from taking advantage of the forfeiture of the lease, had he known of the breach & proceeded to determine the lease, he ought not to be placed in a worse situation after the expiration of the term than he would have been in had he known of the breach & availed himself of it before the term expired (*SHADWELL, V. C.*).—*THOMPSON v. GUYON* (1831), 5 Sim. 65; 58 E. R. 262.

**Annotations:—***Expld.* Job v. Banister (1856), 2 K. & J. 374. *Refd.* Bowser v. Colby (1841), 1 Hare, 109; Algar v. Murrell (1842), 6 Jur. 775.

**2204. Failure to work mines.]—**By release of Oct. 6, 1791, reciting that B., X., & Y. (X. & Y. not being parties to the deed) had proposed as co-partners to accept a lease of the premises, for the purpose of getting the minerals thereunder, & making iron thereon; A. a mtgee., & B. the owner of the equity of redemption, conveyed the premises with the mines, etc., to C. upon trust, to demise same to B., X. & Y. for forty-two years, & upon further trust, at the request of the lessees, to execute a further lease for twenty-one years, & upon the execution of the lease to reconvey to A. & B. By a deed of Oct. 7, C. demised the premises to B., X. & Y. for forty-two years, reserving as the surface rent, £100, & certain royalties in respect of the minerals; & C. covenanted with the lessees to execute a further lease for twenty-one years; & the lessees covenanted among other things, "that the mines should be fairly got & regularly worked to as little disadvantage as possible to C., his exors., etc." By a deed of Oct. 8, C. conveyed to A. the premises & the accruing rents, subject to the lease, & reserving to C. a power to grant the further lease. In 1796, B. conveyed the reversion in fee in the mines to M. & T. as tenants in common. The mines were worked & royalties paid till 1815, at which time it was admitted the mines were "drowned out." The surface was occupied by the ptfs. with iron works, & the rent of £100 regularly paid to the parties entitled up to the present time. On June 21, 1833, the lessees applied to M. & T. to concur in the grant of the further lease; & on July 3, M. & T. declined to comply, denying the right of the lessees. On June 27, 1836, the assignees of the lease filed their bill, stating the trust in C., & the covenant to renew, & praying a

specific performance of the covenant as to the mines:—*Held*: (1) the laches of ptfs. in filing their bill would, if the case depended on the covenant alone, have been a bar to the relief; (2) under the covenant, "that the mines should be fairly got & regularly worked," etc., the lessees were bound to continue the working, if practicable; & an issue must be directed, as to whether the "drowning out" of the mines, or their continuance in that state, was by any default of ptfs. *Semble*: if it were not, the ct. would not refuse specific performance.—*WALKER v. JEFFREYS* (1842), 1 Hare, 341; 11 L. J. Ch. 209; 6 Jur. 336; 60 E. R. 1064.

**Annotations:—***As to* (1) *Refd.* Southcomb v. Exeter (Bp.) (1847), 6 Hare, 213; Parkin v. Thorold (1852), 16 Beav. 59; Bastin v. Bidwell (1881), 44 L. T. 742. *As to* (2) *Consd.* Watson v. Charlesworth, [1905] 1 K. B. 74. *Refd.* Macbride v. Weekes (1856), 22 Beav. 533. *Generally*, *Mentd.* Kimber v. Ensworth (1842), 1 Hare, 293.

**2205. Form of notice to renew—Notice to be in writing.]—**By memorandum in writing, A. granted to B. a lease for the term of three years, & agreed, upon B. giving him notice in writing within three months after the expiration of the lease, to grant him a new lease for a further term. At the expiration of the three years, B. applied to A., but whether or not in writing did not appear, for a new lease, & the solrs. of A. & B. prepared a draft of the intended lease. In consequence of some difference as to the terms, B. refused to accept the lease. On bill filed by A. for specific performance:—*Held*: B., having by his answer admitted the demand of a lease, but not having expressly set up Stat. Frauds, was bound to accept a lease, although his demand might not have been in writing.—*BEATSON v. NICHOLSON* (1842), 6 Jur. 620.

**2206. Failure to keep in repair.]—**The landlord of a workshop, which he held under a lease, agreed in writing to underlet it at a yearly rent, with an option to the tenant to take an underlease upon the same terms for twenty-one years from the previous Lady Day. The tenant continued in possession under this agreement for four years, when he received notice to quit. He then applied to his landlord for a lease for twenty-one years, according to the agreement. Some months afterwards the landlord obtained possession of the premises under a warrant of possession from a district ct. The tenant filed a bill against the landlord for specific performance & an injunction. It appeared, at the hearing, that the tenant had not kept the premises in repair. The ct. dismissed the bill with costs, & expressed a doubt whether ptff. had not, by his delay alone, lost his option.—*NUNN v. TRUSCOTT* (1849), 3 De G. & Sm. 304; 12 L. T. O. S. 397; 13 Jur. 114; 64 E. R. 490.

**2207. —.]—**In a lease for twenty-one years was contained a covenant, on the part of the lessor, upon the expiration of the term, provided all arrears of rent should then have been paid, & all the covenants performed, at the request in writing of the lessee, to grant a lease for a further term of twenty-one years, & so from time to time upon the expiration of every subsequent term of

*LOVELESS v. FITZGERALD* (1909), 42 S. C. R. 254.—**CAN.**

**2203 ii. —.]—***NANKIN v. STARLAND, LTD.* (1910), 15 W. L. R. 529.—**CAN.**

*c. Form of notice to renew.]—**GREENWOOD v. BANCROFT* (1912), 20 W. L. R. 816; 2 D. L. R. 417.—**CAN.**

*d. —.]—**BAIN v. BARTLETT, BARTLETT v. BAIN*, [1922] N. Z. L. R.

790.—**N.Z.**

*e. Failure to perform condition precedent.]—*A lease contained a covenant for renewal in consideration of the lessee erecting substantial stores in the rear of house leased:—*Held*: the performance of the covenant to build was a condition precedent to the lessees having a renewal.—*FLOOD v. CHANCEY* (1889), 7 Nfld. L. R. 404.—**NFLD.**

*f. —.]—*A lease contained a

covenant for renewal on notice "if the lessees shall have duly & punctually observed & performed all the covenants of the lease." Rent had been paid irregularly, but was fully paid at the time the notice of desire to renew was given:—*Held*: the lessee, having failed to comply with the condition precedent of duly & punctually paying the rent at the times specified, had lost his right to call on the lessor to

twenty-one years, provided such request in writing should be given. The lease contained covenants to repair & insure. At the expiration of the first term, a renewed lease was granted for twenty-one years, with a similar covenant for renewal. Upon the expiration of this second term, some buildings erected by the lessee were out of repair & required to be rebuilt; & during the term the property had been left for four days uninsured. All arrears of rent were paid; & a request was made to the lessor to grant a renewed lease, but this was refused. In a suit by the lessee for specific performance of the covenant for renewal:—*Held*: in consequence of the breach of the covenant to repair, the lessee was not entitled to a renewal of the lease.—*JOB v. BANISTER* (1856), 26 L. J. Ch. 125; 28 L. T. O. S. 242; 21 J. P. 86; 3 Jur. N. S. 93; 5 W. R. 177, L. C.; *affg.*, 2 K. & J. 374.

*Annotations*:—*Expld.* *Finch v. Underwood* (1875), 33 L. T. 634. *Refd.* *Bastin v. Bidwell* (1881), 18 Ch. D. 238.

**2208.** — *Breach not serious.* — *FINCH v. UNDERWOOD*, No. 2238, *post*.

**2209.** — *—* — *—* — The lease of a house contained a covenant by the lessee to pay the rent & keep the premises in repair, & to paint the outside & inside at certain fixed periods; & the lessor covenanted that the lessee should be entitled, on giving six months' notice before the end of the term, to have a further lease for twenty-one years "upon paying the rent & performing & observing the covenants" in his lease. The lessee applied for a renewal of his lease, but the lessor refused to grant such renewal, on the ground that the covenants had not been fulfilled either at the date of the six months' notice or at its expiration:—*Held*: the performance of the covenants was a condition precedent to the lessee's privilege of having a renewed lease, & the requisite painting & repairs not having been completed either when the six months' notice was given or when it expired the lessee was not entitled to a renewal of his lease. *BASTIN v. BIDWELL* (1881), 18 Ch. D. 238; 44 L. T. 742.

*Annotation*:—*Refd.* *Starkey v. Barton*, [1909] 1 Ch. 284.

#### (b) Application for Renewal within Time Mentioned.

##### i. In General.

**2210. Application must be made within time—Application to be made at stated periods.** — *A. & B. covenant in a lease for sixty-one years, "That at any time within one year after the expiration of twenty years of the term of sixty-one years, upon the request of the lessee, & his paying £6 to the lessors, they would execute another lease of the premises unto the lessee, for & during the further term of twenty years to commence from & after the expiration of the term of sixty-one years, etc.; & so in like manner at the end & expiration of every twenty years during the term of sixty-one years, for the like consideration, & upon the like request, would execute another lease for the further term of twenty years, to commence at & from the expiration of the term then last before granted, etc."* Under this covenant the lessee cannot claim a further term of twenty years, at the expiration of the last term of twenty years in the lease, if he has omitted to claim a further term at the end of the first & second twenty years in the lease.—*RUBERY v. JERVOISE* (1786), 1 Term Rep. 229; 99 E. R. 1067.

*Annotation*:—*Refd.* *Maxwell v. Ward* (1824) 13 Price, 671.

**2211.** — *—* — *—* — Where the lessee, or those claiming under him, continued in possession after the first terms of fourteen years each had expired & then before the expiration of the third fourteen years desired to renew:—*Held*: the lessee was not precluded, by his not giving notice earlier, from claiming his right to have a renewed lease in the terms of the covenant.—*BOGG v. MIDLAND RY. CO.* (1867), L. R. 4 Eq. 310; 36 L. J. Ch. 440; 16 L. T. 113.

**2212.** — *Relief in equity.* — Lease for twenty-one years, at £1 rent, with covenant to tenants to renew from twenty-one years to twenty-one years, to make up ninety-nine years. At the expiration of the first term, there being an arrear of rent due, & no application for renewal, lessor brought an ejectment & obtained judgment, & possession; bill filed for a renewal, accounting for the delay, on payment of the arrear & interest it was decreed. — *RAWSTORNE v. BENTLEY* (1793), 4 Bro. C. C. 415; 29 E. R. 966.

**2213.** — *—* — *—* — *ALLEN v. HILTON* (1738), 1 Fonblanque's Treatise of Equity, 5th ed. 432, n., L. C.

*Annotation*:—*Consd.* *London City v. Mitford* (1807), 14 Ves. 41.

**2214.** — *—* — *—* — (1) Covenant for perpetual renewal. Specific performance refused under circumstances: Laches; & alterations of the property, so that it could not be enjoyed according to the stipulations.

Upon the question whether this is a covenant under the qualifications belonging to it for perpetual renewal the etc., whatever might be its inclination upon ambiguous words, would not be justified in saying this is not clearly, providing the terms are all properly complied with, a covenant for perpetual renewal, in terms the most express (*LORD ELDON, C.*).

(2) I shall not notice the cases further than by observing, that there is a great distinction between this and the cases upon leases for lives; & that where there has been default of this kind in making a request, unless it has been excused by circumstances, there is no authority for decreeing a specific performance; & in one case, *Allen v. Hilton*, No. 2213, *ante*, the want of such request prevented it; admitting that great stress was in that instance laid upon the nature of the subject demised; & if the general rule is: that the request is not of the essence of the contract, the nature of the subject, especially a colliery, might make a difference; for it is most material to the lessor to know three months before the expiration of the lease whether the tenant is to continue (*LORD ELDON, C.*). — *LONDON (CITY) v. MITFORD* (1807), 14 Ves. 41; 33 E. R. 437, L. C.

*Annotation*:—*As to* (2) *Consd.* *Nicholson v. Smith* (1882), 22 Ch. D. 610.

**2215.** — *—* — *—* — A lease was declared to commence "as to the houses & grass at Whitsunday, & as to the arable land, at the separation of the crop from the ground." It was to last for nineteen years, perpetually renewable on requisition, to be made twelve months before its expiration:—*Held*: the expiration of the lease was at Whitsunday, 1861; the requisition for renewal ought to have been made at or prior to Whitsunday, 1860; & consequently a requisition postponed till Aug. 1, 1860, though before "the separation of the crop from the ground," was too late.

renew the lease.—*BIRCH v. PROUSE*, [1922] N. Z. L. R. 913.—*N.Z.*

*g. Payment of collateral debts—Whether lessor may demand.*—Where there is a lease with covenant for re-

newal, the landlord cannot insist that the tenant shall pay collateral debts as a condition of granting a renewal.—*FITZGERALD v. CAREW* (1839), 1 E. R. 346.—*IR.*

#### PART IX. SECT. 2. SUB-SECT. 9.—B. (b) i.

*h. Application not made within time—Holding over must be with lessor's permission.*—*GUARDIAN REALTY CO.*

**Sect. 2.—Covenants and options for renewal: Sub-sect. 9, B. (b) i. & ii.]**

The lease, if its expiration were at the separation of the crops, would not have a certain & definite termination, but separate endings, as to different & unknown portions of the arable lands at different & uncertain periods; & consequently there would be no possibility of computing either the beginning or the ending of the last year, & no certainty as to the day when the notice of renewal ought to be given, or when it would expire (LORD WESTBURY, C.).

Looking at the object of this provision, that the owner should renew on a demand, giving twelve months' time before the expiry of the term, I cannot feel a doubt that the true meaning is, that the landlord should have twelve months to look out for another tenant, to whom he might give possession of the house & grass at Whitsunday, & the arable when the previous crop is taken away (LORD WENSLEYDALE).

It appears to me that the term of nineteen years expired at Whitsunday, 1861; that the period between Whitsunday & the separation of the crop from the ground was not a continuance of the term, but only a continuance of the possession (LORD CHILMSFORD.).—WIGHT v. HOPE TOWN (EARL) (1864), 4 Macq. 729, H. L.

*Annotation:—*Reid. Black v. Clay, [1894] A. C. 368.

**2216. — Informal notice sufficient.]—**A lease of household property was granted in the year 1818 to the trustees of an insurance co. for twenty-one years at a rent of £100, with a covenant that the lessor, his heirs or assigns, could from time to time, at any time before the expiration of the term, & also before the expiration of every succeeding term to be granted by every future or renewed lease, whenever required by the lessees or the person interested in the term, or any succeeding term, & upon payment of a fine or premium of £1,000, grant a renewed lease for twenty-one years, & in every such new lease there should be a similar covenant for renewal at or before the end of every twenty-one years, it being the intention of the parties that this lease should be renewable for ever at the option of the lessees, their exors., administrators, or assigns; & there was a covenant by the lessees that in case the option to renew was not exercised they would before the expiration of the term rebuild or reinstate the buildings & premises as a dwelling-house. There were two renewals of the lease, one in 1839 & one in 1860, which last lease expired on June 24, 1881. The persons then entitled under the original lessor were G., who was tenant for life of a moiety of the property, & three trustees, of whom G. was one, of the entirety subject to the life interest. Under arrangements made by the insurance co. this lease with other property was vested in five trustees upon trust to indemnify a certain class of stockholders & subject thereto for the co. One H. was secretary to these trustees & also to the co., & it was his duty to attend to the renewal of the lease. On June 23, 1881, G. gave notice to H. that the lease would expire on the following day. H. answered that the directors of the co. "would of course renew the lease." Subsequently renewal was refused. In an action for specific performance:—*Held*: it was not necessary for the lessees to pay the fine of £1,000 or execute a new lease before the expiration of the term, but it was

necessary that notice of an intention to renew should be given before the end of the term; & the informal notice by H. to G. was sufficient. Specific performance decreed, with payment of the premium & interest at £5 per cent. from the end of the prior lease.—NICHOLSON v. SMITH (1882), 22 Ch. D. 640; 52 L. J. Ch. 191; 47 L. T. 650; 31 W. R. 471.

**ii. Leases for Lives.**

*See, now, Law of Property Act, 1925 (c. 20), s. 149 (6).*

**2217. Wilful concealment of death of one life.]—**Where a lessee wilfully conceals the death of any of the *cestuis que vie*, & acts under such concealment for his own advantage, the lessor is not obliged to renew, but may take advantage of the forfeiture, & enter upon & hold the estate.—PENDRED v. GRIFFITH (1744), 1 Bro. Parl. Cas. 314; 1 E. R. 590, H. L.

**2218. Failure to apply on death of life—Application on death of second life.]—**Under a covenant in a corp'n. lease to renew, upon the falling in of one life for ever, there is no equity to extend it to the case where two are suffered to fall in, although a compensation is offered.—BAXLEY v. LEOMINSTER CORPN. (1792), 3 Bro. C. C. 529; 1 Ves. 476; 29 E. R. 683, L. C.

*Annotations:—*Apld. Eaton v. Lyon (1798), 3 Ves. 690. *Consd.* Maxwell v. Ward (1824), 1 McCle. 458.

**2219. — — — ]—**In a lease for a term of years determinable on the deaths of three persons, it was covenanted that on the death of either of the lives, the lessee should, within twelve months, renew, & pay a fine of nine guineas; & each party bound himself unto the other in a penalty of eighteen guineas, to renew, & to grant & take the new lease respectively; two of the lives died before the lessee made his application to renew, when he offered to pay the fines & a penalty, but the owner of the land refused to renew:—*Held*: (1) no accident will entitle a party to renew, unless it could not have been avoided by reasonable diligence; (2) the penalty did not give an option to the lessee, & a direction given by a former owner in his will to renew, only left the trustees to do what testator himself would have done; (3) if the lessee omit to renew on the death of the first life, he is not entitled to renew on the death of the second life.—REID v. BIAGRAVE (1831), 9 L. J. O. S. Ch. 245.

**2220. — — — ]—**A lessor demised hereditaments to the lessee, his heirs & assigns, for the natural lives of the lessee & two other persons & the longest liver of them, with a covenant that the lessor, his heirs & assigns (upon the lessee, his heirs or assigns "surrendering this present demise as hereinafter mentioned"), should at any time thereafter at the request of the lessee, his heirs or assigns, "as often as one or two life or lives of & in the hereditaments" should drop & be determined, renew & grant a further term "for any other life or two lives of any other person or persons to be nominated by the lessee, his heirs or assigns, in the stead of the person's life or lives so dropping or determining," the lessee, his heirs or assigns, paying to the lessor, his heirs or assigns, "for every such renewal for every life or lives of such person or persons so to be renewed as aforesaid the sum of 40s. only, & at the same time surrendering this present demise to be cancelled":—

OF CANADA, LTD. v. STARK (JOHN) & CO. (1922), 70 D. L. R. 333; 51 O. L. R. 551; *affd.* (1922), 70 D. L. R. 340.—CAN.

**PART IX. SECT. 2, SUB-SECT. 9.—**  
**B. (b) ii.**

**2223 i. Failure to apply on death of life—Whether relieved in equity.]—**

MOUNTNORRIS (EARL) v. WHITE (1814), 2 Dow. 459; 3 E. R. 931.—IR.

**2223 ii. — — — ]—**PALMERSTON (LORD) v. DUBLIN CORPN. (1831), Lyne

**Held**: upon the true construction of the covenant the right of renewal was neither perpetual nor limited to one renewal for not more than two new lives, but was a right of renewal as often as any of the three original lives should drop, so that any such renewal might take place either on the dropping of any one of the three lives, or after the dropping of any two of them, as the lessee might from time to time request.

(2) There is no legal presumption against a right of perpetual renewal, but the burden of proof is on any one claiming such a right, which will not be inferred from equivocal expressions fairly capable of another construction.—**SWINBURNE v. MILBURN** (1884), 9 App. Cas. 844; 51 L. J. Q. B. 6; 52 L. T. 222; 33 W. R. 325, H. L.

**Annotations**:—*As to* (1) **Refd.** *Wynn v. Conway Corpn.*, [1914] 2 Ch. 705; *Batchelor v. Murphy*, [1925] Ch. 220. *As to* (2) **Consd.** *Wynn v. Conway Corpn.*, [1914] 2 Ch. 705. **Refd.** *Sherwood v. Tucker*, [1924] 2 Ch. 440.

**2221. — Ignorance of death of life.**—The assignee of a lease for lives, which contained a covenant for renewal upon the dropping of any life, provided application were made within six months, having omitted, upon the death of one of the *cœtuis que vie*, to apply for a renewal within the six months, filed his bill praying relief, upon the ground that he did not, within the six months, know that the person was dead, or that the deceased person was one of the *cœtuis que vie* named in the lease. The bill was dismissed with costs; because *pltf.* might have known the facts, if he had used reasonable diligence, & acted with ordinary prudence.—**HARRIES v. BRYANT** (1827), 4 Russ. 89; 38 E. R. 738.

**2222. — Whether relieved in equity—Slight circumstances.**—Where a lessor covenants for the perpetual renewal of a lease, upon the lessee's naming a new life, & paying a fine within a certain time after the death of any of the *cœtuis que vie*; a *ct.* of equity will, upon slight circumstances, relieve the lessee against a forfeiture, for not literally complying with the terms of the covenant.—**ROSS (EARL) v. WORSOP** (1740), 1 Bro. Parl. Cas. 281; 1 E. R. 568, H. L.

**2223. —**—**BATEMAN v. MURRAY** (1779), 5 Bro. Parl. Cas. 20; 2 E. R. 506, H. L.

**Annotations**:—**Consd.** *Rawstone v. Bentley* (1793), 4 Bro. C. C. 415; *Jackson v. Saunders* (1814), 2 Dow, 437; **Refd.** *Baynham v. Guy's Hospital* (1796), 3 Ves. 295; *Barrett v. Burke* (1817), 5 Dow, 1.

**2224. — Laches.**—**BAYNHAM v. GUY'S HOSPITAL**, No. 2243, *post*.

**2225. —**—**Construction of a covenant for a renewal.**

At law a covenant must be strictly & literally performed: in equity it must be really & substantially performed according to the true intent & meaning of the parties, so far as circumstances will admit; but if by unavoidable accident, if by fraud, by surprise or ignorance not wilful, parties may have been prevented from executing it literally a *ct.* of equity will interfere, & upon compensation being made, the party having done everything in his power will give relief (**ARDEN, M.R.**).—**EATON v. LYON** (1798), 3 Ves. 690; 30 E. R. 1223.

**Annotations**:—**Apld.** *Maxwell v. Ward* (1824), *McCle.* 458. **Refd.** *Davis v. West* (1806), 12 Ves. 475; *Sanders v. Pope* (1806), 12 Ves. 282; *Reynolds v. Pitt* (1812), 19 Ves. 134; *Howard v. Fanshawe* (1895), 64 L. J. Ch. 666. **Mentd.** *Doe d. Jersey v. Smith* (1819), 1 Brod. & Bing. 97.

**2226. —**—**Demand for fines made under Tenantry Act, 1780 (c. 30), on Oct. 6, 1800,**

after all the lives had dropped, one in 1789, another in 1791, & the last in Aug. 1800; & repeated applications since 1798 for payment, & no tender till Mar. 1801, after ejection brought by the landlord:—**Held**: the tenant had forfeited his right to renewal; the offer to pay & renew being considered, in the circumstances, as delayed for an unreasonable time.—**JACKSON v. SAUNDERS** (1814), 2 Dow, 437; 3 E. R. 923, H. L. **Annotations**:—**Refd.** *Barrett v. Burke* (1817), 5 Dow, 1; *Galbraith v. Cooper* (1860), 8 H. L. Cas. 315; *Aldworth v. Allen* (1865), 11 H. L. Cas. 549.

**2227. —**—**Where on the dropping of one of the lives in a lease for three lives with a covenant for perpetual renewal repeated applications were made to the tenant to renew according to his covenant particularly in 1798 & 1796, & he made no offer to renew till 1804 or 1805, when some conversations took place respecting a renewal upon the tenants relinquishing a suit in equity which he was carrying on against his landlord, but which conversations ended without anything being done, & the landlord refused to renew:—Held**: the tenant's right to a renewal was forfeited & the case was not one where relief could be granted under Tenantry Act, 1780 (c. 30).

(2) The character of a general agent is sufficient to authorise him to demand & receive the fines, payable on renewal of a lease.—**MOUNTNOURIS (EARL) v. WHITE** (1814), 2 Dow, 459; 3 E. R. 931, H. L.

**Annotations**:—*As to* (1) **Distd.** *Galbraith v. Cooper* (1860), 8 H. L. Cas. 316. **Refd.** *Jackson v. Saunders* (1814), 2 Dow, 437.

**2228. —**—**A lease for lives of lands in Ireland, renewable for ever, is not absolutely forfeited by extinction of all the lives & neglect to pay the fines for renewal, even after notice from the lessor. Under particular circumstances, as in the following case, the right of renewal may still exist & be enforced.**

In a case where A. the heir of the lessee, having such right, had entered into an agreement with B. respecting an independent lease of the lands held under the renewable lease by the ancestor of A. which independent lease B. had obtained from the landlord when in a state of intoxication, & by circumvention:—**Held**: the heir of A. & purchasers for valuable consideration, claiming under him, were entitled in equity to the benefit of the agreement between B. & A., & the heir of the landlord (lessor) was entitled to the benefit of the same agreement, so far as B. took an interest.—**BUTLER v. MULVHILL** (1819), 1 Bli. 137; 4 E. R. 49, H. L.

**2229. — Ignorance of rights.**—Ignorance of a party's own rights, or of instruments in his possession or power, in no way occasioned by the adverse party, cannot excuse a non-performance of anything incumbent on that party to perform.

Covenant in a lease for perpetual renewal, upon notice within one year next after the death of any, or either of the life or lives; informal notice about five years after the dropping of the first life, with an allegation of accident, & ignorance of rights, & a regular application after the determination of the second & third lives, both within one year:—**Held**: the lessee not entitled to a renewed lease determinable on either three, or two lives, with a similar covenant, but bill retained for a year with liberty to bring an action at law.—**MAXWELL v.**

on Leases for Lives, App. Case 20, p. lxxiv.—**IR.**

m. —.—**BALDWIN v. BRIDGES**

(1835), L. & G. temp. Plunk. 408.—**IR.**  
n. *Application within six months of death of life.*—**HUSSEY v. DOMVILLE** (No. 2), [1903] 1 I. R. 265.—**IR.**

o. *Formal renewal unnecessary—Where provision for nomination.*—**DOMVILLE v. CALLWELL**, [1907] 2 I. R. 617.—**IR.**

**Sect. 2.—Covenants and options for renewal: Sub-sect. 9, B. (b) ii. & iii.; sub-sects. 10 & 11, A.]**

WARD (1824), M'Cle. 458; 13 Price, 674; 148 E. R. 192.

**Payment of fines on renewal.**—See Sect. 4, *post*.

**iii. Waiver of Condition.**

Waiver, generally, see Part XXIV., Sect. 1, sub-sect. 5, *post*.

**2230. Suit pending to determine whether forfeiture incurred—Omission by lessee to give notice of renewal.**—T. a tenant under a lease for nineteen years perpetually renewable on twelve months' previous notice before the expiration of each term, instituted a suit to compel L., the landlord, to renew from 1842 to 1861. In defence L. pleaded that the lease had been forfeited for breach of covenants. The suit, however, was allowed to stand still, & the parties then began to negotiate about a draft of a renewal, L. proposing alterations & threatening, if they were not accepted, he would insist on his original defence of forfeiture. Pending these negotiations, & the delay not being caused by T., the time arrived for T. giving notice of renewal of another term from 1861 to 1880, which T. did not give:—*Held*: while the *lis pendens* as to the existence of the former lease existed, T. was excused from making demand for a further renewal, & had not lost his right of renewal, it being inequitable in L. to insist on compliance with a covenant of which he denied the existence. HUNTER v. HOPKINSON (EARL) (1865), 13 L. T. 130; 29 J. P. 727, H. L.

**SUB-SECT. 10.—RENEWAL ON SAME TERMS.**

**2231. Whether covenant for further renewal included.**—(1) Lessor covenanted to renew the lease at the request of the lessee within the term; lessee did not request, but exors. did within the term; lessor was compellable to renew.

The exors. of every person are implied in himself, & bound without naming; & the meaning of this covenant was to the end the lessee might be reimbursed the money which he had laid out in the improvement of the premises, for which reason it is immaterial whether testator or the exors. required the renewal of the lease, it need not be personal (LORD MACCLESFIELD, C.).

(2) The request for the making of a new lease for fifty years is too much; for it might have been as well for a hundred or two hundred years; but the usual term for leasing being for twenty-one years let deft. demise the premises to pltf. for twenty-one years or for any lesser term as pltf. shall elect (LORD MACCLESFIELD, C.).

(3) Though the lease is to be made on the same covenants, yet that shall not take in a covenant for the renewing this new lease, forasmuch as then

the lease would never be at an end (LORD MACCLESFIELD, C.).—HYDE v. SKINNER (1723), 2 P. Wms. 196; 24 E. R. 697, L. C.

*Annotations*:—As to (1) *Reffd.* Wills v. Murray (1850), 4 Exch. 843; Muller v. Trafford, [1901] 1 Ch. 54. As to (3) *Consd.* Furnival v. Crew (1744), 3 Atk. 83. *Follid.* Iggulden v. May (1806), 7 East, 237. *Consd.* Lewis v. Stephenson (1898), 67 L. J. Q. B. 296. *Generally, Mentd.* Foster v. Clagget (1838), 1 Will. Woll. & H. 182; Edwards v. Walters, [1896] 2 Ch. 157.

**2232.** —.—.]—RUSSEL v. DARWIN (1767), 2 Bro. C. C. 639, n.; 29 E. R. 353, L. C.

*Annotations*:—*Follid.* Moore v. Foley (1801), 6 Ves. 232; Iggulden v. May (1806), 7 East, 237.

**2233.** —.—.]—Covenant in a lease to renew under the same covenants is exclusive of the covenant of renewal.—TRITTON v. FOOTE (1789), 2 Bro. C. C. 636; 2 Cox, Eq. Cas. 174; 29 E. R. 352, L. C.

*Annotations*:—*Consd.* Baynham v. Guy's Hospital (1796), 3 Ves. 295. *Follid.* Moore v. Foley (1801), 6 Ves. 232; Iggulden v. May (1806), 7 East, 237. *Consd.* Browne v. Tighe (1831), 8 Bl. N. S. 272. *Reffd.* Smith v. Doe d. Jersey (1821), 7 Price, 379.

**2234.** —.—.]—A covenant in an indenture of lease to grant a new lease, with all covenants, grants, & articles as in the said indenture contained, does not bind the lessor to insert a covenant of renewal in the renewed lease.—IGGULDEN v. MAY (1807), 2 Bos. & P. N. R. 449; 127 E. R. 703, Ex. Ch.; *previous proceedings* (1804), 9 Ves. 325, L. C.

*Annotations*:—*Consd.* Sherwood v. Tucker, [1924] 2 Ch. 440. *Reffd.* Dowling v. Mill (1816), 1 Madd. 541; Smith v. Doe d. Jersey (1821), 7 Price, 379; Swinburne v. Milburn (1884), 9 App. Cas. 844; Bachelors v. Murphy, [1925] 1 Ch. 220. *Mentd.* Solvency Mutual Guarantee Co. v. Froane (1861), 7 H. & N. 5.

**2235.** —.—.]—A voluntary agreement indorsed on a lease by one not a party to it, but only a remainderman, not binding.

*Qu.*: whether on a covenant, in a lease for ninety-nine years, determinable on three lives, that upon the death of either of the lives, etc., on request & payment of £20, etc., to grant a new lease for another term of ninety-nine years, determinable with the life of a new person to be named, under the same yearly rents, covenants, etc., the lessee is entitled to a covenant for renewal in such new lease.—DOWLING v. MILL (1816), 1 Madd. 541; 56 E. R. 198.

**2236.** —.—.]—LEWIS v. STEPHENSON, No. 2178, *ante*.

**2237.** —.—.]—A three years' lease or tenancy agreement terminating Dec. 25, 1917, gave the tenant an option to purchase the freehold for £700 "during the three years hereby provided for." In June, 1917, the landlord & tenant signed an indorsement agreeing "that this lease be extended for three years expiring Dec. 25, 1920." In Sept. 1920, the parties signed a further indorsement agreeing "that this lease be extended for three years expiring Dec. 25, 1923." These indorsements, though duly stamped, were settled informally by the parties themselves without legal aid:—*Held*: on the construction of these documents, it was not intended to extend the lease

**PART IX. SECT. 2, SUB-SECT. 9.—B. (b) iii.**

**p. Oral agreement for renewal—Where written notice stipulated.**—An indenture of lease contained a covenant for renewal of the lease whereby if the lessee desired to renew the lease he should give three months' notice in writing of his intention to do so. The lessee failed to observe this covenant, & relied on an oral statement or agreement between himself & his lessor for renewal of the lease:—*Held*: there was no waiver.—MARK D'CRUZ v. JITENDRA NATH CHATTERJEE (1919), 1 L. R. 46 Cal. 1,079.—IND.

**PART IX. SECT. 2, SUB-SECT. 10.**

**2231 i. Whether covenant for further renewal included.**—A covenant in a lease for years to grant a new lease on the expiration of the existing term under & subject to all covenants, as in the first lease contained, is satisfied, if such new lease contain the like covenants as the former lease, except the covenant for renewal.—PENINSULAR & ORIENTAL STEAM NAVIGATION CO. v. KONNOYLALL DUTT (1863), 2 Hyde, 21.—IND.

**q. Special covenant in original lease.**—Applicability to renewed lease.—

HOWEY v. DOLAN, [1915] V. L. R. 297.—AUS.

**r.** —.—.]—BEDELL v. CHRIST'S CHURCH, FREDERICKTON, VESTRY (1855), 3 All. 217.—CAN.

**t.** —.—.]—A lease for twenty-one years contained the covenant that after the end of twenty-one years, if the lessors did not continue the lease they would compensate the lessees for their improvements:—*Held*: at the end of the twenty-one years the lessees were entitled to a renewal of the term, but not to a new lease containing a similar covenant for renewal or compensation.—R. v. ST.

or tenancy agreement with all its provisions, collateral or otherwise, & the option was not therefore extended.—*SHERWOOD v. TUCKER*, [1924] 2 Ch. 410; 94 L. J. Ch. 66; 132 L. T. 86; 40 T. L. R. 782; 68 Sol. Jo. 769, (C. A.).

*Annotation*:—*Consd. Batchelor v. Murphy*, [1925] Ch. 220.

**2238. Impossibility of lessees entering into original covenants—One lessee bankrupt.**—A lease was granted to two, with a proviso for re-entry in case the rent should be in arrear for thirty days, or the tenants or either of them should become bkpt., or let, assign, or part with the premises, or any part thereof, without licence; or if the tenants should not keep the covenants, which were joint & several covenants, one of which was to keep the interior of the property in repair. The landlord covenanted that he would, at the expiration of the term, in case the covenants on the tenants' part should have been duly performed, grant to "the tenants, their exors. & administrators," a fresh lease, subject to the same covenants, provided the tenants or either of them, their or either of their exors. or administrators, should, twenty days before the end of the term, give the landlord notice of the desire to take such lease. One of the tenants became bkpt., shortly before which he assigned his interest in the lease to the other tenant. The landlord, with knowledge of this, received rent to the end of the term. The continuing tenant, twenty-one days before the end of the term, gave the landlord notice to grant the renewed lease to him. At this time the interior of the property required repairs to the amount of at least £13. The judge decided that the lease must be granted, the repairs required being only trifling:—*Held*: (1) the tenant was not entitled to a renewed lease, for that the granting it was subject to a condition precedent that the covenant of the lease should have been kept, which condition had not been performed, as there was a want of repair which, though not serious, constituted an existing breach of covenant when the new lease was applied for; (2) the agreement being to grant a lease to the two, who must enter into joint & several covenants, & both being alive the landlord could not be called upon to grant a lease to one only.—*FITCH v. UNDERWOOD* (1876), 2 Ch. D. 310; 45 L. J. Ch. 522; 34 L. T. 779; 24 W. R. 657, (C. A.).

*Annotations*:—*As to (1) Consd. Bastin v. Bidwell* (1881), 18 Ch. D. 238. *Apld. Hollies Stores v. Timmis*, [1921] 2 Ch. 202. *Refd. Starkey v. Barton*, [1909] 1 Ch. 284.

**2239. Three named guarantors in original lease—Death of one guarantor.**—By a lease dated Mar. 20, 1914, a lessor demised a house to a co. for the term of seven years at a yearly rent of £60, & the co. & three named persons jointly & severally covenanted for payment of the rent reserved. The lease contained a proviso that if at the expiration of the term the co. should be desirous of taking the premises on a further lease for seven years & should give six calendar months' previous

notice in writing of their decision, the lessor should grant to the co. a further lease for seven years, "such lease to contain clauses so far as possible identical with the terms hereof including the covenant" by the three named guarantors "for payment of rent thereby reserved." One of the guarantors having died in 1917, the co., six months before the termination of the lease, gave the required notice & offered another guarantor in the place of the guarantor who had died, or to make a deposit, or to pay the seven years' rent in advance. The personal representatives of the lessor refused to grant the lease on the ground that the terms on which it was to be granted had become incapable of performance:—*Held*: the effect of the proviso was that the new lease was to contain a covenant by the three guarantors to pay the rent; having become incapable of performance the landlords could not be compelled to grant a different lease, even though the rent were equally well secured.—*HOLLIES STORES, LTD. v. TIMMIS*, [1921] 2 Ch. 202; 90 L. J. Ch. 485; 126 L. T. 18; 65 Sol. Jo. 735.

#### SUB-SECT. 11.—PERPETUAL RENEWAL.

##### A. Nature of Covenant or Agreement.

**2240. Not a perpetuity.**—In a lease the lessor covenants, that if, at the expiration of the term, the lessee should be desirous of taking a further lease, the lessor would grant such further lease, without any fine, & under the same rent & covenants only, as in this lease. A new lease is desired & prepared, but it contains a covenant to grant a further lease at the end of the new term; the lessor objected to this covenant, as being in the nature of a perpetuity upon his estate; but the objection was overruled.—*BRIDGES v. HITCHCOCK* (1715), 5 Bro. Parl. Cas. 6; 2 E. R. 498, 11. L.

*Annotations*:—*Consd. Furnival v. Crew* (1744), 3 Atk. 83. *Apld. Cooke v. Booth* (1778), 2 Cowp. 819. *Expld. Tritton v. Foote* (1789), 2 Cox, Eq. Cas. 174; *Iggulden v. May* (1807), 2 Bos. & P. N. R. 149.

**2241. Run with the land.**—Covenants for the perpetual renewal of leases are considered as real agreements, & go with the land; & will therefore affect even the legal interest of all those who take the estate, with notice of these leases & covenants.—*SHELBOURNE (EARL) v. BIDDULPH* (1748), 6 Bro. Parl. Cas. 356; 2 E. R. 1131, 11. L.

**2242. Repugnant to tenancy from year to year.**—A perpetual right of renewal is repugnant to a strict tenancy from year to year, but when a landlord & tenant agree that the latter is to have a tenancy for a year, with an option to continue from year to year by giving notice, & the context shows that the governing idea is a tenancy for a year certain, to be renewed as such a tenancy by the notice, then there is no strict tenancy from year to year, & the right of renewal is valid; in such a case the words "from year to year" in the

*CATHARINES HYDRAULIC CO.* (1910), 43 S. C. R. 595.—*CAN.*

*a.* ———.—*Covenants for renewal must be read to mean that such of the terms & conditions of the original lease as are applicable are to be inserted in the new lease.*—*ZOHRAH v. HARRIS* (1891), 11 N. Z. L. R. 12.—*N.Z.*

*b.* ———.—*HURD v. McDERMID* (1906), 25 N. Z. L. R. 901.—*N.Z.*

*c.* ———.—*KELIS v. EAST COAST COMR.*, [1924] N. Z. L. R. 76.—*N.Z.*

*d. Whether all covenants of original lease included.*—*DOCKRILL v. DOLAN*

(1841), 3 L. Eq. R. 552.—*IR.*

*e.* ———.—*SLIGO (MARQUIS) v. O'DONEL* (1854), 7 Ir. Jur. 178.—*IR.*

#### PART IX. SECT. 2, SUB-SECT. 11.—A.

*f. What amounts to.*—*ATKINSON v. PILLSWORTH* (1787), 1 Ridg. Parl. Rep. 449; *Vern. & Scr.* 157.—*IR.*

*g.* ———.—*PALMER v. HAMILTON* (1793), 2 Ridg. Parl. Rep. 535.—*IR.*

*h.* ———.—*CHAMBERS v. GAUSSEN* (1844), 2 Jo. & Lat. 99.—*IR.*

*k. Extent of.*—A covenant for perpetual renewal, entered into by a person holding a limited interest in

lands, does not bind the estate beyond that interest; & therefore, if his assignee acquires the inheritance, it is not bound by the covenant.—*BREUSTON v. TUOHY* (1858), 8 L. C. L. R. 190; 10 Ir. Jur. 404.—*IR.*

*l. "Renewable for ever."*—*Held*: the words "renewable for ever," in the *habendum*, taken in conjunction with the lessor's covenant to pay a fine for inserting a new life in place of any that should fail, conferred a right to renewal in perpetuity notwithstanding there was no covenant by the lessor so to renew.—*CLINCH v. PERNETTE* (1895), 24 S. C. R. 385.—*CAN.*

**Sect. 2.—Covenants and options for renewal: Sub-sect. 11, A. & B. (a) & (b), & C.]**

agreement are not used in their technical sense.—**GRAY v. SPYER**, [1922] 2 Ch. 22; 91 L. J. Ch. 512; 127 L. T. 277; 66 Sol. Jo. 387, C. A.

**B. Intention of Parties.**

**(a) In General.**

See, now, Law of Property Act, 1925 (c. 20), s. 145.

**2243. Intention must be clear.]**—Right of renewal of lease for lives forfeited by the laches of the tenant. The ct. leans against a construction for perpetual renewal, unless clearly intended. A legal instrument is not to be construed by the acts of the parties.—**BAYNHAM v. GUY'S HOSPITAL** (1796), 3 Ves. 295; 30 E. R. 1019.

**Annotations:—****Consd.** *Maxwell v. Ward* (1824), 1 McCle. 458. **Expld.** *Sadler v. Biggs* (1853), 4 H. L. Cas. 435. **Refd.** *Moore v. Foley* (1801), 6 Ves. 232; *Smith v. Jersey* (1821), 3 Bll. 290; *Browne v. Tighe* (1834), 8 Bll. N. S. 272; *Lewis v. Stephenson* (1898), 67 L. J. Q. B. 296; *Watcham v. A.-G. of East Africa Protectorate*, [1919] A. C. 533; *Gray v. Spyer*, [1922] 2 Ch. 22.

**2244. —.]**—Construction of a covenant for renewal under the like covenants, etc., that it was not for perpetual renewal: the cts. leaning against that construction, unless clearly intended.—**MOORE v. FOLEY** (1801), 6 Ves. 232; 31 E. R. 1027.

**Annotations:—****Consd.** *Iggulden v. May* (1806), 7 East, 237; *Browne v. Tighe* (1834), 8 Bll. N. S. 272. **Refd.** *Swinburne v. Milburn* (1884), 9 App. Cas. 844; *Gray v. Spyer*, [1921] 2 Ch. 549.

**2245. —.]**—**IGGULDEN v. MAY**, N. 2604, *post*.

**2246. —.]**—**LONDON (CITY) v. MITFORD**, No. 2214, *ante*.

**2247. —.]**—**BROWNE v. TIGHE**, No. 2257, *post*.

**2248. —.]**—Although, *prima facie*, a lessor shall not be taken to have intended to enter into a covenant for perpetual renewal, yet if there be in the lease expressions indicative of such an intention, the ct. will give effect thereto.

Lease for lives, with a covenant on the death of either of the *cestuis que vie* to execute a renewed lease at the same rent & subject to the same covenants "including this present covenant":—**Held**: a covenant for perpetual renewal, & lessee entitled to have inserted in the renewed lease a covenant for renewal *totidem verbis* with that contained in the original lease, but with the name of the new *cestui que vie* substituted for that of deceased.—**HALE v. BURGESS** (1857), 4 K. & J. 45; 27 L. J. Ch. 86; 30 L. T. O. S. 255; 22 J. P. 84; 3 Jur. N. S. 1294; 6 W. R. 144; 70 E. R. 19.

**Annotations:—****Consd.** *Swinburne v. Milburn* (1884), 9 App. Cas. 844. **Appld.** *Wynn v. Conway Corpn.*, [1914] 2 Ch. 705. **Refd.** *L. & S. W. Ry. v. Gomm* (1882), 20 Ch. D. 562.

**2249. —.]**—**SWINBURNE v. MILBURN**, No. 2220, *ante*.

**(b) What Amounts to Expression of Intention.**

**2250. Series of previous renewals.]**—A. demised to B. for the lives of B. & of C. & D., & covenanted, that if B., his heirs, etc., should be minded at the decease of B., C. & D., or any of them, to surrender the demise, & take a new lease, & thereby add a new life to the then two in being, in lieu of the life so dying, that then he, A., his heirs, etc., upon payment for every life so to be added, in lieu of the life of every of them so dying, would grant a new

lease for the lives of the two persons named in the former lease, & of such other person as B., his heirs, etc., should appoint in lieu of the person named in the preceding lease, as same should respectively die, under the same rent & covenants. There had been successive renewals from the time of a former lease granted by the ancestor of A.; & in each, a like covenant for renewal:—**Held**: A. & his ancestors had, by their own acts, construed this to be a covenant for a perpetual renewal.—**COOKE v. BOOTH** (1778), 2 Cowp. 819; 98 E. R. 1380.

**Annotations:—****Consd.** *Baynham v. Guy's Hospital* (1796), 3 Ves. 295. **Expld.** *Moore v. Foley* (1801), 6 Ves. 232. **Consd.** *Iggulden v. May* (1804), 9 Ves. 325; *Iggulden v. May* (1807), 2 Bos. & P. N. R. 449; *Smith v. Jersey* (1821), 3 Bll. 290; *Browne v. Tighe* (1834), 8 Bll. N. S. 272. **Distd.** *Swinburne v. Milburn* (1884), 9 App. Cas. 844. **Refd.** *Tritton v. Foote* (1789), 2 Bro. C. C. 636; *Clifton v. Walmsley* (1794), 5 Term Rep. 564; *Eaton v. Lyon* (1798), 3 Ves. 690; *Sadler v. Biggs* (1853), 4 H. L. Cas. 435; *Watcham v. A.-G. of East Africa Protectorate*, [1919] A. C. 533. **Mentd.** *Edwards v. Bates* (1844), 2 Dow. & L. 299.

**2251. —.]**—**BAYNHAM v. GUY'S HOSPITAL**, No. 2243, *ante*.

**2252. —.]**—Every presumption is to be made to support a right of renewal, where, from 1682, leases for twenty-one years, at a small rent & fine certain, of the tithes of a parish, had been regularly granted by the respective bishops of Ely, who were impropriate rectors of the parish, to the vicars for the time being.—**A.-G. v. ELY (BP.)** (1827), 4 Russ. 102; 38 E. R. 743.

**2253. — Original covenant not produced.]**—S., on Jan. 5, 1746, being tenant in fee simple of lands in Tipperary, executed an indenture, which was, two days afterwards, registered under the Irish Registration Acts. The memorial represented that S. had, by the indenture, demised, or agreed to demise, these lands to C. for three lives therein named, with "a clause of renewal after the expiration of said lives therein before mentioned" provided that C., his heirs, etc., should "within six months from the death of the last of said three lives, nominate such life, or lives as he would have inserted," & pay all rent, & "the sum of £11 7s. 6d. for adding or renewing such life or lives for ever." The memorial was signed by C. alone & he registered it. In Feb. 1750, S. executed a settlement in contemplation of marriage, by which he made himself tenant for life only in the estate comprised in the indenture of 1746. In Mar. 1750, he executed a lease to C., in which the indenture of 1746 was recited, & in consequence of some changes in the lands a change was made in the rent. The lease recited the indenture as a demise to C. for three lives & the longest liver of them, with a covenant to "renew same for ever, on payment of £11 7s. 6d. for renewing same on the fall of every life, within six months next after the fall of each life." The *habendum* in the lease was for the same three lives; & S. covenanted that "upon the death or failure of the aforesaid life or lives, or any or either of them," naming them, & upon C., his heirs, etc., paying "the sum of £11 7s. 6d. above the annual rent, within the space of six calendar months, & immediately after the death or failure of such life," & on nomination, etc., "S. & his heirs," etc., would add the life so nominated; "& so in like manner from time to time successively for ever thereafter on the failure of every other several life or lives in the lease or thereafter to be nominated." Re-

**PART IX. SECT. 2, SUB-SECT. 11.—B. (a).**

**2243 i. Intention must be clear.]**—Where the terms of a lease did not

appear to create a perpetual tenancy, there being no circumstances in the evidence from which the ct. ought to infer that the intention of the parties was to create such a tenancy:—**Held**:

the lease was not a perpetual lease.—**RAMBAI SAHIB PATWARDHAN v. RAMBAI** (1891), 1 L. R. 15 Bom. 704.—**IND**

newals had, from time to time, been made by the successors of S. in the estate, sometimes after proceedings in Chancery to compel same, sometimes without such proceedings; but in 1845, G., the descendant of S., having absolutely refused to renew, a bill was filed against him by B., who had become possessed of C.'s lease. The bill prayed for a renewal according to the lease, which B. alleged to have been made in conformity with, & under the obligation of, the indenture of 1746. This indenture could not be produced, but the memorial was tendered & received in evidence. Deft. alleged that the lease was ineffectual to bind the inheritance, as it was made by a person who was, at the moment of executing it, only tenant for life, & he contended that there was no legal evidence of the indenture of 1746. He also relied on the difference between the terms of renewal contained in the indenture & those contained in the lease:—*Held*: pltf. was entitled to the renewal as prayed; the memorial was properly admitted as secondary evidence of the indenture; that indenture was to be treated as an original lease, containing a covenant, under the obligation of which the lease of 1750 was executed; the obligation entered into in 1746 being by the tenant in fee simple, his performance of it in 1750 was valid, although he was then only tenant for life; & the acts of the successive tenants of the estate, though not evidence to prove the existence of the covenant, became, when the covenant had been otherwise proved, evidence of the construction which the parties interested had put upon it.—*SADLER v. BIGGS* (1853), 4 H. L. Cas. 435; 22 L. T. O. S. 69; 10 E. R. 531, H. L.

*Annotation*:—*Refd.* McKay v. McNally (1879), 41 L. T. 230.

**2254.** —.]—An obligation to renew leases cannot be inferred from the mere fact of continual renewal.—*A.-G. v. ST. JOHN'S HOSPITAL, BATH* (1865), 1 Ch. App. 92; 35 L. J. Ch. 207; 13 L. T. 616; 30 J. P. 72; 12 Jur. N. S. 127; 14 W. R. 237, L. J.

**2255. Express words in lease**—" & so to continue the renewing."—(1) *LORD HARDWICKE*, on the circumstances of this case, was of opinion, pltf. was entitled to a new lease, with a covenant of renewal to be inserted in it, as well upon the death of the additional lives, as upon the death of the old.

(2) The right of renewal with like covenants arises out of the original covenants & runs along with the land (*LORD HARDWICKE, C.*).—*FURNIVAL v. CREW* (1744), 3 Atk. 83; 9 Mod. Rep. 446; 26 E. R. 850, L. C.

*Annotations*:—*As to* (1) *Expld.* *Browne v. Tighe* (1834), 8 Bl. N. S. 272. *Refd.* *Cooke v. Booth* (1778), 2 Cowp. 819; *Clifton v. Walmesley* (1794), 5 Term Rep. 564; *Baynham v. Guy's Hospital* (1796), 3 Ves. 295; *Moore v. Foley* (1801), 6 Ves. 232; *Iggulden v. May* (1807), 2 Bos. & P. N. R. 449; *Swinburne v. Milburn* (1884), 9 App. Cas. 844; *Lewis v. Stephenson* (1898), 67 L. J. Q. B. 296.

**2256.** — "At any time when requested."—A. granted a lease & covenanted that he would always, at any time when requested by the lessees, etc., demise the premises for the further term of thirty-one years, in which new lease were to be contained the same rents, covenants, articles, clauses, provisoes, & agreements:—*Held*: this amounted to a covenant for perpetual renewal.—*COPPER MINING Co. v. BEACH* (1823), 13 Beav. 478; 1 L. J. O. S. Ch. 84; 51 E. R. 184.

*Annotations*:—*Refd.* *Hodges v. Blagrove* (1854), 18 Beav. 404; *Hare v. Burges* (1857), 4 K. & J. 45.

**2257.** — "From time to time renew."—A lease made in 1663 of land in Ireland, together with all mines thereon in the disposal of the lessor, & all timber growing thereon, to be disposed of by

the lessee, he planting trees in the room of them, to hold the premises, without impeachment of waste, to him, his exors., administrators & assigns, for ninety-eight years, at a rent therein mentioned, contained a covenant that the lessor, his heirs & assigns, should, upon request of the lessee, his exors., administrators & assigns, from time to time renew the lease, & perfect such other assurances as the lessee, his exors., administrators & assigns, should reasonably require for strengthening, confirming, & surmaking the demised premises, at such rents, & under such covenants & conditions, as in the lease were contained. Another covenant provided that, in case of eviction, or waste by rebellion, the rent should cease & be abated. A renewal of the lease, with all the covenants, was executed in 1739:—*Held*: the covenant was not for perpetual renewal, but for confirming & further assuring the original lease.

That a covenant for a perpetual renewal must be clear, plain, & distinct, & in terms that will not bear any other construction, is a proposition which is borne out by law, & sanctioned by a series of decided cases (*LORD BROUGHAM, C.*).—*BROWNE v. TIGHE* (1834), 8 Bl. N. S. 272; 2 Cl. & Fin. 390; 5 E. R. 944, H. L.

*Annotation*:—*Refd.* *Swinburne v. Milburn* (1884), 9 App. Cas. 844.

**2258.** — "Renewing this present covenant."—*HARE v. BURGES*, No. 2248, *ante*.

**2259.** —.]—*NICHOLSON v. SMITH*, No. 2216, *ante*.

**2260. Agreement to pay fine upon renewal.**—An agreement in a lease for lives, "that, upon the renewing or inserting of any life or lives, a certain sum shall be paid by the lessee, his heirs & assigns, to the lessor, his heirs & assigns," does not amount to a covenant for perpetual renewal.—*SMYTH v. NANGLE* (1840), 7 Cl. & Fin. 405; West, 184; 4 Jur. 476; 7 E. R. 1124, H. L.

**2261. Lease for twenty-one years—Covenant to renew at end of every eleven years.**—Covenant in a lease for twenty-one years that the lessors will "at the expiration of the first eleven years of the term hereby granted in case the lessee shall surrender or resign these presents & the term of twenty-one years hereby granted to the lessors & upon such surrender as aforesaid & paying to the lessors at the expiration of eleven years aforesaid or upon Sept. 29 next after the determination of the eleven years the sum of £7 10s. for a fine for the premises then the lessors shall & will at the proper costs & charges of the lessee grant unto the lessee a new lease of the premises hereby demised with the appurtenances for the term of twenty-one years to commence from the expiration of the eleven years at with & under the like rents covenants & agreements as are in these presents mentioned expressed or contained & so often as every eleven years of the term shall expire will grant & demise unto the lessee such new lease of the premises upon surrender of the old lease as aforesaid & paying such fine of £7 10s. on the day or time hereinbefore limited as appointed":—*Held*: upon the true construction of the covenant the lessee was entitled to the perpetual right of renewal at the end of every successive period of eleven years.—*WYNN v. CONWAY CORPN.*, [1914] 2 Ch. 705; 84 L. J. Ch. 203; 111 L. T. 1016; 78 J. P. 380; 30 T. L. R. 666; 59 Sol. Jo. 43; 13 L. G. R. 137, C. A.

#### C. In Case of Charities.

See CHARITIES, Vol. VIII., p. 361, Nos. 1600–1607.

**Sect. 2.—Covenants and options for renewal: Sub-sects. 12 & 13. Sect. 3.]**

**SUB-SECT. 12.—LEASE GRANTED IN EXERCISE OF POWERS.**

*See, now, Settled Land Act, 1925 (c. 18), ss. 42, 43.*

**2262. Whether enforceable—Rent & covenants conformable with power.]**—Under a power to lease for twenty-one years reserving the best rent, so as the lease should not contain any clause whereby authority should be given to the lessee to commit waste, or whereby he should be exempted from punishment for committing waste, & so as such lease should contain such other conditions, covenants, & restrictions, as were generally inserted according to the usage of the counties where the premises were:—*Held*: a lease was good; though the lessor thereby took the repairs of the mansionhouse, excepting the glass windows, on himself, & covenanted that if he did not repair it within three months after notice, the tenant might, & deduct the charges out of the rent reserved to the lessor: & though the lessor covenanted, in consideration of a large sum to be laid out by the lessee in the repair of the premises in the first instance, to renew during his, the lessor's, life at the request of the lessee, his exors., etc., on the same terms: because this covenant only bound the lessor himself, & if the best rent were not reserved upon such renewal, the lease would be void against the remainderman.—*DOE v. BROMLEY v. BETTISON* (1810), 12 East, 305; 104 R. R. 119.

*Annotations:—Expld. Yellowly v. Gower* (1855), 11 Exch. 274. *Consd. Gas Light & Coke Co. v. Towse* (1887), 35 Ch. D. 519. *Refd. Moore v. Clench* (1875), 34 L. T. 13.

**2263. ———.]**—Although a lessor has power to lease in possession only, & not in reversion, yet an agreement entered into between lessor & lessee, a short period before the expiration of an existing lease, for a renewal of the lease upon the same terms as before, is reasonable . . . provided the effect of the agreement is, that the rent & covenants in the renewed lease are conformable with the terms of the power.—*DOWELL v. DEW* (1843), 1 Y. & C. Ch. Cas. 345; 12 L. J. Ch. 158; 7 Jur. 117; 62 E. R. 918, L. C.

*Annotations:—Consd. Gas Light & Coke Co. v. Towse* (1887), 35 Ch. D. 519. *Refd. Buckland v. Papillon* (1866), L. R. 1 Eq. 477. *Mentd. Gregory v. Wilson* (1852), 9 Ilare, 683; *Crofts v. Middleton* (1855), 2 K. & J. 194; *Buckland v. Papillon* (1866), 15 W. R. 92; *Purchase v. Lichfield Brewery Co.*, [1915] 1 K. B. 184.

**2264. ———.]**—Trustees of a messuage & premises, partly freehold & partly leasehold, for a term, of which fourteen years were unexpired, but which lease was renewable by custom on paying a fine, granted a lease to W. of the whole for fourteen years, & covenanted to use their best endeavours to obtain a renewal of the lease, & thereupon to grant him a lease for a further term of seven years from the expiration of his tenancy, at a like rent. The trustees' power was to lease at a rack rent for any term not exceeding twenty-one years. Before the expiration of W.'s lease new trustees had been appointed, & the reversion in fee had become vested in other persons, who would not renew the lease on the old fine, the property having much increased in value:—*Held*: the

trustees had no power to enter into a covenant to grant a further term at a like rent on the renewal of the lease, & the covenant did not bind the new trustees.—*SALAMON v. SOPWITH* (1876), 35 L. T. 826, C. A.

**2265. ———.]**—A covenant for renewal in a lease executed by a lessor under a power of granting leases in possession at the best rent is good, & may be enforced against the lessor, provided that, at the time for its performance, the new lease reserves the best rent that can then be obtained & contains only stipulations then authorised by the power. But if at the time when performance of the covenant is claimed, the stipulated rent is not the best rent, the lessee is not entitled either to specific performance or damages, even though the original lease had been sanctioned by the ct. in the presence of all the beneficiaries.—*GAS LIGHT & COKE Co. v. TOWSE* (1887), 35 Ch. D. 519; 56 L. J. Ch. 889; 56 L. T. 602; 3 T. L. R. 483.

**2266. ——— Covenant with perpetual renewal—Acceptance of rent by reversioner.]**—Where a lease not warranted by a power is granted by a tenant for life, containing a covenant for perpetual renewal, the reversioner, by accepting for many years after he comes into possession the rent reserved upon the lease, does not confirm it so far as to make the covenant for renewal binding upon him.—*HIGGINS v. ROSSE (EARL)* (1821), 3 Bli. 112; 4 E. R. 546, H. L.

**2267. ——— Covenant amounting to breach of trust.]**—Bill for the execution of a covenant contained in a renewed lease granted by trustees dismissed; the covenant being *ultra vires* of the trustees.

If the covenant for renewal is a breach of trust, this ct. cannot . . . interfere for the purpose of its performance (*KNIGHT BRUCE, V.-C.*).—*BELLINGER v. BLGRAVE* (1847), 1 De G. & Sm. 63; 8 L. T. O. S. 442; 11 Jur. 407; 63 E. R. 972.

*Annotation:—Refd. Oceanic Steam Navigation Co. v. Sutherland* (1880), 16 Ch. D. 239, n.

**SUB-SECT. 13.—UNDERLEASE WITH COVENANTS FOR RENEWAL.**

**2268. Covenant by lessee to procure renewal—Sub-lessee to pay double rent & portion of fine—Power to sub-lessee to reject renewal if rent advanced—Right of lessee to renew at increased rent & small fine.]**—Lessee of a church lease, made about one hundred & fifty years ago, sub-leases, with covenant for renewal as long as he could renew the original lease; the sub-lessees covenanting to pay double the rent that might be demanded by the dean & chapter, & to pay £300 of the fine; the immediate lessee covenanting "to make all proper applications, & use all proper endeavours, for the renewal of the leases." Renewals at the old rent, & increasing fines, till 1796; when the sub-lessees agreed to pay a greater proportion of the fine, on having an addition to their term, & clause introduced into the contract, that they should have the option to reject the renewal, in case the rent should be too much advanced. Immediate lessee endeavours to procure a renewal at a small fine & increase of rent; but the ct., on

**PART IX. SECT. 2, SUB-SECT. 12.**

*m. Whether enforceable.]—LOWRY v. DUFFERIN (LORD)* (1839), 1 L. Eq. R. 281.—IR.

**PART IX. SECT. 2, SUB-SECT. 13.**

*n. Covenant by intermediate lessee*

*to procure renewal—Intermediate lessee compelled to pay increased rent—Liability of underlessee to contribute.]—A. holding under a corp. & in the habit of obtaining renewals on favourable terms, demised to B. at a certain rent, with a covenant to renew at the same rent as often as the corp. should*

*renew to him. The corp. at length raised the rent payable by A. :—Held: A. was bound, notwithstanding, to renew to B. on the former terms.—EVANS v. WALSH (1805), 2 Sch. & Lef. 519.—IR.*

*o. ——— Intermediate lessee compelled to pay increased fine—Liability*

bill by the sub-lessees, decreed performance of the covenant, by renewal for a large fine at the old rent, the dean & chapter being willing to renew in that way, on the ground, apparently, that such was the true intent & meaning of the parties; it being conceived, that the option reserved to the sub-lessees, to reject the renewal, was intended to guard against the effect of an increase of rent, if insisted upon by the dean & chapter, without its being left to the immediate lessee to endeavour to procure a renewal at an increase of rent & small fine, if he could.—*HONE v. DAVIS* (1814), 2 Dow, 546; 3 E. R. 961, H. L.

**2269. — Purchase of reversion by lessee — Right of sublessee to purchase at same price.]—**Lessees for lives of ecclesiastical property under a lease which it had been a long-continued practice to renew upon certain fixed terms on the dropping of each life, executed an underlease of a portion of the property for the same lives, with a covenant for perpetual renewal on certain fixed terms, as often as a new life should be added to the original lease. The property afterwards became vested in the Ecclesiastical Comrs., who declined to renew the lease, but sold the reversion to the lessees in pursuance of Episcopal & Capitular Estates Act, 1851 (c. 104). Upon a bill filed by the underlessee to establish his rights in respect of the reversion so purchased:—*Held*: the lessees were *quasi* trustees of the reversion so purchased for the underlessee, but the right of the latter was not to have a perpetual renewal, but to purchase the reversion upon the terms of paying a due proportion of the consideration given by the lessees, & of the expense of purchasing the fee; & the lessees having offered before the filing of the bill to convey the reversion on fair & reasonable terms, *pltf.* was ordered to pay their costs.—*POSTLETHWAITE v. LEWTHWAITE* (1862), 2 John. & H. 237; 31 L. J. Ch. 584; 6 L. T. 779; 8 Jur. N. S. 791; 10 W. R. 459; 70 E. R. 1045.

*Annotations*:—*Consd. Lumley v. Timms* (1873), 28 L. T. 608. *Ridd. Alden v. Kennerley* (1862), 7 L. T. 312; *Trumper v. Trumper* (1872), L. R. 14 Eq. 295; *Re Ranagh's Will* (1884), 26 Ch. D. 590.

**2270. — Duty to offer reasonable fine.]—***SIMPSON v. CLAYTON*, No. 2161, *ante*.

**2271. Covenant conditional on obtaining renewal — Renewal obtained in name of trustee for wife of lessee.]—**A lessee of a house covenanted with his underlessee of a part of the house that in case he obtained an extension of the term or a renewal of his lease, he would give to underlessee a like renewal or extension of his underlease. A lease was subsequently taken from the ground landlord for an extended term in the name of a trustee for the separate use of the lessee's wife. On a bill by the underlessee against the lessee, his wife, & her trustee, charging that the extended lease had been taken in a trustee's name in order to defeat *pltf.*'s right under the lessee's covenant, & praying that the wife & her trustee might be decreed to grant an underlease to *pltf.* for the extended term:—*Held*: the lessee was under no obligation to endeavour

to procure the renewal to himself, & as it appeared on the evidence that the person in whose name the extended lease was taken was in reality a trustee for the wife, *pltf.*'s bill must be dismissed with costs.—*LUMLEY v. TIMMS* (1873), 28 L. T. 608; 21 W. R. 494, C. A.

**2272. — Whether binding on assigns of lessee.]—**D., who was sub-lessee of certain premises, demised same to F. for the residue of the term then vested in him less the last days thereof, & covenanted for himself, his exors., administrators, & assigns, that in case he should obtain from the freeholder, his heirs or assigns, any extension of the term for which he then held the premises, then he, his exors., administrators, or assigns, would grant to F. a new lease for such extended term as would include the unexpired residue of the original term granted to F., & the further term less the last days thereof, which might be granted to D. by the freeholder, his heir or assigns. D. died, & his reversion became vested in *deft.*, who surrendered his term to the freeholder & obtained from him a new lease for an extended term, subject to existing underleases. F. having died, *pltf.* acquired from his exors. his interest in the premises, & then claimed specific performance of D.'s covenant with F.:—*Held*: (1) on the construction of the covenant, it was personal to D. alone & did not bind his representatives; (2) the covenant was not strictly a covenant for renewal, & did not on that account run with the land; but assuming that it did run with the land, the doctrine of perpetuity had no application; (3) the covenant ran with the reversion which was vested in the covenantor at the time when he entered into the covenant; & consequently, 32 Hen. 8, c. 34, s. 2, did not apply.—*MULLER v. TRAFFORD*, [1901] 1 Ch. 54; 70 L. J. Ch. 72; 49 W. R. 132.

*Annotation*:—*As to* (2) *Consd. Woodall v. Chilton*, [1905] 2 Ch. 257.

**Payment of fines & expense.]—See Sect. 4, *post*.**

### SECT. 3.—CONSIDERATION FOR RENEWAL.

**2273. Necessity for—Parol agreement—Past consideration.]—***MOORE v. WILLIAMS* (1585), Moore, K. B. 220; 72 E. R. 542.

**2274. — — — — —.]** Promise to renew a lease, in consequence of money already laid out, is *nudum pactum*, & not to be specifically performed; & money laid out afterwards will not vary it.—*ROBERTSON v. ST. JOHN* (1780), 2 Bro. C. C. 140; 29 E. R. 81, L. C.

**2275. — Covenant for perpetual renewal.]—**Bill for a specific performance of a covenant for renewal dismissed, it being either a covenant for perpetual renewal, & if so, obtained without consideration from the lessor, or else inserted by mistake.—*REDSHAW v. BEDFORD LEVEL CO. (GOVERNOR)* (1759), 1 Eden, 346; 28 E. R. 718.

*Annotation*:—*Obtd. Brown v. Tighe* (1834), 2 Cl. & Fin. 396.

**2276. — — — — —.]—***DOWLING v. MILL*, No. 2235, *ante*.

*of underlessee to contribute.]—*Renewal decreed against a tenant under a bishop's lease, without any contribution from his sub-lessee, he having covenanted, that as often as the bishop should renew, he would renew, without fine, with his sub-lessee.—*REVELL v. HUSSEY* (1813), 2 Ball & B. 280.—*IR.*

**p. — — — — —.]—***LAWDER v. BLACHFORD* (1815), Beat. 522.—*IR.*

**q. — — — — —.]—***THOMAS v. BURNE* (1838), 1 Dr. & Wal. 657.—*IR.*

**r. Liability of lessee to accept re-**

**newal.]—**The intermediate lessee having obtained a renewal of the head-lease:—*Held*: he might compel the underlessee to accept a renewal of the sub-lease, & to pay his proportion of the renewal fines & expenses.—*CURRY v. STANLEY* (1833), Haycs & Jo. 487.—*IR.*

**t. Right of lessee to renewal—Effect of delay.]—**Delay on the part of a sub-lessee in taking out a renewal, & paying his proportion of fines, etc., when required by notice so to do by

the first lessee, at a time when he has been called upon to renew & pay the necessary fine, is a circumstance which will be taken into consideration by a *ct.* of equity on a bill filed by the sub-lessee for renewal.—*MORGAN v. GURLEY* (1851), 1 L. Ch. R. 482.—*IR.*

### PART IX. SECT. 3.

**2277. Necessity for.]—***CROFTON v. ORMSBY* (1806), 2 Sch. & Lef. 583.—*IR.*

**a. Sufficiency of.]—**An expenditure  
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**Sect. 3.—Consideration for renewal. Sect. 4.]**

**2277. — Inadequate consideration.]—**An agreement for a reversionary lease having been obtained by an attorney from the son of his employer, who was remainderman in a settlement under which his father who had granted the existing lease was tenant for life, on a bill for specific performance, the ct. refused under the circumstances to enforce the agreement.

The consideration for the renewal is not stated in the memorial, but it was admitted at the bar, that £20 was the consideration for the agreement to renew the lease. That a young man, an expectant heir, should be induced by his father's attorney, for a consideration of £20 to ratify a lease which was void as against him, & also for the same consideration, to grant in reversion another lease for lives undefined, imports in itself a transaction so grossly fraudulent, that no ct. of equity could give its assistance to effectuate such an agreement (LORD MANNERS).—BLAKENEY v. BAGOTT (1829), 3 Bli. N. S. 237; 1 Dow. & Cl. 405; 4 E. R. 1326, 11. L.

**SECT. 4.—FINES AND EXPENSES OF RENEWAL.**

See, now, Settled Land Act, 1925 (c. 18), ss. 62 (4), 71.

**2278. General agent—Right to demand fines.]—**MOUNTNORRIS (EARL) v. WHITE, No. 2227, ante.

**2279. Payable by lessee—Owner of charge upon land not bound to contribute.]—**MAXWELL v. ASHE (1752), cited in 7 Ves. 184; 32 E. R. 75.

*Annotations:—*Folld. Moody v. Matthews (1802), 7 Ves. 174; Webb v. Lugar (1836), 2 Y. & C. Ex. 247.

**2280. — — —.]—**Grant of an annuity for life out of tithes leased for years with covenant for further assurance. The lessee afterwards renewed the lease, married & died. Her husband administered & renewed with his own money. The annuity is a charge upon the renewed term generally & the grantee is not bound to contribute to the expense of the renewal.—MOODY v. MATTHEWS (1802), 7 Ves. 174; 32 E. R. 71.

*Annotation:—*Folld. Webb v. Lugar (1836), 2 Y. & C. Ex. 247.

**2281. — — —.]—**A testator, being seised in fee of a farm in the parish of A., & being also possessed of a lease for lives of the rectorial tithes of that parish, devised the farm to his nephews in tail male, & the lease to his brother J., his exors., administrators, & assigns, upon condition that his brother J., his exors., administrators, & assigns, owners or occupiers of the parsonage, tithes, & premises, should, at all times after his decease, free & discharge his farm from all manner of tithes which should be payable out of same to the owner or occupier of the parsonage & tithes aforesaid. J. survived testator, & devised his interest in the lease to his four sons, who took several renewals, & in 1782 assigned the existing lease, for a valuable consideration, to A. B., with notice of the trust of the will:—*Held*: a party to whom the tithes were bequeathed by the will of A. B., & who took a renewal of the lease in 1817, held the renewed lease upon the trusts of the will; consequently, he had no title to the tithes of the farm, & the owner of the farm was not bound to contribute to the renewal fines.—WEBB v. LUGAR (1836), 2 Y. & C. Ex. 247; 6 L. J. Ex. Eq. 49; 160 E. R. 380.

**2282. — — —.]—**Where the first trust of leasehold

property held for lives & years is to pay the fines on renewals out of the rents & profits, & the next trust is for the benefit of those who in strict settlement take freehold & copyhold property under the same will, the expenses of renewal are incidental to the leasehold property & fall upon those who from time to time are entitled to the possession of it under the will.—SHAFTESBURY (EARL) v. MARLBOROUGH (DUKE) (1833), 2 My. & K. 111; 3 L. J. Ch. 30; 39 E. R. 886.

*Annotation:—*Refd. Jones v. Jones (1846), 5 Hare, 440.

**2283. — Apportionment between tenant for life & remainderman.]—**WHITE v. WHITE, No. 2295, post.

**2284. — — —.]—**(1) The words "rents & profits" extended beyond their natural meaning, annual profits, to mtge. or sale, when necessary to effect the object, raising a gross sum for fines on renewal therefore as well as portions, & not controlled by the apparent general intention to preserve the estate entire.

(2) Contribution of tenant for life to the fine on renewal in proportion to his enjoyment, not as formerly one-third, nor, as upon a mtge. confined to keeping down the interest.—ALLAN v. BACKHOUSE (1813), 2 Ves. & B. 65; 35 E. R. 243; *affd.*, cited 2 My. & K., p. 120, L. C.

*Annotations:—*As to (1) Refd. Haldenby v. Spofforth (1839), 1 Beav. 390; Garmstone v. Gaunt (1845), 1 Coll. 577; Forbes v. Richardson (1853), 11 Hare, 354; Bute v. Ryder (1884), 53 L. J. Ch. 1090. As to (2) *Consd.* Shaftesbury v. Marlborough (1833), 2 My. & K. 111. *Apld.* Jones v. Jones (1846), 5 Hare, 440. *Distd.* Solley v. Wood (1861), 29 Beav. 482. *Refd.* Hayward v. Pile (1870), 22 L. T. 893. *Generally, Mentd.* Wragg v. Morley (1866), 14 W. R. 949.

**2285. — — —.]—**Where testator provides a fund for the payment of fines on admission to copyholds, or on renewals of leases, the manner of raising the fines, & the question of contribution between the tenant for life & the remainderman, must depend upon the intention of testator, to be collected from the whole will.—PLAYTERS v. ABBOTT (1833), 2 My. & K. 97; 3 L. J. Ch. 57; 39 E. R. 881.

*Annotations:—**Apld.* Carter v. Sebright (1859), 26 Beav. 374; Alsille v. Harcourt (1860), 28 Beav. 313. *Refd.* Jones v. Jones (1846), 5 Hare, 440; *Re Bute*, Bute v. Ryder (1884), 27 Ch. D. 196.

**2286. — — —.]—**R. devised leaseholds held for lives to his widow for life, with remainder to J., who was one of the *cestuis que vie*, for life, with remainder over. There was no direction as to renewal; but, the second husband of the widow having surrendered the old lease, & obtained a renewal:—*Held*: he was a trustee for those in remainder; the tenant for life, & those in remainder, are bound to contribute to the expenses of renewal in proportion to their enjoyment; the proper mode of making this calculation is to allow compound interest on the sums advanced for renewal, & to charge the parties in proportion to the value of their respective enjoyment; but the enjoyment of the tenant for life under such renewed lease must, for the purposes of the calculation, be considered as commencing at the time at which the old lease, if unsurrendered, would have expired by effluxion of time.—CRIDLAND v. LUXTON (1834), 4 L. J. Ch. 65.

**2287. — — —.]—**Principles on which the ct. will direct the apportionment of the expenses of the renewal of leases for lives as between tenant for life & remaindermen.—REEVES v. CRESWICK (1839), 3 Y. & C. Ex. 715.

*Annotation:—**Consd.* Jones v. Jones (1846), 5 Hare, 440.

for repairs under an agreement for a lease for a term of twenty-one years is good consideration to sustain a

promise for the extension of five & a half years upon a lease for fifteen years, which is tendered *plff.* in place

of the original lease agreed upon.—HUTTON v. HARTERY (1904), 9 Nfld. L. R. 28.—NFLD.

**2288.** ———.]—On a devise of successive interests in leases for lives or years, where testator directs that the leases are from time to time to be renewed, without more, the fines & expense of renewal are to be borne by the tenant for life & remainderman, or parties successively entitled, in proportion to their actual enjoyment of the estate, & not in proportion to an extent of enjoyment to be determined speculatively, or by a calculation of probabilities.

There is no difference in the rule as to the apportionment of fines for renewal between the devisees of successive interests in the estate, whether the leases are for lives or for years.

If testator provides a specific fund for the renewals, or directs that the renewals shall be raised or borne by the parties in a certain manner, or in certain proportions, such direction supersedes the general rule; but if trustees, having power to direct the manner in which the fines shall be raised, do not exercise the power, the ct. will pursue the general rule which would be adopted in the absence of any direction as to the manner of providing for the fines. *Qu.*: whether there is any difference in the rule of apportionment in cases where the parties take successive interests under wills, & in cases where such interests are taken under settlements by deed. *Qu.*: whether trustees, having power to raise the fines out of the rents & profits, or by mtge., or otherwise, as they should think fit, might so act as to throw the burden on the parties, in proportions different from those in which it would be distributed by the general rule of the ct.—*JONES v. JONES* (1846), 5 Hare, 440; 7 L. T. O. S. 157; 10 Jur. 516; 67 E. R. 984.

*Annotations*:—*Consd.* *Huddleston v. Whelpdale* (1856), 9 Hare, 775. *Foll.* *Ainslie v. Harcourt* (1860), 28 Beav. 313. *Dist.* *Solley v. Wood* (1861), 29 Beav. 482. *Consd.* *Bradford v. Brownjohn* (1868), 3 Ch. App. 711. *Refd.* *Hayward v. Pile* (1870), 5 Ch. App. 214; *Re Butte, Butte v. Hyder* (1884), 27 Ch. D. 196.

**2289.** ———.]—Where leases, which testator had directed to be renewed, were renewed by adding a *cestui que vie*, by means of a payment out of funds belonging to testator's estate, not charged with such renewal, & it was referred to the master to inquire what security the tenant for life of the leases ought to give, & to what amount, for the contribution which he might be liable to make for the benefit he should derive from the renewal, the master found, & the ct. had confirmed the finding, that the payment for the renewal ought to be secured by a policy of life insurance for the amount paid, in the name of the trustees, on the life of the new *cestui que vie*, the costs & premiums in respect of which ought to be paid out of the rents & profits of the estate to which the tenant for life was entitled: the ct. subsequently declared the policy of life insurance to be a security for the benefit which the tenant for life had derived, or might derive, from the renewal, or might have derived therefrom if another proper life had been inserted in lieu of his own.

*Semble*: the mode of providing the security adopted by the report is erroneous in principle; for the object of the ct. in requiring security to be given by the tenant for life in respect of the benefit which he may derive from the renewal of the lease, is, that the sum paid out of the capital shall be borne by the parties in proportion to the benefits which they derive; & the security therefore is for the purpose of bringing back to the capital so much as the tenant for life has had the benefit of; & this sum, which would be payable on the death of the tenant for life, is not properly secured by a policy of insurance on the life of

another person, inasmuch as it throws upon the remainderman not merely the interest of the capital provided, but the burden of keeping up a policy of life insurance for the full amount; & it is mere speculation whether this burden will be compensated by giving him the benefit of a policy at a less rate of premium, owing to an earlier insurance of the life. Although it may be, that, when provision is made of a fund for renewal, the remainderman will not suffer, this is not the principle, for the principle is, that the remainderman ought to bear so much of the capital paid for renewal as may not be paid by the tenant for life under the security which he has given.

The ct. will not retain the income of the tenant for life, because he may become liable to give security for the payments on account of renewals, before the occasion for giving such security has arisen.—*HUDLESTON v. WHELPDALE* (1852), 9 Hare, 775; 68 E. R. 729.

**2290.** ———.]—(1) Under a trust to renew leaseholds out of the rents or by mtge. thereof:—*Held*: the fines for renewal must be borne by the successive tenants for life, etc., of the estate in proportion to their actual enjoyment of the property.

(2) Under a trust to renew leaseholds by sale or mtge. of an independent estate:—*Held*: the fines must be raised by sale or mtge. of that estate, & the successive tenants for life were only bound to keep down the interest on the mtge.—*AINSLIE v. HARCOURT* (1860), 28 Beav. 313; 30 L. J. Ch. 686; 51 E. R. 386.

*Annotation*:—*As to* (2) *Consd.* *Bradford v. Brownjohn* (1868), 3 Ch. App. 711.

**2291.** ———.]—(1) Under a trust to renew leases "out of the rents, issues & profits," followed by a power in case, from any cause, the money wanted to pay the fines should not be produced by the way & means aforesaid, to mtge.:—*Held*: the rents being sufficient for that purpose, the fines ought to be paid out of income.

(2) A trustee whose duty it was to renew leaseholds out of the rents applied them to his own use:—*Held*: the tenant for life & not those in remainder must bear the loss.—*SOLLEY v. WOOD* (1861), 29 Beav. 482; 30 L. J. Ch. 813; 7 Jur. N. S. 1225; 54 E. R. 714.

*Annotation*:—*As to* (2) *Refd.* *Bradford v. Brownjohn* (1868), 3 Ch. App. 711.

**2292.** ———.]—Testator, being possessed of a leasehold house held by him for a term of sixty-one years, renewable every fourteen years on fines for renewal, & under covenants to pay the rent, repair & insure, bequeathed the house to trustees, in trust for his widow for life, with remainder in trust for his son for life, with remainders over; & he bequeathed his residuary estate to his trustees upon trust out of the income to pay all the costs, charges, & expenses of carrying into execution the trusts of his will, & subject thereto, to hold such residuary estate upon trusts for his children in settled shares:—*Held*: neither tenant for life was under any obligation to pay the rent, repair, or insure, or to pay the fines or expenses of renewal; the rent & the expenses of repair & insurance, during the respective lives of the tenants for life, were payable out of the income of the residuary estate; & the fines & expenses of renewal were distributable among the beneficiaries of the house according to their enjoyment, such enjoyment to be ascertained by actuarial valuation. The object of the Trustee Act, 1888 (c. 60), was merely to remove the then existing liability of trustees, not to alter any law as between tenant for life & remainderman.—*Re BARING*,

**Sect. 4.—Fines and expenses of renewal.]**

**JEUNE v. BARING**, [1893] 1 Ch. 61; 62 L. J. Ch. 50; 67 L. T. 702; 41 W. R. 87; 9 T. L. R. 7; 3 R. 37.

*Annotations*.—**Consd.** *Re Redding*, *Thompson v. Redding*, [1897] 1 Ch. 878; *Re Tomlinson*, *Tomlinson v. Andrew*, [1898] 1 Ch. 232. **Refd.** *Debnay v. Eckett* (1894), 71 L. T. 659; *Re Betty*, *Betty v. A. G.*, [1899] 1 Ch. 821; *Re Giers*, *Cooper v. Giers*, [1899] 2 Ch. 54; *Re Wise*, *Hardy v. Lemon*, [1916] 1 Ch. 279.

**2293.** ———.]—A tenant for life of leaseholds for years determinable on lives, obtained before his estate for life had come into possession, the grant of a reversionary term determinable on a new life, & to commence after the determination of the old term. He came into possession, & afterwards died, having possessed the estate, during part of the term created by the new grant:—**Held**: the amount to be paid by the remainderman in respect of the fine & expenses of renewal was to be ascertained by reference to the actual enjoyment of the tenant for life, & compound interest to be computed on the proportion attributable to the remainderman up to the death of the tenant for life, & simple interest from that time until payment.—**BRADFORD v. BROWNJOHN** (1868), 3 Ch. App. 711; 38 L. J. Ch. 10; 19 L. T. 248; 16 W. R. 1178, L. J.

*Annotation*.—**Consd.** *Isaac v. Wall* (1877), 6 Ch. D. 706.

**2294. Liability of lessee—Renewal obtained by misrepresentation.**]—The tenant having by misrepresentation & collusion with plff.'s steward obtained a renewal of a lease for lives as if one only had dropped, & two were to be exchanged, when in fact two lives had fallen, decreed to pay the value of the two lives; & shall not have the option of delivering up the new, & abiding by his former lease.—**ABINGDON (EARL) v. BUTLER** (1790), 3 Bro. C. C. 112; 2 Cox, Eq. Cas. 260; 1 Ves. 206; 29 E. R. 440, L. C.

**2295. Fund provided by testator.**]—**Held**: though the old rule, throwing one-third of the fine for renewal upon the tenant for life, does not now prevail, the tenant for life in general cases must contribute beyond the interest, in proportion to the benefit he takes; but in this case testator having provided a fund for renewal, the tenant for life might put in his own life; & was not under an obligation to renew farther than to permit a mtge. for raising that fund.—**WHITE v. WHITE** (1804), 9 Ves. 554; 32 E. R. 718, L. C.

*Annotations*.—**Apld.** *Allan v. Backhouse* (1813), 2 Ves. & B. 65. **Consd.** *Ordlad v. Luxton* (1834), 4 L. J. Ch. 65. **Foll.** *Jones v. Jones* (1846), 5 Hare, 440. **Consd.** *Bradford v. Brownjohn* (1868), 3 Ch. App. 711. **Refd.** *Shaftesbury v. Marlborough* (1833), 2 My. & K. 111; *Hudleston v. Whelpdale* (1852), 9 Hare, 775.

**2296.** ———.]—**ALLAN v. BACKHOUSE**, No. 2284, *ante*.

**2297.** ———.]—**PLAYTERS v. ABBOTT**, No. 2285, *ante*.

**2298.** ———.]—A, being entitled to a crown lease of houses, which would expire in 1845, & to a sum of stock, by his will, dated in 1825, bequeathed the interest of the stock to his wife for her life, & directed that, after her decease, the stock, subject to & after deducting such premium or sum of money as should be necessary for the renewal of the crown lease, in case he should not have renewed such lease in his lifetime, should go to his children. He then bequeathed to his son G. the houses comprised in the lease, or of which he should at his decease have obtained a renewed lease, to hold for the existing term therein, & all benefit of renewal aforesaid, for his own benefit:—**Held**: G. was entitled, out of the stock, to the value, at the widow's death, of a grant of a new reversionary lease, for the term, at the rent, & subject to the

covenants contained in the old lease, or as near thereto as the law would allow; this value to be ascertained by the master.—**RICKARDS v. RICKARDS** (1844), 13 L. J. Ch. 344; 3 L. T. O. S. 217, L. C.

*Annotation*.—**Mentd.** *Barber v. Mackrell* (1892), 67 L. T. 108.

**2299.** ———.]—Testator bequeathed his share in renewable leaseholds, which he expressed himself to be entitled to under a lease, but in fact held under a trust, whereby the entirety was vested in trustees with powers for renewal, upon trust to renew the lease from time to time out of the income, & to divide the surplus during his wife's life as therein mentioned, with a direction that after her decease same should fall into his residuary estate; & he empowered his exors. at any time to sell the leaseholds & invest the proceeds in consols. Renewal having become impossible:—**Held**: the will showed not a mere discretionary power for the trustees to renew, but a paramount intention that the property should be enjoyed in succession, & therefore the remainder of the term must be sold, & the renewal fund treated as capital, & not paid to the tenants for life.—**MADDY v. HALE** (1876), 3 Ch. D. 327; 45 L. J. Ch. 791; 35 L. T. 134; 24 W. R. 1005, C. A.

*Annotations*.—**Foll.** *Re Barber's S. E.* (1881), 18 Ch. D. 624. **Consd.** *Re Ranelagh's Will* (1884), 26 Ch. D. 590.

**2300.** ———.]—**JONES v. JONES**, No. 2288, *ante*.

**2301. Contribution by underlessee—Proportionate to interest.**]—A. being possessed of certain premises held under an archbishop by lease, renewable from time to time on payment of certain fines & fees, demised the premises for a term to B., who covenanted that he would, from time to time, & at every time during the term, pay to A. or the archbishop, such part of the fine & fees which, upon every renewal by A. of the lease by which he held the premises demised, should be paid, or payable, by A. in respect of the premises demised to B. A. afterwards renewed his lease under the archbishop for a period exceeding, by five years, the term demised to B.:—**Held**: B. was not liable, upon this covenant, to pay the whole of the fine & fees incurred by A. upon the renewal of his lease to the extent above mentioned, but only a part of such fine & fees, commensurate with the interest which B. had acquired in the premises.—**CHARLTON v. DRIVER** (1820), 2 Brod. & Bing. 345; 5 Moore, C. P. 59; 129 E. R. 999.

*Annotation*.—**Refd.** *Clutton v. Fleming* (1836), 8 Sim. 105.

**2302.** ———.]—A., a lessee under a dean & chapter, for twenty-one years renewable every seven, underlet to B., & covenanted, within two months after the dean & chapter should have renewed the lease under which he then held, to execute to B. a lease for such further term as would make up a certain term of which twenty-four years were then unexpired; B. from time to time surrendering his then subsisting lease, & paying, upon every such renewal, such a proportion of the fine which A. should have paid to the dean & chapter on renewing the lease or leases under which he should hold the premises, as should have been imposed on account of any new buildings erected, or to be erected by B. upon the premises:—**Held**: B. was not bound to contribute to the fine paid on any renewal subsequent to that which first enabled A. to make up the term agreed to be granted.—**CLUTTON v. FLEMING** (1836), 8 Sim. 105; 5 L. J. Ch. 373; 59 E. R. 42.

**2303.** ———.]—**Duty of underlessee to pay on demand.**]—Equity will not decree the specific per-

formance of a covenant by the mesne landlord with his lessee for the renewal of the lease after the lessee has wilfully neglected or refused to renew; & the non-payment, after demand, of the fine which the mesne landlord has paid to the superior landlord amounts to such neglect or refusal. An under-lessee who is not himself bound to take a renewal of his lease, but who is entitled to the benefit of a covenant by his lessor for the renewal of his underlease, upon payment of his proportion of the fines & expenses of a renewal by the superior landlord, ought, if he complains of the amount of such proportion required from him by the mesne landlord, to apply without delay to a ct. of equity to assess the sum which he ought to pay, submitting himself to the jurisdiction of that ct., to compel him to pay a reasonable sum; & if instead of making such application, & after notice from his mesne landlord that the fine must be paid in a certain time or his right will be excluded, he should delay the payment, the objection that the sum demanded from him was unreasonable will not excuse his laches.—*CHESTERMAN v. MANN* (1851), 9 Hare, 206; 22 L. J. Ch. 151; 68 E. R. 476.

**2304. — Necessity for demand.]**—Lease to A., for a term of years, at a yearly rent, & under & subject to the payment, at stipulated periods during the term, of certain sums of money in the nature of fines, with a covenant on the part of the lessor, at the end of the term, on due & punctual payment being made of the rent, & gross sums or fines, at the times appointed for payment thereof, to grant a further or renewed lease. A. assigned to B. a part of the premises, for the same term & interest as A. himself took under the lease, subject to the payment of a proportional part of the rent & gross sums or fines, the amount of the proportion was not specified. C. afterwards purchased of the lessor the reversion of the premises, expectant on the lease to A., & subsequently to acquiring the reversion, purchased A.'s interest in all the premises demised to A. by the lease, & not assigned by him to B. After this purchase by C., one of the gross sums or fines became due, but was not paid, & no proportion of it was demanded by C. from, or was paid by B.:—*Held*: the double character filled by A. relieved B. from the strict performance of the covenant, & the non-payment by B. of a proportion of the gross

sum or fine was not, in the circumstances, a refusal to pay, or such a breach of the covenant, as to deprive B. of his claim to a renewed lease of the property assigned to him.—*STATHAM v. LIVERPOOL DOCK CO.* (1830), 3 Y. & J. 565; 148 E. R. 1304.

**2305. What are costs of renewal—Not costs of action caused by disposition of property of lessor.]**—Where an owner in fee of property, having granted a lease of it for three lives, & the life of the survivor, & covenanted, for himself, his heirs & assigns, to renew, on the dropping of one or more of the lives mentioned in the lease, by his will so devised the property as, under the limitations of his will, the parties entitled to the estate could not comply with the obligation imposed upon them by testator without instituting a suit:—*Held*: the costs of such suit must be paid out of testator's personal estate.—*WORTHAM v. DACRE* (LORD) (1850), 2 K. & J. 437; 27 L. T. O. S. 63; 4 W. R. 451; 69 E. R. 853.

*Annotations:—***Consd.** *Mostyn v. Fitzsimmons*, [1903] 1 K. B. 349. **Mentd.** *Cresswell v. Haines* (1861), 8 Jur. N. S. 208; *Murdin v. Patey* (1863), 1 New Rep. 566.

**2306. — Costs of reference to determine amount of fine.]**—By a covenant for renewal in a lease for years the lessor covenanted at any time during the term at the request & "at the costs of the lessee," & on payment by him of a fine calculated upon the number of the expired years of the term & the full improved annual value of the premises at the time of the renewal (the value to be determined by the lessor's surveyor or, at the option of the lessee, by two surveyors to be appointed by the lessor & the lessee respectively, & in case of their differing, by their umpire), to renew the lease for a further term. The lessee having required a renewal, & the parties being unable to agree as to the amount of the fine, the question of the improved annual value of the premises at the time of the renewal was referred to two referees or their umpire, & the umpire made an award:—*Held*: upon the natural & true construction of the covenant the cost of the reference & award were payable by the lessee as necessary costs of the renewal.—*FITZSIMMONS v. MOSTYN* (LORD), [1904] A. C. 46; 73 L. J. K. B. 72; 89 L. T. 616; 52 W. R. 337; 20 T. L. R. 134, H. L.; *affg.* S. C. *sub nom.* *MOSTYN* (LORD) *v.* *FITZSIMMONS*, [1903] 1 K. B. 349, C. A.

*Annotation:—***Apld.** *Re Baylis*, [1907] 2 Ch. 54.

*NELL v. BURNETT, BURNETT v. GOING* (1841), 4 I. Eq. R. 216.—**IR.**

**2303 iii. —**—*CULLEN v. LEONARD* (1842), 5 I. Eq. R. 134.—**IR.**

**b. — Proportionate to quality & quantity of land comprised in underlease.]**—*FRANKFORT (LORD) v. THORPE* (1813), 2 Ball & B. 372.—**IR.**

**c. —**—*Held*: an agreement that the underlessee should contribute to the fines & expenses of obtaining the renewal of the head-lease in proportion to the quantity of land he held was not inequitable or unreasonable.—*CURRY v. STANLEY* (1833), 11 Hare & Jo. 487.—**IR.**

**d. —**—*The contributions of sub-tenants, under leases with toties quoties covenants, to renewal fines, are to be calculated according to the proportion which the annual value of the lands comprised in each lease bears to the annual value of the entire lands comprised in the original lease at the time of the renewal.*—*MOLONY v. SCOLLARD* (1847), 12 I. Eq. R. 93.—**IR.**

**e. —**—*The contributions to renewal fines of the tenant of a college lease, & his sub-tenant, with a toties quoties covenant for renewal, are in proportion to the annual value of their respective interests.*—*ORR v.*

*LITTLEWOOD* (1861), 11 I. Ch. R. 502.—**IR.**

**2304 i. — Necessity for demand.]**—There should be a distinct demand made upon an underlessee to pay his proportion of the renewal fines.—*JOHN v. ARMSTRONG* (1834), L. & G. temp. Plunk. 392.—**IR.**

**2304 ii. —**—*LAWLESS v. GROGAN* (1837), 1 Dr. & Wal. 53.—**IR.**

**f. — Interest on fines.]**—A previous renewal by the tenant of a fee to his sub-tenant recited the payment of interest on the renewal fines, & contained a *toties quoties* covenant for renewal & a covenant by the tenant to pay what fine or fines the lessor should pay to the fee:—*Held*: the sub-tenant was bound to pay interest on the renewal fines on obtaining the perpetuity.—*BRABAZON v. LUCAN* (LORD) (1849), 12 I. Eq. R. 432.—**IR.**

**g. —**—*A bishop's lease was, after a former one's expiration, granted at a less fine, because the new lessee was son to the former tenant, whose assets were sufficient to pay the fine. V. was his administrator, but the son had made himself exor. de son tort:—Held*: the new lease was a graft, & the new lessee was bound to renew to a sub-lessee without contribution.—*M'NULTY v. HAMILL* (1815), Beat.

544.—**IR.**

**h. What are costs of renewal—Costs occasioned by state of lessee's title to renew.]**—A tenant having, by his conduct, made his title to a renewal doubtful, & thereby rendering a suit for it necessary, was, on obtaining a renewal, decreed to pay all the costs.—*BARRETT v. PEARSON* (1812), 2 Ball & B. 189.—**IR.**

**k. Title to accrued fines.]**—In the case of a renewable lease, the sum calculated as renewal & septennial fines & interest is really compensation for the breach of the covenant to pay a fine on the fall of each life. Therefore, where the lessor's interest in a renewable lease was sold after the lease had been allowed to remain unrenewed until more than one life had dropped, & a large number of fines had accrued due:—*Held*: (1) the owner of the reversion, though the proper person to receive the fines, receives them only as trustee for the persons who were entitled on the fall of each life; (2) the execution of a fee farm grant subsequent to the publishing of the rental, but before the sale, affords no ground to the purchaser to claim the money paid as renewal & septennial fines & interest.—*Re BRINKLEY'S ESTATE* (1868), 16 W. R. 356.—**IR.**

## Part X.—Particular Properties.

### SECT. 1.—AGRICULTURAL TENANCIES.

**Commencement, duration & termination of tenancy.]—See AGRICULTURE, Vol. II., pp. 5 *et seq.***

**Authority of agent to let.]—See AGENCY, Vol. I., pp. 326, 411, Nos. 428–431, 1089.**

**Covenants & customs of the country.]—See AGRICULTURE, Vol. II., pp. 10 *et seq.***

**Compensation.]—See AGRICULTURE, Vol. II., pp. 41 *et seq.***

**Arbitration relating to.]—See AGRICULTURE, Vol. II., pp. 46–48, Nos. 251–264; ARBITRATION, Vol. II., pp. 320, 321, 328, Nos. 60–63, 117.**

**Damage by game.]—See GAME, Vol. XXV., pp. 361, 362, Nos. 108–115.**

**Crops & emblements.]—See AGRICULTURE, Vol. II., pp. 52 *et seq.***

**Assignment of.]—See AGRICULTURE, Vol. II., p. 56, Nos. 307–309; BILLS OF SALE, Vol. VII., p. 37, Nos. 194–197.**

**Seizure in distress.]—See DISTRESS, Vol. XVIII., pp. 300, 301, Nos. 379–388.**

**Seizure in execution.]—See EXECUTION, Vol. XXI., pp. 481, 482, Nos. 611–620.**

**Distress.]—See DISTRESS, Vol. XVIII., pp. 260 *et seq.***

**Execution.]—See EXECUTION, Vol. XXI., pp. 415 *et seq.***

**Fixtures.]—See AGRICULTURE, Vol. II., pp. 49 *et seq.***

**Rights of tenant over game.]—See GAME, Vol. XXV., pp. 360 *et seq.***

**Trees & timber.]—See AGRICULTURE, Vol. II., pp. 61 *et seq.***

### SECT. 2.—BUILDING AGREEMENTS AND LEASES.

#### SUB-SECT. 1.—IN GENERAL.

*See, generally, BUILDING CONTRACTS, Vol. VII., pp. 331 *et seq.**

**Agreement for lease.]—See Part II., *ante*.**

**Agreements amounting to lease.]—See Part III., Sect. 2, sub-sect. 4, *ante*.**

**Leases.]—See Part III., *ante*.**

**2307. Agreement stipulating for ground rent—Stipulation for building or building lease not imported.]—Deft. was owner of a piece of land which he held subject to certain restrictions as to the buildings which should be erected on it. He received £5 from pltf., for which he signed a receipt, which contained an agreement for a lease of the land for ninety-nine years at a rent of £20, payable quarterly. It also stated that ground rent was to be payable from a certain date, but did not fix any time for the commencement of the term:—*Held*: pltf. was entitled to a lease for ninety-nine years from the date at which the ground rent was to commence, & the use of the word "ground rent" did not import a stipulation that the ground was to be built on, & therefore did not imply that a building lease was to be agreed on & executed by the parties.—*WESLEY v. WALKER* (1878), 38 L. T. 284; 20 W. R. 368.**

**2308. Agreement stipulating for formal contract—Specific performance of agreement refused—No damages for non-performance.]—Where parties have entered into a preliminary building agreement with the intention of executing a more formal & complete contract, the ct. will not decree specific performance of the agreement, nor will it**

**give damages for non-performance.—WOOD v. SILCOCK** (1884), 50 L. T. 251; 32 W. R. 845.

**2309. Compliance of agreement with statutory requirements—Agreement entered into before statute—London Building Act, 1894 (c. cxxiii).—The provision in sect. 212 of the above Act, which exempts from compliance with its requirements buildings to be carried out under any contract entered into before the Act, includes buildings to be carried out under a building agreement made for the development of an estate.—*TANNER v. OLDMAN*, [1896] 1 Q. B. 60; 65 L. J. M. C. 10; 73 L. T. 404; 44 W. R. 63; 12 T. L. R. 13; 40 Sol. Jo. 12; 15 R. 603; 59 J. P. Jo. 693, D. C.**

**Annotation:—Reid. Withington U. D. C. v. Moore** (1896), 60 J. P. 408.

**2310. Unrestricted power of leasing—Includes building lease.]—A testator, entitled on his death to city freeholds, devised his real estate upon trust after the death of his widow to sell at such times & in such manner as his trustees should think fit, & until sale he empowered his trustees in the widest possible terms to let the same on lease or otherwise. Upon proof that testator's real estate could be most profitably realised by first putting up the property to auction to be let on a building lease to the highest bidder & then selling the reversion, & that the ground rent to be obtained from the building lease would not be less than the rent of the property in its existing condition, the ct. authorised the trustees to realise in the manner proposed.—*Re JAMES, JAMES v. GREGORY* (1895), 64 L. J. Ch. 686; 73 L. T. 1, C. A.**

**2311. Rescission of agreement—Election to rescind—Must be unequivocal.]—MARSDEN v. SAMBELL, No. 2315, *post*.**

**2312. — Must be within reasonable time—Before other party alters position.]—MARSDEN v. SAMBELL, No. 2315, *post*.**

**2313. — Ground of rescission—By consent—Action for money lent to builder.]—By agreement between pltf. & deft., the former engaged to let to the latter certain land, upon which deft. engaged to build certain houses, pltf. to lend him £8,000 for that purpose, which sum deft. was not to be called upon to pay before June 24, 1829; & deft. agreed to convey the houses to pltf. when completed, as a security for the advance. In pursuance of this agreement pltf. advanced to deft. £1,108 19s. On the completion of six of the houses, deft., at the request of pltf., discontinued the building. After June 24, 1829, pltf. brought *indebitatus assumpsit* for the £1,108 19s.:—*Held*: the action was maintainable, the special contract being rescinded by the consent of the parties.—*JAMES v. COTTON* (1831), 7 Bing. 266; 5 Moo. & P. 26; 9 L. J. O. S. C. P. 55; 131 E. R. 103.**

**2314. — Refusal by other party to recognise agreement.]—MARSDEN v. SAMBELL, No. 2315, *post*.**

**2315. — Effect of rescission—Right to enter & remove goods.]—(1) Where the right of election to rescind a building agreement arises, the person to whom the right of election falls must signify his election to rescind in an unqualified manner:—*Held*: such election was not made by the appointment of a caretaker to look after the premises, who had no access to part of the premises, & did not exclude the party against whom the election**

was claimed to have been made from his workings on the other part of the premises.

(2) Such right of election must be exercised within a reasonable time, or, at all events, not after the party against whom it is claimed has been allowed to alter his position on the faith of its continuance.

(3) A refusal by one of the parties to such an agreement to recognise it as subsisting may be a ground for a rescission of the contract by the other party, but there will be no rescission unless that other party claims to rescind.

(4) A party to such an agreement, who himself rescinds it, is not entitled to enter & remove his goods from the premises after the termination of the agreement.—*MARSDEN v. SAMBELL* (1880), 43 L. T. 120; 28 W. R. 952.

**2316. — Partial completion of work—Liability to pay for work done.]**—Pltf., who was a builder, entered into an arrangement under which he was to erect a building on a piece of land upon the terms that the building should be in accordance with the requirements of the freeholder of the land, who upon its completion should give pltf. a lease of the premises at £90 a year, & pltf. should sublet them at £500 a year. At that time the intended freeholder was one W., & in the course of certain negotiations between the various persons interested in the speculation, but before they had finally come to terms, certain drawings of a portion of the work were shown to pltf. & he was asked to begin the work. He accordingly did so, & had proceeded with the work for some time, incurring considerable expense in executing the same, when it was arranged that in place of W. deft. should become the freeholder, & an alteration in the character of the building was insisted on which pltf. was unwilling to accept on the ground that it would involve a considerably larger expenditure on his part than he had originally contemplated. He therefore discontinued the work, & eventually brought an action against deft. to recover compensation for the amount which he had expended on the same:—*Held*: the arrangement being one under which pltf. was to erect the building at his own cost on deft.'s land, no promise to pay him for the work executed by him could be implied from the request to him to start the work, nor from the acceptance by deft. of the benefit of the work.—*WHEELER v. STRATTON* (1911), 105 L. T. 786, D. C.

**2317. Covenant to erect buildings—Whether continuing covenant—Implied from covenant to repair erected buildings.]**—A lease of land contained covenants by the lessees within twelve months to erect certain buildings thereon, & during the term of the lease to keep the premises "so to be erected as aforesaid in good & substantial repair." The lessees failed to erect the buildings within the twelve months; but the lessor accepted a quarter's rent which accrued due next after the expiration of that period. The lessor served upon the lessee a notice under Conveyancing Act, 1881 (c. 41), s. 14, referring to the building covenant only, & calling upon the lessees to erect the buildings. He then brought an action for recovery of possession:—*Held*: (1) there had been a waiver of the breach of the building covenant, & the breach was not continuing; (2) the covenant to repair implied an obligation to erect the buildings, & this was continuing; (3) the notice under Conveyancing Act was insufficient because it did not refer to the repairing covenant, as to which alone there was a continuing breach, & consequently the action failed.—*JACOB v. DOWN*,

[1900] 2 Ch. 156; 69 L. J. Ch. 493; 83 L. T. 191; 64 J. P. 552; 48 W. R. 441; 44 Sol. Jo. 378.

*Annotations:—As to (2) Overd. Stephens v. Junior Army & Navy Stores, [1914] 2 Ch. 516. Rejd. Wright v. Lawson (1903), 19 T. L. R. 203.*

**2318. — — — — —.]**—*STEPHENS v. JUNIOR ARMY & NAVY STORES, LTD.*, No. 2350, *post*.

**Building leases of charity lands—Settlement of form without reference to court.]**—*See CHARITIES*, Vol. VIII., p. 303, No. 1657.

**Building leases of settled land.]**—*See SETTLEMENTS*.

**Power of trustees to grant building leases.]**—*See POWERS; SETTLEMENTS; TRUSTS & TRUSTEES*.

## SUB-SECT. 2.—THE BUILDER.

### A. In General.

*See, generally, BUILDING CONTRACTS*, Vol. VII., pp. 331 *et seq.*

**2319. Nature of tenancy—Before building completed—Tenancy at will—Not from year to year.]**—By indenture A. covenanted with B., that in consideration of the expense which B. would be at in erecting on the ground therein described, & agreed to be demised & also in consideration of the yearly rents, covenants, & agreements therein reserved, etc., on the part of B., he (A.) would from time to time, when & so soon as B., his exors., etc., or assigns, should have erected one or more of the messuages therein covenanted to be built, demise & lease unto B., his exors., administrators, nominees, or assigns, the whole, or such part whereon the said messuages should be built, of all the ground, etc., therein described & agreed to be demised for ninety-eight years, yielding & paying the rent or sum of £35 for & during the first year, & so on till the fifth year, when £285 was to be paid, & the same for each remaining year of the term. Proviso, that if the yearly rent or rents, to be reserved by the lease or leases to be granted of any part of the ground agreed to be demised, should amount to the full yearly rent to be reserved, then from time to time the remainder of such ground should be leased, together with the buildings on it, at a yearly peppercorn rent. Covenant by B., for himself, his exors. & administrators, to pay the several yearly rents thereby agreed to be reserved, & all rates, etc., & to complete the buildings therein described, & to accept leases; & that in the meantime, until the granting of such lease or leases, he would perform all the covenants, etc., as if such lease or leases had been granted: with a proviso for re-entry in case of non-payment of the said rents, etc., to be reserved, etc., or on breach of covenant. By indenture, of later date, between B. & C., reciting the above agreement, B. assigned to C. the said recited arts. of agreement, & all the right title, etc., which B. had, etc., by virtue of the said indenture, subject to the performance by C., etc., of the covenants therein: & B. appointed C. to be his attorney to demand the said leases, etc.; & C. covenanted to perform the covenants of the said arts. of agreement, & to indemnify B., as assignee of the said articles. C. erected buildings on a part of the ground, & obtained leases of them from A., & paid A. the stipulated sums, in respect of the portion of the ground of which leases had not been granted, up to the quarter day previous to May 23, 1857, when he assigned to another person:—*Held*: (1) the first mentioned arts. of agreement did not amount to a demise to B. of the land; (2) B. was not a tenant from year to

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year to A.; (3) C. paid the stipulated sums as assignee of B., & as bound by his covenant with him, & was not liable for it to A., & was not a tenant from year to year to A., nor liable to pay rent at all to him; & (4) B. was tenant at will to A., but was so on the terms, not of paying the sums due from him as & for a rent, but as a stipulated or collateral payment, handed over by him, in respect of his liability to his assignor.—**CAMDEN (MARQUIS) v. BATTERBURY** (1860), 7 C. B. N. S. 864; 28 L. J. C. P. 335; 23 J. P. 821; 7 W. R. 616; 141 E. R. 1055; *sub nom.* **BATTERBURY v. CAMDEN (MARQUIS)**, 5 Jur. N. S. 1405, Ex. Ch.

**Annotations:—**As to (1) **Refd.** *Elliott v. Johnson* (1866), L. R. 2 Q. B. 120. As to (2) & (3) **Refd.** *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508. As to (4) **Consd.** *Adams v. Hagger* (1879), 4 Q. B. D. 480. *Generally, Refd.* *Howlett v. Tarte* (1861), 10 C. B. N. S. 813; *Hayne v. Cummings* (1864), 16 C. B. N. S. 421; *Holland v. Kensington Vestry* (1867), L. R. 2 C. P. 565.

**2320. ——— Licence coupled with interest.]—**

By a building agreement between the Ecclesiastical Comrs. & deft. the right was given to him to enter upon a piece of land belonging to them for the purpose of erecting a number of houses upon it. As each house should be erected & completed to the satisfaction of the Comrs. they agreed to grant a lease of it to deft. for ninety-nine years. The lease was to be in a specified form, one of the clauses in which provided that the Comrs. should have power to erect on the land adjoining the demised land any buildings whatsoever, whether they should or should not affect or diminish the light enjoyed by the lessee. It was also provided by the agreement that nothing therein contained should be deemed to operate as an actual demise of the land to deft., or to create as between him & the Comrs. the relation of tenant & landlord.

On one of the plots deft. erected a house, No. 28, & the Comrs. granted to him a lease of that house in the specified form. Deft. sold that house to plffs., & transferred the lease of it to them. He afterwards erected on an adjoining plot a house, No. 30, which when completed obstructed the access of light to some of the windows of plffs.' house. They brought an action against deft. claiming an injunction & damages:—**Held**: at the time when deft. transferred the lease of No. 28 to plffs., he had not under the building agreement such an interest in the adjoining plot, No. 30, as would enable him to make an express grant of an easement of light over it, & consequently no such grant by him could be implied.

Deft. had at the most a kind of licence, coupled with an interest in the land, which could not ripen into ownership until he had actually completed the building upon the land (**COLLINS, M.R.**).—**QUICKE v. CHAPMAN**, [1903] 1 Ch. 659; 72 L. J. Ch. 373; 88 L. T. 610; 51 W. R. 452; 19 T. L. R. 284, C. A.

**Annotations:—****Refd.** *Financial Times v. Bell* (1903), 19 T. L. R. 433; *Cable v. Bryant* (1908), 1 Ch. 259; *Abbey v. Gutierrez* (1911), 55 Sol. Jo. 364; *Westwood v. Heywood*, [1921] 2 Ch. 130.

**2321. ——— After building completed—Subject to terms of lease.]—**Agreement to grant a lease to S. when S. should have erected certain buildings on the premises to be demised. No covenant to pay rent before the execution of the lease. S. after the buildings are erected, holds the premises, subject to the terms in the lease, but is liable in *assumpsit* for use & occupation.—**BANISTER v. USBORNE** (1796), Peake, Add. Cas. 70, N. P.

**2322. ——— ———.]—**(1) By a building agreement it was stipulated that as soon as R. should have roofed-in the houses to be erected by him on certain plots of ground belonging to H., H. would grant & R. would accept a separate lease for ninety-nine years, at the rent therein mentioned, of each house when & so soon as the roof was completed, & the plot of ground on which it stood; the leases to be in the form of a draft annexed to the agreement. There was a proviso that the lessor "in respect of any of the plots not previously demised," might re-enter, in the event of the rent being in arrear for twenty-one days, or if at any time the works were not regularly proceeded with for twenty-one days. The form of lease contained a covenant to complete the house within a certain period, & a proviso for re-entry on non-payment of rent, or breach of covenant, but no power of re-entry was given if the works were not proceeded with for twenty-one days. In June, 1887, R. assigned to L. the benefit of the agreement as to four houses which he had roofed-in. R. died in July, 1887, & after his death building operations stopped for more than twenty-one days. In Oct. 1887, L. brought his action to compel H. to grant leases. H., by his defence, denied the right of L. to leases, on the grounds that the works had been stopped for more than twenty-one days, & that rent was in arrear:—**Held**: as soon as R. had roofed-in a house he was entitled to claim & bound to accept a lease of it, & his rights & liabilities were the same as if the lease had been granted, & he no longer held the house on the terms of the building agreement, but on the terms of the draft lease, & as the draft contained no power of re-entry on work being discontinued for twenty-one days, discontinuance, which did not take place till after the right to a lease had accrued, did not affect that right.

(2) The only evidence on the question whether the rents were in arrear was a statement of account which upon R.'s death H. sent to his administratrix, & the items in which were admitted to be correct. H. had lent considerable sums to R., who also had become indebted to him to a considerable amount for rent. R. had paid on account sums amounting to many times more than the amount of rents, but H. appropriated most of them to the loan account, so as to show R. largely indebted on the rent account:—**Held**: it lay upon H. to show that R. had not appropriated a sufficient part of his remittances to payment of rent, & as H. had not shown this, he had not made out that rent was in arrear, & therefore L. was entitled to have the leases granted.—**LOWTHER v. HEAVER** (1889), 41 Ch. D. 248; 58 L. J. Ch. 482; 60 L. T. 310; 37 W. R. 465, C. A.

**Annotations:—**As to (1) **Refd.** *Manchester Brewery Co. v. Combs*, [1901] 2 Ch. 608; 1 R. Comrs. v. Derby, [1914] 3 K. B. 1186; *Gray v. Spyer*, [1922] 2 Ch. 22. As to (2) **Refd.** *Foster v. Reeves*, [1892] 2 Q. B. 255; *Murgatroyd v. Silkstone & Dodsworth Coal & Iron Co., Ex p. Charlesworth* (1895), 65 L. J. Ch. 11. *Generally, Menth.* *Beighton v. Beighton* (1895), 64 L. J. Ch. 796.

**2323. Performance of agreement—What amounts to—Substantial performance.]—**(1) A condition, on the sale of leasehold property, that the title of the lessor would not be shown, & should not be inquired into, held to be binding, & the purchaser compelled to perform his contract, although in the investigation before the master a serious defect in the lessor's title was discovered.

(2) A lessee of land covenanted to build thereon two houses, with the approbation & under the inspection of the lessor's surveyor, & to expend in such building £400. With the surveyor's approbation he built five houses on the land, no

two of which were worth so much as £400, though all together were worth much more:—*Held*: the covenant was substantially performed, & there was no objection, on the ground of the deviation from its terms, under the circumstances, to the lessor's title.—*HUME v. BENTLEY* (1852), 5 De G. & Sm. 520; 21 L. J. Ch. 760; 16 Jur. 1109; 64 E. R. 1225.

*Annotations*:—As to (1) *Consd.* *Drysdale v. Mace* (1854), 2 Eq. Rep. 386. *Apld.* *Nunn v. Hancock* (1871), 24 L. T. 569. *Consd.* *Waddell v. Wolfe* (1874), L. R. 9 Q. B. 515. *Apld.* *Re Banister, Broad v. Munton* (1879), 12 Ch. D. 131. *Consd.* *Re National Provincial Bank of England & Marsh*, [1895] 1 Ch. 190. *Refd.* *Harnett v. Baker* (1875), L. R. 20 Eq. 50; *Best v. Hamand* (1879), 12 Ch. D. 1; *Re Scott & Alvarez's Contract*, *Scott v. Alvarez*, [1895] 2 Ch. 603.

**2324. — Compliance with statutory building regulations—Necessity for.**—Where a man, under contract to build according to a specified plan, & according to the Metropolitan Building Acts, commenced building according to the plan, which was in some particulars in contravention of the Building Acts, & upon being cautioned by the board, stopped building, & refused to proceed:—*Held*: he was bound to rebuild in conformity with the plan, modified so as to meet the requirements of the statutes.—*CUBITT v. SMITH* (1864), 11 L. T. 298; 28 J. P. 820; 10 Jur. N. S. 1123.

*Annotation*:—*Refd.* *Wolverhampton Corpn. v. Emmons*, [1901] 1 K. B. 515.

**2325. — Approval by lessor of proposed buildings—Failure to approve.**—The Metropolitan Board of Works, the owners in fee of two adjoining pieces of land, agreed with X. to grant him a lease of one plot on his erecting on the land a building according to certain plans to be approved by the board. The board entered into a similar agreement with W. as to the other plot, X. then agreed with W. for a sub-lease of the first plot on similar terms. W. subsequently entered into two agreements with a co. (formed for the purpose of erecting an hotel) by each of which he contracted to grant them a sub-lease of one of the two plots on the completion of a building according to the terms of the agreement. Each agreement provided that the co. "shall before Oct. 30, 1884, cover the ground . . . with a substantial building or part of a substantial building of such class, size, form, elevation, etc., & general character as shall be approved by the board or their superintending architect on their behalf, before the erection of such building is commenced." Another clause provided that the co. should forthwith submit for the approval of the board plans of the building to be built by the co., & submit to any modifications required by the board. Another clause provided that "no building shall be commenced before the said plans, etc., shall have been approved by the board as aforesaid." The plans were duly submitted to the board, which was satisfied with them, but declined to grant separate leases of the two plots if one entire building was erected over both, & required that the title to both leases should be vested in one & the same person. W. endeavoured to arrange this, but failed. The co. having gone into liquidation, the building not being completed, W. claimed to be admitted as a creditor of the co. in respect of damages for the alleged breach of the agreement:—*Held*: there was no condition precedent, but an agreement to erect such particular kind of building as the board should have approved, & the board not having approved of any particular kind of building, there was nothing capable of performance, & therefore, the co. had committed no breach of the agreement.—*Re NORTHUMBER-*

*LAND AVENUE HOTEL CO., FOX & BRAITHWAITE'S CLAIM* (1887), 56 L. T. 883, C. A.

**2326. — Right of builder to use surface for mining operations—Under collateral lease—Liability under building agreement prevails.**—The lessee of a plot of land for a term of ninety-nine years, commencing in 1804, covenanted within three years from the commencement of the term to erect seven dwelling-houses on the demised premises, similar to dwelling-houses already erected in a certain street. The lease contained an exception of the minerals (which did not belong to the lessor) & reserved to the owner for the time being full rights of working, including power to destroy the surface. At the date of this lease the lessee had acquired from the owner a lease of the minerals with full surface rights. The houses in the street in question were not exactly alike, some having four rooms & others five. In an action for specific performance of the covenant:—*Held*: (1) upon the construction of the lease, the covenant was not extinguished by the power reserved by the lease to the mineral owner to destroy the surface; (2) a decree for specific performance was the only remedy available as the damages for the injury done to the reversion would necessarily be infinitesimal, on account of the length of the lease, & would therefore be no adequate compensation for the depreciation of the reversion; (3) the houses to be erected were sufficiently defined to enable the ct. to order specific performance; & specific performance was ordered accordingly.—*MOLYNEUX v. RICHARD*, [1906] 1 Ch. 34; 75 L. J. Ch. 39; 93 L. T. 698; 54 W. R. 177; 22 T. L. R. 76.

**2327. — Waiver of performance.**—On granting a building lease for 92½ years the lessee covenanted that he would, within the first five years of the term, build thirty-four additional houses, of the dimensions therein mentioned, & keep the same in repair, & the same so repaired, at the end or other sooner determination of the term, deliver up to the lessor or his assigns. Some only of the thirty-four houses were built; but the lessor, notwithstanding received the rent, payable under the lease, for forty-six years afterwards:—*Held*: on a sale of the property, by public auction, by the assignees in bkcy. of the lessee, although there had been a waiver by the lessor of the covenant to build, still the covenant to deliver up the houses, at the end or sooner determination of the term, continued in force, & was a valid objection to the title; & the purchaser could not be required to accept compensation or indemnity. The circumstance that the purchaser could at any time rid himself of all liability, in respect of the breach of the covenant, by assigning the premises to a pauper, was considered no reason for compelling the purchaser to accept the title.—*NOUAILLE v. FLIGHT* (1844), 7 Beav. 521; 13 L. J. Ch. 414; 8 Jur. 838; 49 E. R. 1168.

*Annotation*:—*Refd.* *Hume v. Bentley* (1852), 5 De G. & Sm. 520.

**2328. — Enforceable by specific performance—Contract sufficiently defined.**—*MOLYNEUX v. RICHARD*, No. 2326, *ante*.

**2329. — Damages in lieu of specific performance.**—*MOLYNEUX v. RICHARD*, No. 2326, *ante*.

**2330. Right to call for lease—Expenditure on land.**—If a man, under a verbal agreement with a landlord for a certain interest in land, or under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, & upon the faith of such

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promise or expectation, with the knowledge of the landlord, & without objection by him, lays out money upon the land, a ct. of equity will compel the landlord to give effect to such promise or expectation (LORD KINGSDOWN).—RAMSDEN v. DYSON (1866), L. R. 1 H. L. 129; 12 Jur. N. S. 506; 14 W. R. 926, H. L.; *revisg.* S. C. *sub nom.* THORNTON v. RAMSDEN (1864), 4 Giff. 519.

**Annotations:—***Apprvd.* Pflimmer v. Wellington Corpn. (1884), 9 App. Cas. 699. *Consd.* Civil Service Musical Instrument Assn. v. Whitoman (1899), 68 L. J. Ch. 484. *Appld.* Ahmad Yar Khan v. Secretary of State for India in Council (1901), 17 T. L. L. 500. *Reid.* Bankart v. Tennant (1870), L. R. 10 Eq. 141; Bastin v. Bidwell (1881), 44 L. T. 742; McManus v. Cooke (1887), 35 Ch. D. 681; Lala Beni Ram v. Kundan Lal (1899), 15 T. L. R. 258. *Mentd.* Weller v. Stone (1885), 54 L. J. Ch. 497; Proctor v. Bennis (1887), 36 Ch. D. 740; Re Clarke, *Ex p.* Newton v. Kearly (1889), 60 L. T. 335; Wimbledon & Putney Commons Conservators v. Nicol (1894), 10 T. L. R. 247; Re Williams & Parry's Contract (1895), 72 L. T. 869; Marriott v. Reid (1900), 82 L. T. 369; Cloutte v. Storey (1910), 80 L. J. Ch. 193; Wheeler v. Stratton (1911), 105 L. T. 786; Ramsden v. I. R. Comrs., [1913] 3 K. B. 580, n.; A.-G. to the Prince of Wales v. Colloff, [1916] 2 K. B. 193; Morpeth Corpn. v. Northumberland Farmers' Auction Mart Co. & Donkin (1921), 90 L. J. Ch. 420; Jones Bros. (Holloway) v. Woodhouse, [1923] 2 K. B. 117; Michaud v. Montreal City (1923), 92 L. J. P. C. 161.

*See, also*, Part II., Sect. 4, sub-sect. 2, C. (a) ii. & (b) ii.

**2331. Assignment of agreement—Default of purchaser—Time essence of contract.]**—If it be of the essence of the contract that an act should be completed by a fixed date, an extension of the time does not operate as an absolute waiver of that condition, but only substitutes the extended time for the original time.

M. & W., entitled to a lease under a building agreement, defeasible by notice in case they did not complete buildings by Jan. 1, 1874, in July, 1873, entered into an agreement to sell their interest to plffs. for £2,000, £200 of which was paid on signing the agreement, £800 & £1,000 to be paid at the times specified in clause 5, which was as follows: "If the purchaser shall fail to pay either the £800 on July 14, 1873, or the £1,000 on July 31, 1873, or as to the £1,000 upon such deferred date as the parties may agree upon, all money paid previous to such default being made shall be absolutely forfeited & this contract become null & void." The £800 was duly paid. The time for payment of the £1,000 was extended to Aug. 26, 1873. The purchaser made default in payment at the date. The vendors gave notice to determine the agreement, & a suit for specific performance was instituted by the purchasers:—*Held*: by clause 5, time was made of the essence of the contract. The extension of the time to August 26, did not operate as an absolute waiver of that condition, but merely substituted Aug. 26 for the original date.—BAILEY v. MESSENGER (1874), 43 L. J. Ch. 449; 30 L. T. 351; 22 W. R. 522.

**2332. Rent—Liability for—No entry or possession by builder.]**—By arts. of agreement not under seal pltf. agreed to grant to deft. a lease at a certain rent for ninety-nine years of a piece of land so soon as the latter should have erected upon it a messuage, & deft. undertook until the execution of the lease, to "hold the said piece of land & other the premises at the rent & subject to the conditions to be contained" in the lease. Deft. never entered upon or took possession of the piece of land:—*Held*: although the arts. of agreement did not operate as a demise, yet deft. by a collateral

contract to the intended lease had undertaken to pay the amount of the rent, & it was immaterial that he had never entered upon possession of the land.—ADAMS v. HAGGER (1879), 4 Q. B. D. 480; 41 L. T. 224; 43 J. P. 796; 27 W. R. 402, C. A.

**2333. —Acceptance by lessor before building completed—Whether waiver of breach of covenant.]**

—A tenant was in possession of plots of land under an agreement for leases to be granted when he should have fulfilled certain conditions as to building. The intention of the parties was, in the view of the ct., that the agreement should be regarded as a lease. The conditions were (to the landlord's knowledge) not fulfilled within the appointed time, but after that date the landlord demanded rent as under the leases & the tenant paid it:—*Held*: the landlord could not, on receiving the rent, stipulate that it was received "without prejudice to any breaches of covenant made up to that time in the agreement for leases."—STRONG v. STINGER (1889), 61 L. T. 470; 5 T. L. R. 638.

**Annotation:—***Mentd.* Wenman v. Lyon & Honeywill (1891), 60 L. J. Q. B. 223.

**2334. —Builder indebted to lessor for advances—Appropriation of payments.]**—LOWTHER v. HEAVER, No. 2322, *ante*.

**2335. Right to quiet possession.]**—In 1790 defts.' predecessors in title entered into an agreement with a builder, under which the builder was to erect certain houses upon land belonging to them, & they agreed to grant him leases of the houses when erected at the yearly rent of £25 for each acre of land for the term of ninety-nine years from 1790. The builder was accordingly let into possession of the land, & built houses thereon in pursuance of the agreement. The full amount of the stipulated rent of £25 per acre having been secured by leases of houses erected on part of the land, the builder became entitled under the agreement to have leases granted to him of the houses erected on the rest of the land for the said term of ninety-nine years at a peppercorn rent, but no leases of the latter houses were ever asked for or granted, nor was any rent paid in respect of them. The interest of the builder in two of these latter houses became vested in pltf., who continued in possession of them until the expiration of the term of ninety-nine years, when defts. entered into possession. In an action to recover possession of the two houses, pltf. contended that his predecessor in title became tenant at will, & that by Real Property Limitation Act, 1833 (c. 27), s. 7, combined with ss. 2 & 15, the title of defts. was barred after the lapse of five years from the passing of the Act:—*Held*: as a ct. of equity would have restrained defts.' predecessors in title from re-entering during the ninety-nine years covered by the agreement, they had no right of re-entry during that period, & therefore the statute did not operate so as to bar their title.—WARREN v. MURRAY, [1894] 2 Q. B. 648; 64 L. J. Q. B. 42; 71 L. T. 458; 43 W. R. 3; 10 T. L. R. 573; 9 R. 793, C. A.

**2336. Whether builder an "owner"—Within London Building Act, 1894 (c. cxxiii), s. 5.]**—The word "owner" in s. 5 (29), (32), & in s. 90 of the above Act as therein defined, includes a person who has entered upon land & erected buildings under an agreement for a lease although no lease has been executed & although the agreement is expressed not to operate as a demise but to give only a right to enter upon the premises for the purpose of performing the agreement.—LIST v. THARP, [1897] 1 Ch. 260; 66

L. J. Ch. 175; 76 L. T. 45; 61 J. P. 248; 45 W. R. 243; 13 T. L. R. 149; 41 Sol. Jo. 188.

*Annotations*.—*Consd.* Crosby v. Alhambra Co., [1907] 1 Ch. 295. *Refd.* Splers v. Troup (1915), 84 L. J. K. B. 1986.

— **Within Metropolis Management Acts—Paving street.**—*See* HIGHWAYS, Vol. XXVI., pp. 490, 491, Nos. 2011–2013.

**Building owners—Within London Building Acts.**—*See* BOUNDARIES, Vol. VII., p. 306, Nos. 284 *et seq.*

**Adjoining owners—Within London Building Acts.**—*See* BOUNDARIES, Vol. VII., p. 305, Nos. 269 *et seq.*

**Compulsory purchase of part of building land—Remainder of building agreement unaffected.**—*See* COMPULSORY PURCHASE, Vol. XI., p. 278, No. 2055.

### B. Rights in Relation to Soil.

**2337. Pending completion of building—Right to excavate & dispose of material—Reservation of minerals.**—The holder of a building lease where minerals are reserved has a right to dig foundations for buildings about to be erected, & dispose of the materials dug out, but not to do so in order to improve the surface as a building site.—*ROBINSON v. MILNE* (1884), 53 L. J. Ch. 1070.

**2338. — Fossilised boat embedded in soil.**—In land demised to a gas co. for ninety-nine years, with a reservation to the lessor of all mines & minerals, & covenants under which the lessees were authorised, under the inspection of the lessor's surveyor & according to plans to be previously approved, to erect a gasholder & other buildings, a prehistoric boat, embedded in the soil 6 feet below the surface, was discovered by the lessees in the course of excavating for the foundations of the gasworks:—*Held*: the boat, whether regarded as a mineral, or as part of the soil in which it was embedded when discovered, or as a chattel, did not pass to the lessees by the demise, but was the property of the lessor though he was ignorant of its existence at the time of granting the lease.

The implied permission to remove & dispose ought then to extend to what the parties might fairly be deemed to have contemplated would be found in making the excavations; but beyond this point it ought not to be carried. The existence of the boat was unknown, & its discovery was not contemplated. In my opinion, then, the licence to remove & dispose extended to the clay & ordinary soil likely to be found in pursuing the licence to excavate, but it did not extend to what was unknown & not contemplated, & therefore did not comprise the boat (*CHITTY, J.*).—*ELWES v. BRIGG GAS CO.* (1886), 33 Ch. D. 562; 55 L. J. Ch. 734; 55 L. T. 831; 35 W. R. 192; 2 T. L. R. 782.

*Annotation*.—*Refd.* South Staffordshire Waterworks Co. v. Sharman (1896), 74 L. T. 761.

**2339. —**—*J.*—*PEDLEY v. COOPER* (1892), 36 Sol. Jo. 729.

**2340. After completion of building—Soil between houses—Vests in builder—Interference with reserved right of way.**—The proprietor of land agreed to grant leases to deft. of certain houses he had undertaken to build on the land, deft. to hold the land & premises for eighty years, yielding therefore £400 a year rent, & to build a wall all along the west side of the land; the landlord to have a right of way over the streets between the houses. Deft. entered, paid rent, built houses, & obtained leases of the houses as fast as they were built:—*Held*: he was under these circumstances, in possession of the soil between the houses, & the

landlord could not maintain trespass against him for erecting a wall, on the west side of the land, across the end of one of the streets.—*ALEXANDER v. BONNIN* (1888), 4 Bing. N. C. 799; 1 Arn. 337; 6 Scott, 611; 8 L. J. C. P. 53; 132 E. R. 997.

### C. Position of Assignee of Builder.

*See, generally*, BUILDING CONTRACTS, Vol. VII., pp. 417 *et seq.*

**2341. Assignee of particular building—Whether entitled to demand lease thereof—Without assuming remainder of assignor's liabilities.**—*ANON.* (1822), 1 L. J. O. S. Ch. 25.

**2342. —**—*J.*—In Jan. 1857, deft. agreed with D., that as soon as he had erected thirty-seven houses, in eight blocks, on certain land, he would grant him eight leases of the land & houses. The leases were to contain covenants to insure against fire in the Law Fire Insurance Office, in the joint names of deft. & D. or his assigns; & if D. failed to erect the houses within the time specified, deft. was to have the power of re-entry. In Apr. 1858, the number of the houses, was, by agreement between the parties, altered, & as to seventeen of them, D. was to roof them in by June 24, & complete them by Sept. 20 following; & deft. agreed to grant to D., or his nominee, a lease for four carcasses of houses then standing on block No. 1; & also, as soon as D. or his assigns should have erected & roofed in any of the carcasses of the houses in any of the blocks to grant a lease of the said block to D. or his nominee, in the same manner as if the houses were finished. At that time there were, in addition to the four carcasses on block No. 1, three standing on block No. 4, & D. gave the name of pltf. as his nominee. Deft. agreed, as soon as D. would be entitled to require the same, to grant leases of the seven houses to pltf., & D. assigned to pltf. the two plots of land, Nos. 1 & 4, & all the benefit of the agreement of Jan. 1857, & Apr. 1858, in relation thereto. The seven houses on the two blocks were duly completed within the time specified, but none of the remaining houses were erected. On Sept. 23, 1858, pltf. insured the premises in the Phoenix Office, & in his own name only. Deft. discovered the latter circumstance, as pltf. alleged, two days afterwards, but as deft. himself alleged, not till Dec. 1. Deft.'s solr., in Jan. 1859, wrote to pltf.'s solr., claiming a forfeiture; & on Feb. 2 following the seven houses were insured in the Law Fire Office, in the names of pltf. & deft. On Mar. 10, deft. commenced an action of ejectment for the forfeiture, & he asserted his right to re-enter upon any part of the property for breach of the covenant to build the thirty-seven houses, & of the covenant to insure. Pltf. thereupon filed a bill for an injunction, & for specific performance of the agreement to grant a lease:—*Held*: as between pltf. & deft., the agreement related only to seven houses, & pltf. was bound by the stipulations of D. only so far as they related to the said seven houses; & a decree was made in the terms of the prayer.—*ROGERS v. TUDOR* (1860), 2 L. T. 303; 24 J. P. 708; 6 Jur. N. S. 692.

**2343. —**—*J.*—C. agreed to let to W. several plots of ground for ninety-nine years, at one given rent, to be apportioned as thereafter mentioned. W. agreed to build on plot P. twenty houses, on plot B. eight, on plot G. ten, & on plot Y. five; & it was agreed that a separate lease of plot B., at a given rent, should be granted as soon as four of the houses on that plot & two of the ten houses on plot G. were covered in, & that a separate

**Sect. 2.—Building agreements and leases: Sub-sect. 2, C.; sub-sect. 3, A., B. & C.]**

lease of plot G. should be granted as soon as five of the ten houses on that plot were covered in. W. mortgaged this contract to pltf., & afterwards became insolvent. Pltf. covered in the requisite number of houses on plots B. & G., & applied for leases of them, denying at the same time his liability to take upon himself the other parts of the agreement, upon the performance of which the granting of leases of plots B. & G. did not by the terms of the contract depend:—*Held*: as by the terms of the contract the right to have leases of plots G. & B. depended only on conditions which had been fulfilled, pltf., as assignee of W., was entitled to have leases of those plots granted to him, without assuming W.'s obligations under the entire contract.—*WILKINSON v. CLEMENTS* (1872), 8 Ch. App. 96; 42 L. J. Ch. 38; 27 L. T. 834; 36 J. P. 789; 21 W. R. 90, L. J. J.

*Annotations*:—*Consd.* *Lowther v. Heaver* (1889), 41 Ch. D. 248. *Mentl. Odessa Tram. Co. v. Mendel* (1878), 8 Ch. D. 235; *Pocahontas Fuel Co. (Incorporated) v. Ambafielos* (1922), 27 Com. Cas. 148.

**2344. Whether tenancy created between assignee & lessor—Occupation taken & payment made by assignee.**—*CAMDEN (MARQUIS) v. BATTERBURY*, No. 2310, *ante*.

**SUB-SECT. 3.—THE LESSOR.**

**A. In General.**

**2345. Covenant to make roads—Sufficiency of performance.**—A lease, reciting that defts. had appropriated & laid out certain meadows as building ground, demised a portion of them to pltf., who covenanted to build two houses thereon; & defts. covenanted "that on such buildings being covered in they would cut good & sufficient roads & footpaths in, through, & over the said fields & meadows, & cut & construct a good & sufficient sewer along & under the said turnpike road & under the said intended roads in the said fields for the common use of pltf. & all other lessees or tenants of other portions of the said fields or meadows":—*Held*: this covenant, as far as concerned the roads, was not performed by defts. making a road up to pltf.'s houses; but they ought, as soon as pltf.'s houses had been covered in, to have made the roads in, through, & over the whole meadows as contemplated by the building scheme, although no other houses than pltf.'s had been built.—*MASON v. COLE* (1849), 4 Exch. 375; 18 L. J. Ex. 478; 154 E. R. 1257.

**2346. Compensation to builder by purchaser—For interference with performance of agreement—Statutory declaration by lessor—Liability to reimburse purchaser.**—A land co. were in possession of part of certain settled estates under building agreements providing for leases to be eventually granted, such agreements to expire in case the buildings were not completed in 1881 & 1885 respectively. A railway co. projected a scheme which would involve taking part of the premises & interfere with the building operations. The tenant for life, the leasing authority of the estate, under these circumstances, without making any agreement to that effect, did in fact, through his agent's conduct, waive the obligation of the land co. to complete within the specified time. In 1883 the railway co., with knowledge of these circumstances, agreed to purchase the fee subject to the building agreements. In 1886 the railway co. entered without making a deposit or giving a bond to the land co. under the Lands Clauses Act,

though knowing that the land co. claimed that their agreements were subsisting in equity. The land co. brought an action against the railway co., & established that the railway co. had wrongfully entered, the land co. being equitably entitled to an extension of time. The railway co. took their conveyance of the fee, the tenant for life, who joined as beneficial owner, & his land agent, making statutory declarations that they knew of no negotiation of any kind with the land co. having reference to any extension of time under the building agreements. The conveyance was expressed to be subject, so far as the premises were affected thereby, to the building agreements. The land co. consequently obtained compensation from the railway co. in respect of their interest in the lands taken:—*Held*: in the absence of fraud, neither under the statutory declarations nor under the covenant for title supplied by Conveyancing Act, 1881 (c. 41), were the railway co. entitled to be recouped the compensation they had paid the land co.—*LONDON & NORTH WESTERN RY. CO. v. BOULTON* (1890), 63 L. T. 727, C. A.

**Rescission of agreement.**—*See* Nos. 2313, 2316, *ante*.

**B. Provisions for Forfeiture.**

Forfeiture generally, *see* Part XXIV., Sect. 1, *post*.

**2347. Waiver of forfeiture—Builder permitted to employ workmen—After date of forfeiture.**—Land was demised to defts., who covenanted in the lease to build & complete certain houses thereon, within a year; & that, if they did not, the lease should be void. The houses not being completed within the specified period:—*Held*: the forfeiture was not waived by the steward of the lessor having permitted deft. to employ workmen in completing the houses, for a short period after such forfeiture.—*DOE v. KENSINGTON v. BRINDLEY* (1826), 12 Moore, C. P. 37; 5 L. J. O. S. C. P. 3.

*Annotation*:—*Dtd. Re Garrud, Ex p. Newitt* (1881), 16 Ch. D. 522.

**2348. — Not revocable—Failure to complete on particular day.**—*PLATT v. PARKER* (1886), 2 T. L. R. 786, C. A.

**2349. — Acceptance of rent.**—*JACOB v. DOWN*, No. 2317, *ante*.

**2350. — Includes waiver of subsidiary rights—Repair of erected buildings.**—(1) Where there is an express covenant to build, both as to time & mode of building, no further covenant to build can be implied from a covenant to repair.

(2) Waiver of forfeiture for not building in accordance with such a covenant carries with it a waiver of forfeiture for breach of a covenant to repair the said building if & when erected.—*STEPHENS v. JUNIOR ARMY & NAVY STORES, LTD.*, [1914] 2 Ch. 516; 84 L. J. Ch. 56; 111 L. T. 1055; 30 T. L. R. 697; 58 Sol. Jo. 808, C. A.

**2351. Relief against forfeiture—Full performance of agreement by lessor.**—A builder agreed to take some land on a building lease, & to erect houses within a specified period, the landowner making him certain advances. There was a clause of forfeiture, in default of their being completed within the time. Relief against a forfeiture was refused to the builder, it appearing that the landowner had fully performed his part of the contract.—*CROFT v. GOLDSMID* (1857), 24 Beav. 312; 53 E. R. 378.

**2352. Right of re-entry—Whether passing with assignment of lessor's interest—No expressed intention—No sufficient words.**—By indenture of Mar. 31, 1852, H. demised to B. for ninety-nine years

a piece of land & four unfinished dwelling-houses; & B. covenanted that he would, on or before June 25, 1852, finish the dwelling-houses under the direction & to the satisfaction of the surveyor of H.: Provided that, if default should be made, it should be lawful for H. "into the demised premises, or any part thereof in the name of the whole, & repossess, retain, & enjoy the same as of his former estate." By a subsequent indenture of the same date, B. mortgaged the premises in question to pltf. By indenture of July 30, 1852, between H. of the one part, & deft. of the other part, reciting that H. had entered into several underleases affecting the said premises, the particulars of which were known to deft., H. assigned to deft. the said leasehold premises, " & all the estate, right, title, & interest of him the said H. in, to, or out of the said premises," for the residue of the term of years granted by the aforesaid indenture of lease, subject nevertheless to the underleases therein referred to. B. did not complete the houses on June 25, 1852, & no surveyor was appointed. In July, 1852, B. gave up possession of the premises to deft. Pltf. having brought ejectment as mtgee.:—*Held*: assuming there was a sufficient clause of re-entry, & also a forfeiture of which H. might have availed himself, the indenture of assignment did not show any intention or use sufficient words, to pass a right of entry to deft., even if such a right is assignable under Real Property Act, 1845 (c. 106), s. 5, which, *semble*, it is not.—*HUNT v. REMNANT* (1854), 9 Exch. 635; 23 L. J. Ex. 135; 22 L. T. O. S. 350; 18 Jur. 335; 2 W. R. 276; 156 E. R. 271.

*Annotations*:—*Consd.* Davenport v. Smith, [1921] 2 Ch. 270; *Atkin v. Rose*, [1923] 1 Ch. 522. *Mentd.* Williams v. Pinckney (1897), 67 L. J. Ch. 34.

**2253.** — *Contained in building agreement but not in draft lease—Builder holding under terms of lease—Power to re-enter void.*—*LOWTHER v. HEAVER*, No. 2322, *ante*.

Property in material & plant, *see* Sub-sect. 3, C., *post*.

### C. Property in Material and Plant.

*See, generally*, BUILDING CONTRACTS, Vol. VII., pp. 411 *et seq.*

**2254.** *Right of lessor to seize—Waiver of previous breaches of covenant.*—On a clause in a building agreement under which rent had not been paid (& not amounting to a demise) that in case of default in not completing buildings at successive periods, the owner shall be at liberty to re-enter & seize materials, etc., there having been continued & successive defaults, & several periods of indulgence, but no waiver of the last default, & no alteration of the builder's position to his prejudice, & no default on the part of the owner:—*Held*: the owner was entitled to re-enter & seize the materials.—*STEVENS v. TAYLOR* (1860), 2 F. & F. 419, N. P.

**2255.** *Agreement for vesting plant & material in lessors.*—By a building contract it was agreed that all materials brought on the land by the intended lessee should become the property of the intended lessors. The intended lessee entered & commenced building, but obtained no lease:—*Held*: the materials brought on the land by him vested in the intended lessors, & were not liable to be taken in execution by a creditor of the intended lessee.—*BLAKE v. IZARD* (1887), 16 W. R. 108.

*Annotations*:—*Consd.* Reeves v. Barlow (1884), 12 Q. B. D. 436; *Church v. Sage* (1892), 67 L. T. 800. *Refd. Itc*

*Garrud, Ex p. Newitt* (1881), 16 Ch. D. 522, *Climpson v. Coles* (1889), 23 Q. B. D. 465.

— *Whether amounting to bill of sale.*—*See* BILLS OF SALE, Vol. VII., pp. 14, 15, Nos. 61–66.

**2256.** *Rights as against execution creditor of builder.*—*BLAKE v. IZARD*, No. 2355, *ante*.

**2257.** *Rights as against builder's trustee in bankruptcy.*—A builder agreed to build in a given time on a piece of land a certain number of houses which were to be leased to him as they were covered in. Under the agreement, on default in the building stipulation, or on the builder's bkpcy., the other party had a right to re-enter & take possession of all materials on the land not demised.

Before the time had expired the builder went into liquidation, & the trustee took the materials on the land & disclaimed the contract. The other party to the agreement claimed the materials:—*Held*: the claim rested on the bkpcy., & the stipulation as to the right arising on bkpcy. was void as against the trustee.—*Itc HARRISON, Ex p. JAY* (1880), 14 Ch. D. 10; 42 L. T. 600; 44 J. P. 409; 28 W. R. 449, C. A.

*Annotations*:—*Refd. Itc Garrud, Ex p. Newitt* (1881), 16 Ch. D. 522; *Borland's Trustee v. Steel*, [1901] 1 Ch. 279.

— *See, further*, BANKRUPTCY, Vol. V., pp. 657, 658, Nos. 5862, 5863.

**2258.** *Damages in addition to materials forfeited.*

—By a building agreement dated June 10, 1896, deft. agreed with pltf. to pull down & re-erect H.'s Hotel, D. street, in carcase before Dec. 25, 1896, & thereupon to take a lease of it from pltf. for eighty years from June 24, 1896, at a pepper-corn rent for the first year, & at a rent of £1,100 for the second & every subsequent year of the term. Deft. undertook to finish his part of the agreement by Dec. 25, 1896. By clause 2 of the agreement "on default by the lessee of the stipulation contained in this clause" (*i.e.* to complete within the time allowed) he shall forfeit all benefit under this agreement which shall thereupon cease & be determined, & all the materials & buildings on the said premises shall be forfeited to & become the absolute property of the lessor." By clause 11: "If the new buildings shall not be erected or completed within the time & in the manner aforesaid before Dec. 25, 1896, or if the lessee shall fail to observe or perform any of the stipulations herein & in the said form of lease contained or on his part to be observed & performed, or if he shall not proceed with the works with proper diligence, then & in any of the said cases the lessor shall be entitled to re-enter upon & to take immediate possession of the said piece of land & premises with all buildings, erections, plant, & materials thereon without making to the lessee any allowance or compensation in respect thereof, & without any process at law or any notice to the lessee or any other person or persons to quit the said premises or to determine the holding thereof." Deft. went into possession on June 10, 1896, but beyond pulling down about £200 worth of materials did nothing, & on Jan. 19, 1897, pltf. re-entered. Deft. contended that the effect of these two clauses was to limit pltf. to such compensation as he could get by re-entry & taking possession of the materials on the premises, & that he could recover no damages. Pltf. on re-entry could only relet from June, 1899, at £900 a year rent:—*Held*: in addition to the re-entry, pltf. could recover as damages the loss of two years' rent at £1,100, & the loss of £200 a year at twenty-five years' purchase, *viz.* £5,000, in all £7,200.—*MARSHALL v. MACKINTOSH* (1898), 78 L. T. 750; 46 W. R. 580; 14 T. L. R. 458; 42 Sol. Jo. 553.

## SECT. 3.—CHATELS.

**2359. Whether "lease" applicable to chattels.]**

—Whether one can speak technically & strictly of a lease of chattels or not, I do not think that in this statute [Stamp Act, 1891 (c. 39)], a lease of chattels is contemplated, & that rent reserved by a lease or tack of chattels can be said to embrace such an annual payment as is agreed to be paid for the hire of these chattels in this case (COLLINS, J.).—*JONES v. INLAND REVENUE COMRS., SWEETMEAT AUTOMATIC DELIVERY CO. v. INLAND REVENUE COMRS.*, [1895] 1 Q. B. 484; 64 L. J. Q. B. 84; 71 L. T. 763; 43 W. R. 318; 11 T. L. R. 78; 39 Sol. Jo. 97; 15 R. 136, D. C.

*Annotations*:—*Mentd.* Clifford v. I. R. Comrs., [1896] 2 Q. B. 187; National Telephone Co. v. I. R. Comrs., [1899] 1 Q. B. 250; Gartside (Brookside Brewery) v. I. R. Comrs. (1900), 82 L. T. 686; Jackson v. I. R. Comrs. (1902), 87 L. T. 269; British Oil & Cake Mills v. I. R. Comrs., [1903] 1 K. B. 689; Underground Electric Ry. of London & Glyn, Mills, Currie v. I. R. Comrs., [1916] 1 K. B. 306.

**2360. Lease without possession given—No rent paid—Whether fraudulent.]**—A conveyance of chattels unaccompanied with possession is void. Although in the same instrument be contained a valid mtge. of leasehold buildings in which the chattels are situated. Where a person pretending to be a purchaser of goods under an execution leased the goods at a rent to the former owner who still continued in possession, no money having been proved to be given for the purchase nor rent paid under the lease, it was a question for the jury whether the lease was not fraudulent. But under circumstances the possession of the lessor might have been the possession of the lessor.—*REED v. BLADES* (1813), 5 Taunt. 212; 128 E. R. 669.

*Annotation*:—*Refd.* Reeves v. Capper (1838), 5 Bing. N. C. 136.

**2361. Subject-matter of lease—Rolling stock—Whether lease ultra vires.]**—The railway of the T. Co. was a short line in connection with the lines of the G. E. Co. & the B. Co., & all traffic which went over it passed over some of the railways of those cos. By a local & personal Act in 1863, reciting a lease of the T. Ry. to certain lessees for a term to expire in 1875, & reciting that under an arrangement between the G. E. Co. & the lessees the traffic was worked by the G. E. Co., powers were given to the three cos. & the lessees to enter into arrangements for the modification of the lease, for the transfer of it to the G. E. Co. & B. Co., or one of them, & for the granting of a new lease to one or both of those two cos.; & it then provided that the G. E. Co. & the B. Co. might enter into agreements with respect to the working, maintenance, & management of the T. Ry., or any part thereof, & of the railways of the two last-mentioned cos. connected therewith. The G. E. Co. afterwards became lessees of the B. Ry. for a long term. The lease of the T. Ry. having expired, the G. E. Co. in 1876 entered into an agreement with the T. Co. to supply the T. Co. with locomotive power for five years upon the terms therein mentioned, & with carriages, waggons, & break vans for two years. An action was commenced by the A.-G., at the relation a manufacture of rolling stock, to restrain the G. E. Co. from letting rolling stock on hire, & from manufacturing any rolling stock for the purpose of so letting it:—*Held*: apart from the local & personal Act, the letting on hire by the G. E. Co. to the T. Co., whose line was connected with their own & could only be worked profitably in con-

nection with it, parts of their surplus stock was not *ultra vires*; if it would otherwise have been so, it was authorised by the local & personal Act.—*A.-G. v. GREAT EASTERN RY. CO.* (1879), 11 Ch. D. 449; 48 L. J. Ch. 428; 40 L. T. 265; 27 W. R. 759, C. A.; *affd.* (1880), 5 App. Cas. 473, H. L.

*Annotations*:—*Refd.* Guinness v. Land Corpn. of Ireland (1882), 22 Ch. D. 349; L. & N. W. Ry. v. Price (1883), 11 Q. B. D. 485; Harris v. De Pinna (1886), 33 Ch. D. 238; Foster v. L. C. & D. Ry., [1895] 1 Q. B. 711; Re Woking Urban Council (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300; Dundee Harbour Trustees v. Nicol, [1915] A. C. 550; County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251. *Mentd.* A.-G. v. Shrewsbury (Kingsland) Bridge Co. (1882), 21 Ch. D. 752; Small v. Smith (1884), 10 App. Cas. 119; Wenlock v. River Dee Co. (1885), 10 App. Cas. 354; Henderson v. Bank of Australasia (1888), 40 Ch. D. 170; Johns v. Balfour (1889), 1 Meg. 191; Sheffield & South Yorkshire Permanent Bldg. Soc. v. Atzlewood (1889), 44 Ch. D. 412; A.-G. v. L. & N. W. Ry., [1900] 1 Q. B. 78; L. C. C. v. A.-G., [1902] A. C. 165; A.-G. v. Mersey Ry. (1907), 51 Sol. Jo. 624; Re Kingsbury Collieries & Moore's Contract, [1907] 2 Ch. 259; Peel v. L. & N. W. Ry., [1907] 1 Ch. 5; Metropolitan Water Board v. Solomon (1908), 77 L. J. Ch. 517; A.-G. v. West Gloucestershire Water Co., [1909] 2 Ch. 338; Amalgamated Soc. of Ry. Servants v. Osborne, [1910] A. C. 87; Vacher v. London Soc. of Compositors, [1912] 3 K. B. 547; R. v. Bedfordshire County Council, *Ex p.* Sear, [1920] 2 K. B. 465; A.-G. v. Fulham Corp., [1921] 1 Ch. 440; A.-G. v. Westminster City Council, [1924] 2 Ch. 416; Deuchar v. Gas Light & Coke Co., [1925] A. C. 691.

**2362. ———.]**—Defts. agreed to hire forty-four waggons from plffs., paying in respect of twenty specified waggons an annual rent of £285, for five years, & in respect of the other twenty-four an annual rent of £249 for three years. It was agreed that the said waggons should, at the expiration of the respective terms of the demise, & after payment of the rents reserved during the said terms respectively, become the absolute property of the lessees without any further payment whatsoever.

Defts., having paid the first two years' rent in respect of the twenty-four waggons, sent to plffs. the whole of the remaining one year's rent, with a letter stating that this sum was paid in discharge of all rent or other payment due in respect of the twenty-four waggons. The rent in respect of the other twenty waggons was then in arrear, & plffs.' agent declined to receive the payment upon the terms of the letter, requesting the clerk who brought it to take it back. The clerk refused to do so, & left the house without taking up the money or the letter. Plffs.' agent thereupon retained the money, & entered it in plffs.' ledger as a payment upon the general account:—*Held*: the contracts in respect of the twenty-four waggons & the twenty were separable & distinct; & the condition as to the expiration of the term on which the twenty-four waggons were to become the property of defts. was fulfilled when all the rents accruing due under it had been paid.—*LANCASHIRE WAGGON CO., LTD. v. NUTTALL* (1879), 42 L. T. 465; 44 J. P. 536, C. A.

**2363. ———.]**—An agreement for the hire of railway waggons at a fixed yearly rent for a fixed period, with an option of purchase at a nominal price at the end of the period, is not by reason of a stipulation that the lenders may distrain as ordinary landlords for arrears of rent upon the personal chattels of the hirer, in the event of the bkpcy. of the hirer, inoperative as against his general creditors.—*LEMAN v. YORKSHIRE RAILWAY WAGGON CO.* (1881), 50 L. J. Ch. 293; 29 W. R. 466.

## PART X. SECT. 3.

**2359 i. Whether "lease" applicable to chattels.]**—A lease of a chattel can validly be made.—*SHEANE v. WICKLOW COUNTY COUNCIL*, [1919] 2 I. R. 528.—*IR.*

**2364. Notice to determine tenancy—Subsequent acceptance of rent—Waiver.]**—(1) The demand & acceptance of rent due subsequent to a notice to determine a tenancy of chattels is a waiver of the notice.

(2) *Semble*: where a term in chattels has expired & rent has been subsequently accepted, a tenancy from year to year is created, & the tenant is entitled to six months' notice to determine the tenancy, whatever may have been the length of notice required during the continuance of the original tenancy.—KEITH, PROWSE & CO. v. NATIONAL TELEPHONE CO., [1894] 2 Ch. 147; 63 L. J. Ch. 373; 70 L. T. 276; 58 J. P. 573; 42 W. R. 380; 10 T. L. R. 263; 8 R. 776.

*Annotations*:—*Reid*, Civil Service Co.-op. Soc. v. McGrigor's Trustees, [1923] 2 Ch. 347. *Mentd*, Cochran v. Exchange Telegraph Co. (1896), 65 L. J. Ch. 334.

**2365. ——— Tenancy from year to year created—Six months notice requisite.]**—KEITH, PROWSE & CO. v. NATIONAL TELEPHONE CO., No. 2364, *ante*.

**Execution on leased chattels.]**—*See* EXECUTION, Vol. XXI., pp. 501, 502, Nos. 752-767.

**Bankruptcy of lessee—Disclaimer of trustee.]**—*See* BANKRUPTCY, Vol. V., p. 941, No. 7695.

—— **Lessor's right of distress.]**—*See* BANKRUPTCY, Vol. V., p. 963, No. 7887.

#### SECT. 4.—FERRIES.

*See* FERRIES, Vol. XXIV., pp. 971, 972, 973, 983, Nos. 41, 56-58, 162.

#### SECT. 5.—FLATS, CHAMBERS AND OFFICES.

##### SUB-SECT. 1.—IN GENERAL.

**2366. Definition of flats—Separate houses one above another.]**—Formerly houses were built so that each house occupied a separate site, but in modern times a practice has grown up of putting separate houses one above the other. They are built in separate flats or storeys, but for all legal & ordinary purposes they are separate houses. Each is separately let & separately occupied, & has no connection with those above or below, except in so far as it may derive support from those below instead of from the ground, as in the case of ordinary houses (JESSEL, M.R.).—YORKSHIRE INSURANCE CO. v. CLAYTON (1881), 8 Q. B. D. 421; 51 L. J. Q. B. 82; 45 L. T. 697; 30 W. R. 174; 1 Tax Cas. 479, C. A.; *affg.*, 6 Q. B. D. 557, D. C.

*Annotations*:—*Reid*, Grant v. Langston, [1900] A. C. 383. *Mentd*, Chapman v. Royal Bank of Scotland (1881), 7 Q. B. D. 136; Hoddinot v. Home & Colonial Stores, [1896] 1 Q. B. 169; London & Westminster Bank v. Smith (1901), 85 L. T. 747; Hillman v. Ankerson (1906), 95 L. T. 452; Western v. Kensington Assmt. Com. (1907), 76 L. J. K. B. 790; Farmer v. Cotton's Trustees, [1915] A. C. 922.

**2367. Covenant for quiet enjoyment—What amounts to breach—Damage from burst water pipe.]**—ANDERSON v. OPPENHEIMER, No. 2719, *post*.

**2368. ——— Improper user by other tenants of their flats—No physical interference.]**—A covenant in a lease for quiet enjoyment, without interruption by the landlord or any person claiming

under him, relates only to freedom from disturbance by adverse claimants, extending to some physical interference with the use of the property demised as distinguished from its mere comfortable enjoyment. The lessee cannot sue in such a covenant in respect merely of noise or disagreeable sights or sounds. The effects of a common scheme in the letting of flats in one building & the receipt of rent after knowledge by the landlord of the acts complained of as done by the tenants of the other flats considered.—JAEGER v. MANSIONS CONSOLIDATED, LTD. (1902), 87 L. T. 690; 10 T. L. R. 114; 47 Sol. Jo. 147; *on appeal* (1903), 87 L. T. 694, C. A.

*Annotations*:—*Fold*, Malzy v. Elchholz, [1916] 2 K. B. 308. *Reid*, Reid v. Bickerstaff, [1909] 2 Ch. 305.

**2369. ——— Erection of outside staircase—Comfort & privacy interfered with.]**—BROWNE v. FLOWER, No. 2703, *post*.

—— *J.*—*Sec. generally*, Part XI., *post*.

**2370. Agreement to provide service—Whether enforceable by specific performance—Damages in lieu.]**—By indenture of lease defts. let to plff. for the term of twenty-one years a residential flat in a block of buildings at W. The lease contained a clause, by which it was agreed & declared that the premises were taken by the lessee subject to the regulations made by the lessors with respect to the duties of the resident porter, the regulations being set forth in the schedule thereunder written & to be considered as forming part of the indenture. By the regulations the rooms in the building were to be, with the entrance & staircase, in charge of a resident porter appointed by the lessors who was to act as servant to the tenants of the rooms in the block. The tenants were to have the right to the general services of the porter as thereafter defined & to special services under certain conditions. The general services of the porter were to be in constant attendance in the building either by himself or in his temporary absence by some trustworthy assistant, to cleanse the stairs & passages every morning, & to receive for, & deliver to, the tenants all letters, parcels & messages. The lessors appointed a porter who was away for four hours every day acting as cook in a neighbouring building, & during his absence his duties were attended to by a charwoman or some boys:—*Held*: a decree for specific performance could not be granted & for two reasons: first, that part of the agreement which provided for the appointment by the lessors of a porter, was not divisible from so much of it as provided for the various duties of the porter, & as such a contract would require the constant supervision of the ct. during the existence of the lease, it was not one for which a decree of specific performance could be granted; secondly, damages were a sufficient compensation for the breach.—RYAN v. MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCN., [1893] 1 Ch. 116; 62 L. J. Ch. 252; 67 L. T. 820; 41 W. R. 146; 9 T. L. R. 72; 37 Sol. Jo. 45; 2 R. 156, C. A.

*Annotations*:—*Fold*, Barnes v. City of London Real Property Co., [1918] 2 Ch. 18. *Reid*, Davis v. Foreman, [1894] 3 Ch. 654; Alexander v. Mansions Proprietary (1900), 16 T. L. R. 431; Wolverhampton Corp. v. Emmons, [1901] 1 K. B. 515; Kirchner v. Gruban, [1909] 1 Ch. 413; L. C. & D. Ry. & S. E. & C. Ry. Management Committee v. Spiers & Pond (1916), 32 T. L. R. 493; Kennard v. Cory, [1922] 2 Ch. 1; Prosperity v. Lloyds Bank (1923), 39 T. L. R. 372.

#### PART X. SECT. 5, SUB-SECT. 1.

**2368 i. Covenant for quiet enjoyment—What amounts to breach—Improper user by other tenants of their flats—No physical interference.]**—The daily & continual use of sewing machines & the thumping of pressing irons used in a

dressmaker's business in plff.'s apartment house, in the flat above that rented by deft. from plff.:—*Held*: a breach of the covenant for quiet enjoyment.—WALTON v. BIGGS (1912), 19 W. L. R. 895—CAN.

i. ——— *Locking outside door*

*after office hours.]*—MACLENNAN v. ROYAL INSURANCE CO. (1875), 37 U. C. R. 284.—CAN.

m. ——— *Damage during repairs to upper storeys.]*—*Held*: deft., the landlord of premises, was liable to plff., the tenant, for damage done to

**Sect. 5.—Flats, chambers and offices: Sub-sects. 1 & 2.]**

**2371.** — — — — —.]—G.'s trustees, the owners in fee of a large building entirely let out in sets of rooms for use as offices, except one set occupied by their resident housekeeper, let out (under an agreement in writing but not under seal) one set of rooms to B. & Co., at a yearly rent, & an additional & smaller rent for "cleaning the rooms by the housekeeper appointed for the time being by the landlord." By a similar agreement other rooms were let by G.'s trustees to W. A third letting by G.'s trustees of another set of rooms was to S., in which case the additional rent was for "cleaning the premises by the housekeeper," the words "appointed by the landlords" being omitted. G.'s trustees sold & conveyed the building to deft. co., subject to the tenancies. & the co., by a similar agreement let another set of rooms to K. & Co., & the co. thereby agreed "to appoint & pay a housekeeper to be in attendance between the hours of 8 a.m. & 10 p.m. of each weekday, who shall act as the servant of the lessees in cleaning the rooms, windows & skylights excepted, being appointed for that purpose in charge thereof by the lessees. Such appointment shall not constitute any responsibility on the lessors' part for the act or deficiency of such housekeeper, or of any one in his or her employment, or anything arising therefrom, but the lessors will remove such housekeeper & substitute another if called upon to do so by at least two-thirds of the tenants," who negatively agreed not to require the premises to be open before 8 a.m. or after 10 p.m. or to require access on Sundays. The co. let other rooms to O. & Co. by two agreements containing similar terms except that their second agreement did not include any agreement that the housekeeper should attend between 8 a.m. & 10 p.m. After all the tenancies had continued for some time the resident housekeeper, without any notice to the tenants, left the building which was placed in charge of a housekeeper who resided on the top floor of another building, about sixty yards away from door to door, & had charge also of the building in which he resided & a third building. This housekeeper attended at the tenants' house at irregular & short times between 7 a.m. & 8.30 p.m. & had a final look round later on, & if in his absences the tenants wished to see him they had to seek him in one or both of the other buildings in his charge:—*Held*: (1) if it was necessary to decide the question, there seemed to be a correlative obligation, implied on the part of the landlords, as to supplying the services of a housekeeper corresponding with the tenants' obligation to pay the additional rents for those services; (2) the landlords' obligation as to the housekeeper was one "with reference to the subject-matter of the lease" within Conveyancing Act, 1881 (c. 41), s. 11 (which had not altered the law), & would therefore bind the reversionary interest, at any rate if the agreements were under seal; but it was unnecessary to decide whether the want of a seal prevented the result, inasmuch

goods of pltt. upon the demised premises by water & lime dust from the upper storeys of deft.'s building coming down upon the demised premises during repairs to the upper storeys.—*GREGORY v. TUNSTALL* (1910), 15 W. L. R. 140.—**CAN.**

**n.** — — — — —.]—*Interference with shop window view.*—*BLANC v. GREIG* (1856), 19 Durl. (Cl. of Sess.) 1315; 28 Sc. Jur. 665.—**SCOT.**

**o.** — — — — —.]—*Damage from struc-*

*tural alterations in lower flats.*—*HUBER v. ROSS*, [1912] S. C. 898.—**SCOT.**

**2374 i.** *Damage from burst water pipe—Liability of landlord.*—*HESS v. GREENWAY* (1919), 45 O. L. R. 650; 48 D. L. R. 630; 16 O. W. N. 300.—**CAN.**

**2374 ii.** — — — — —.]—*Held*: the proprietor of a flat in the possession of a tenant was liable to the occupant of a shop beneath for damage caused by the negligence of such proprietor in

as (3) in the case of the tenancies granted by G.'s trustees no obligation on the landlords' part could be implied except that the cleaning should be done by some person in charge of the property, & certainly no obligation to provide a resident housekeeper, & therefore, there had been no breach of the agreements made by G.'s trustees; (4) under the three tenancy agreements granted by the co., there was no obligation on it to provide a resident housekeeper, but there had been a breach of the two agreements containing the obligation to provide the housekeeper's attendance between 8 a.m. & 10 p.m.; (5) the remedy of K. & Co., & O. & Co., for the breach was in damages & not by specific performance.—*BARNES v. CITY OF LONDON REAL PROPERTY CO.*, [1918] 2 Ch. 18; 87 L. J. Ch. 601; 119 L. T. 293; 34 T. L. R. 361.

**2372.** — — — — —.]—*Corresponding obligation by tenant—To pay additional rent therefor.*—*BARNES v. CITY OF LONDON REAL PROPERTY CO.*, No. 2371, *ante*.

**2373.** — — — — —.]—*Binding on lessors' assignees.*—*BARNES v. CITY OF LONDON REAL PROPERTY CO.*, No. 2371, *ante*.

**2374.** *Damage from burst water pipe—Liability of landlord.*—*ANDERSON v. OPPENHEIMER*, No. 2719, *post*.

**2375.** — — — — —.]—Where a person uses his land for any purpose for which it may in the ordinary course of the enjoyment of land be used, & without any default or negligence on his part damage happens to his neighbour's premises, no liability attaches to him. Further, if a person claiming to be compensated for damage caused by dangerous matter upon his neighbour's land has consented to such dangerous matter being brought upon his neighbour's land, he cannot recover. Therefore, where a landlord of premises lets a part of them, & at the time the tenant takes such part a water supply has been laid on to the premises by the landlord, the landlord is not, in the absence of contractual obligation, liable to the tenant for injury to goods of the latter, upon that portion of the premises occupied by him, caused by an overflow of water by reason of defective work to the landlord's water supply by a contractor employed by him, provided that the contractor is competent to do the work & was employed by the landlord upon receipt of notice of the defect in the water supply.—*BLAKE v. WOOLF*, [1898] 2 Q. B. 426; 67 L. J. Q. B. 813; 79 L. T. 188; 62 J. P. 659; 47 W. R. 8; 42 Sol. Jo. 688, D. C.

*Annotations*:—**Consd.** *Rickards v. Lothian*, [1913] A. C. 263. **Distd.** *Cockburn v. Smith*, [1924] 2 K. B. 119. **Refd.** *Charing Cross, West End & City Electricity Supply Co. v. London Hydraulic Power Co.*, [1913] 3 K. B. 442; *Performing Right Soc. v. Mitchell & Booker, Palais De Danse*, [1924] 1 K. B. 762.

**2376.** — — — — —.]—*Negligence of landlord's servant.*

—*Defts.* sublet to pltt. the lower rooms of their house, while they retained the upper rooms for carrying on their own business. In these upper rooms there was a lavatory for the use of *defts.* clerks, the key of which was kept by *defts.*

allowing a water pipe in his flat to be in a defective & insufficient state.—*CAMPBELL v. KENNEDY* (1864), 3 Macph. (Cl. of Sess.) 121; 37 Sc. Jur. 62.—**SCOT.**

**p.** *Agreement to provide water—Liability of landlord.*—*Defts.* let to pltt., to be used for the purposes of his business as a photographer, the first floor of a building. In the lease there was a provision that water was to be free to pltt.; pltt. complained that his

foreman. This foreman, leaving off work at seven o'clock, went at ten minutes past seven to the lavatory to wash his hands. Turning on the tap, & finding no water, he went away without turning the tap off. When the water was turned on next morning it overflowed, went through the floor, & damaged plths.' goods in the room below. The jury found that the damage was caused by the negligence of the clerk in leaving the tap open:—*Held*: defts. were liable for the damage so caused by the negligence of their clerk, upon the ground that, whether the use of the lavatory by the clerk was or was not within the scope of his authority, it was at all events an incident to his employment, so as to render his employer liable for the damage resulting from his negligence in such use.—*RUDDIMAN & Co. v. SMITH* (1889), 60 L. T. 708; 53 J. P. 518; 37 W. R. 528; 5 T. L. R. 417, D. C.

**2377. Lock up shop—Loss of tenant's goods—Liability of landlord—Premises insufficiently protected.**—Where premises were let as a jeweller's shop to be occupied during hours of business only:—*Held*: the landlord was, in the absence of express stipulation, under no liability for a loss occasioned by robbery during the night, even though the premises were insufficiently protected.—*ESPIR v. TODD* (1883), Cab. & El. 154.

**2378. Supply of gas—Right of landlord to cut off—Tenant in arrear with payment.**—*HERSEY v. WHITE* (1893), 9 T. L. R. 335; 37 Sol. Jo. 341.

**2379. Demolition of upper floor—Damage thereby to lower floor—Insufficient precautions to prevent damage.**—Pltf. rented from defts. a shop on the ground floor of a building. For their own purposes, defts. decided to pull down a great part of the building above pltf.'s shop, & they employed a contractor to execute the work. In consequence of the work, damage was done to pltf.'s business & goods, & in respect of this he sued defts. The county ct. judge held that defts. were liable inasmuch as they had not taken all the precautions they might have taken to prevent the mischief:—*Held*: (1) although defts. had employed an independent contractor to execute the work, from which in the natural course of things injurious consequences might be expected to arise, there was still a duty upon defts. to prevent the execution of that work from becoming wrongful; (2) there was evidence upon which the county ct. judge could find that defts. had not taken the precautions they might have taken to prevent mischief arising to pltf.—*ODELL v. CLEVELAND HOUSE, LTD.* (1910), 102 L. T. 602; 26 T. L. R. 410, D. C.

supply of water was so reduced that he suffered serious injury; the shortage of water on pltf.'s flat was due to the tenants on the ground floor using an abnormal amount:—*Held*: defts. were liable for breach of their covenant, no matter whether they or their tenants were responsible for the shortage.—*HOWELL v. HUGH ARMOUR & Co.* (1913), 23 W. L. R. 68; 6 Sask. L. R. 25; 9 D. L. R. 125; 3 W. W. R. 832.—*CAN.*

**Agreement to provide steam heating—Damages for inadequate heating.**—*BYRMEYER v. THOMPSON* (1915), 34 O. L. R. 194; *affd.*, 8 O. W. N. 527; 23 D. L. R. 840; 34 O. L. R. 543; 9 O. W. N. 114; 25 D. L. R. 831.—*CAN.*

#### PART X. SECT. 5, SUB-SECT. 2.

**2380 i. Repair—Obligation on landlord to keep in repair—Extent of obligation—To tenants & strangers.**—A child was killed by falling through the railing of a common stair where one of the bannisters was wanting:—*Held*: the

proprietor of the property was liable in damages to the father of the child, in respect that warning of the state of the stair had been given to the factor appointed to look after the property.—*MARTIN v. HANNAY* (1872), 10 Macph. (Ct. of Sess.) 411; 44 Sc. Jur. 230.—*SCOT.*

**2380 ii.**—*RUSSELL v. MACKNIGHT* (1896), 24 R. (Ct. of Sess.) 118; 34 Sc. L. R. 73; 4 S. L. T. 146.—*SCOT.*

**2380 iii.**—The tenant of a house on a common stair, whose child had been injured by falling through the railing on the top landing of the common stair, brought an action for reparation against his landlord, the alleged fault being a defect in construction which was obvious to the tenant, when he took the house:—*Held*: he had accepted the risk, & the action should be dismissed.—*MECHAN v. WATSON*, [1907] S. C. 25; 44 Sc. L. R. 28; 14 S. L. T. 397.—*SCOT.*

#### SUB-SECT. 2.—THE COMMON STAIRCASE.

**2380. Repair—Obligation on landlord to keep in repair—Extent of obligation—To tenants & strangers.**—Deft., who was the owner of certain premises in the City of London, let the different floors as offices to separate tenants. The only mode of access to the offices was by means of a staircase, which was not let to the tenants, but which remained in the occupation & control of deft. The leases to the tenants contained no covenant by deft. to keep the staircase in repair. Pltf. went to the office occupied by one of the tenants on business, & when coming down the stairs, fell & was injured owing to the stairs being out of repair:—*Held*: there was a duty on deft., both towards the tenants & towards those persons who came to the premises on business with them to keep the stairs in a reasonably safe state of repair; & therefore, deft. was liable to pltf.—*MILLER v. HANCOCK*, [1893] 2 Q. B. 177; 69 L. T. 214; 57 J. P. 758; 41 W. R. 578; 9 T. L. R. 512; 37 Sol. Jo. 558; 4 R. 478, C. A.

*Annotations*:—*Consd.* Hargroves, Aronson v. Hartopp, [1905] 1 K. B. 472. *Distd.* Cavalier v. Pope (1905), 74 L. J. K. B. 857; Huggett v. Miers, [1908] 2 K. B. 278. *Consd.* Lewis v. Ronald (1909), 101 L. T. 534; Powell v. Thorndike (1910), 102 L. T. 600. *Distd.* Lucey v. Bayden, [1914] 2 K. B. 318; Douson v. Horsley, [1915] 1 K. B. 631. *Distd.* Groves v. Western Mansions (1916), 33 T. L. R. 76. *Consd.* Hart v. Rogers, [1916] 1 K. B. 646; Dunster v. Hollis, [1918] 2 K. B. 795. *Overd.* Fairman v. Perpetual Investment Bldg. Soc., [1923] A. C. 74. *Consd.* Cockburn v. Smith, [1921] 2 K. B. 119. *Reffd.* Hopkins v. G. E. Ry. (1895), 60 J. P. 86; Blake v. Woolf (1898), 47 W. R. 8; Cavalier v. Pope, [1906] A. C. 428; Murphy v. Hurly, [1922] 1 A. C. 369.

**2381.**—Defts. owned a block of flats which they let to various tenants, defts. keeping possession & control of the common staircase giving access to the flats. The stairs were made of cement reinforced by iron bars embedded in the cement & running along the whole length of the tread. Owing to the wearing away of the cement, in some cases irregular depressions were scooped out behind the iron bars. Pltf., who lodged with her sister in a flat on the fourth floor, of which the sister's husband was tenant, whilst descending the stairs, caught her heel in a depression so formed, & fell & was injured. In an action for damages against defts. the trial judge found that defts. were not guilty of negligence; that the state of the staircase was not dangerous at the time of the accident; that the depression which caused pltf. to fall was not in the nature of a concealed danger or trap, but was obvious, & could have been seen by pltf. if she had looked:—*Held*: the only duty owed by defts. to pltf. was not to expose her to a concealed

**2380 iv.**—*GRANT v. McCLAFFERTY*, [1907] S. C. 201; 44 Sc. L. R. 179; 14 S. L. T. 571.—*SCOT.*

**2380 v.**—*MELLON v. HENDERSON*, [1913] S. C. 1207; 50 Sc. L. R. 703; [1913] 1 S. L. T. 257.—*SCOT.*

**2380 vi.**—*GRANT v. JOHN HEMING & Co., LTD.* (1914), 51 Sc. L. R. 187.—*SCOT.*

**2380 vii.**—*SHILLINGLAW v. TURNER*, [1925] S. C. 807.—*SCOT.*

**r.**—Where premises sub-let—Whether obligation on landlord or mid-tenant.—A landlord let a block of buildings to a tenant who sub-let the houses. A child visiting one of the sub-tenants met with an accident through the defective condition of the railings of an outside stair which constituted the approach to two of the houses. The father of the child sued both the landlord & the mid-tenant

*Sect. 5.—Flats, chambers and offices: Sub-sects. 2 & 3.]*

danger or trap, & the action failed.—**FAIRMAN v. PERPETUAL INVESTMENT BUILDING SOCIETY**, [1923] A. C. 74; 92 L. J. K. B. 50; 128 L. T. 386; 87 J. P. 21; 39 T. L. R. 54, H. L.

*Annotations:—***Consd.** Sutcliffe v. Clients Investment Co., [1924] 2 K. B. 746. **Refd.** Cockburn v. Smith, [1924] 2 K. B. 119.

**2382.** ————.]—Deft. was the owner of a house which consisted of a basement & two upper floors, the rooms on each floor being separately let. The house was entered by a front door on the ground floor level which was approached from the street by a flight of six or seven steps, these steps being protected on each side by a coping about eight inches high. On either side of the steps was an area. The steps remained in deft.'s possession & control. Pltf., the wife of one of the tenants occupying the house, slipped on the steps & fell into the area, sustaining considerable injuries. In an action by pltf. against deft. claiming damages in respect of those injuries, the jury found that the defect in the steps in consequence of which the accident occurred consisted not in any disrepair of the steps themselves, but in the absence of a railing; that this defect was due to the negligence of deft.; & that both pltf. & deft. knew before the accident of the existence of the defect:—**Held**: (1) the only obligation upon deft. in reference to the approach to the house was to avoid exposing pltf. to any unexpected danger without giving her warning; (2) as the danger was patent to every one, & pltf. in fact knew of it, she had voluntarily taken upon herself to bear the risk; & therefore, she had established no cause of action.—**LUCY v. BAWDEN**, [1914] 2 K. B. 318; 83 L. J. K. B. 523; 110 L. T. 580; 30 T. L. R. 321.

*Annotations:—*As to (1) **Consd.** Dobson v. Horsley, [1915] 1 K. B. 634. **Fold.** Dunster v. Hollis, [1918] 2 K. B. 795; Fairman v. Perpetual Investment Bldg. Soc., [1923] A. C. 74. **Refd.** Groves v. Western Mansions (1916), 33 T. L. R. 76; Hart v. Rogers, [1916] 1 K. B. 646; Wilson v. Barry Ry. (1916), 116 L. T. 71; Murphy v. Hurly, [1922] 1 A. C. 369.

**2383.** ————.]—Defts. were the owners of a house, one room in which was let by them to the adult pltf. the father of the infant pltf. The front door of the house was approached from the street by a flight of steps these steps being protected on each side by a railing, but at the time of the letting of the room one of these railings was defective, one of the upright bars in the railing being missing. On either side of the steps was an area. The steps were not let with the room, but remained in the possession & control of defts. The infant pltf., a boy of about three & a half years old, while playing on the steps fell through the aperture caused by the missing railing into the area below & was severely injured. In an action claiming damages from defts. in respect of the injuries the jury found that the railings were in a defective condition at the time of the letting so as to be dangerous to children:—**Held**: the absence of the railing was not in the nature of a trap or concealed danger, & therefore pltf. had established

for damages in respect of the accident:—**Held**: the mid-tenant had possession & control of the stair to the exclusion of the landlord & was accordingly alone liable.—**KENNEDY v. SHOTTS IRON CO., LTD.** (1913), 50 Sc. L. R. 885.—**SCOT.**

**2386 i. Lighting—Obligation on landlord to keep lighted.**—Even where under the terms of a lease there is an implied obligation of the landlord to keep the staircases in the rented building in

repair, he is not also necessarily bound to keep them lighted.—**McKINLAY v. MUTUAL LIFE ASSURANCE CO. OF CANADA**, [1918] 3 W. W. R. 1002; 43 D. L. R. 259.—**CAN.**

**2386 ii.** ————.]—Pursuer averred that she received injuries through falling on the common stair while on her way after dark, to visit the tenant of one of the houses in the tenement. The fault on the part of defender which she alleged was that the stair

no cause of action against defts.—**DOBSON v. HORSLEY**, [1915] 1 K. B. 634; 84 L. J. K. B. 399; 112 L. T. 101; 31 T. L. R. 12, C. A.

*Annotations:—***Consd.** Groves v. Western Mansions (1916), 33 T. L. R. 76; Dunster v. Hollis, [1918] 2 K. B. 795; Fairman v. Perpetual Investment Bldg. Soc., [1923] A. C. 74. **Refd.** Murphy v. Hurly, [1922] 1 A. C. 369; Cockburn v. Smith, [1924] 2 K. B. 119. **Mentd.** Wilson v. Barry Ry. (1916), 116 L. T. 71.

**2384.** ————.]—Pltf. was the wife of the tenant of a room on the first floor of a building which was let by defts. in separate tenements. Several of the tenements, including that of pltf. were approached by a common staircase. Pltf. went out of her room to the landing in order to draw water from a tap on the landing. She found that a tap on the landing immediately above had been left running, & she went to the upper landing to stop it. On the way down she slipped on a defective step & suffered personal injuries. She sued defts. for damages for negligence:—**Held**: proof of the existence of a concealed trap was essential to the cause of action, & as pltf. could not show that there was a concealed trap she was not entitled to recover.—**GROVES v. WESTERN MANSIONS, LTD.** (1916), 33 T. L. R. 76, D. C.

*Annotation:—***Consd.** Dunster v. Hollis, [1918] 2 K. B. 795.

**2385.** ————.]—Where a lessor lets rooms in a building to a tenant & retains control of a common staircase & flight of steps the lessor is not under an absolute obligation towards his tenant to keep the steps reasonably safe. The lessor's obligation towards his tenant is, however, not merely to avoid exposing the tenant to a concealed danger or trap of which the tenant has no notice or warning, but is an obligation to take reasonable care to keep the steps reasonably safe, & unless the tenant has been guilty of contributory negligence the visibility of the danger is no defence to an action by the tenant against the lessor for damages caused by their not being reasonably safe.—**DUNSTER v. HOLLIS**, [1918] 2 K. B. 795; 88 L. J. K. B. 331; 120 L. T. 109; 17 L. G. R. 42.

*Annotations:—***Consd.** Cockburn v. Smith (1923), 40 T. L. R. 113. **Refd.** Murphy v. Hurly, [1922] 1 A. C. 369; Fairman v. Perpetual Investment Bldg. Soc., [1923] A. C. 74.

**2386. Lighting—Obligation on landlord to keep lighted.**—Deft. was the owner of a building, the different floors of which were let by him as separate offices to different tenants, the staircase by which access to them was obtained not being let, but remaining in the legal possession of deft. The agreements for the letting of the offices respectively contained no provision with regard to the lighting of the staircase. The tenants respectively had gas lights on the landings outside the entrances to their respective offices, which were supplied with gas from their own meters, & the practice was that each tenant on leaving his office for the night turned off his own light, but it did not appear that there was any agreement between deft. & the tenants that they should light the staircase. Pltf., who was in the employ of one of the tenants, upon coming down the staircase from his employer's offices on an evening in Mar. at 8.15, when, all the lights having been put out, the

was not sufficiently lighted:—**Held**: as the duty of defender consisted in lighting the stair to the satisfaction of the inspector of lighting, & as it was not averred that he had failed in that duty, the action was irrelevant.—**GATNE v. McINTYRE**, [1914] S. C. 43.—**SCOT.**

**2386 iii.** ————.]—**BOYLE (OR CALDWELL) v. GLASGOW CORPN.**, [1920] S. C. 242.—**SCOT.**

**t.** ———— *Light in dangerous position—Liability of landlord.*—**DAVIDSON v.**

staircase was in darkness, failed to find his way out through the street door into the street, & going further down the stairs towards the basement, fell through a door opening upon a flagged courtyard at some distance above the level of the flagstones. This door was used for hoisting goods into & out of the building. In an action brought by pltf. against deft. in respect of injuries resulting from the fall:—*Held*: there was no duty towards pltf. imposed upon deft. to light the staircase, & consequently the action was not maintainable.—*HUGGETT v. MIERS*, [1908] 2 K. B. 278; 77 L. J. K. B. 710; 99 L. T. 326; 24 T. L. R. 582; 52 Sol. Jo. 481, C. A.

*Annotations*:—*Consd.* *Lewis v. Ronald* (1909), 101 L. T. 534. *Appld.* *Powell v. Thorndike* (1910), 102 L. T. 600; *Lucy v. Bawden*, [1914] 2 K. B. 318. *Consd.* *Dobson v. Horsley*, [1915] 1 K. B. 634; *Fairman v. Perpetual Investment Bldg. Soc.*, [1923] A. C. 74. *Refd.* *Hart v. Rogers*, [1916] 1 K. B. 646; *Dunster v. Hollis*, [1918] 2 K. B. 795; *Murphy v. Hurly*, [1922] 1 A. C. 369.

**2387.** ———. [Pltf., a fishmonger's assistant, was employed to deliver fish to a tenant of deft., the owner of a block of flats. By the terms of his agreements with his tenants deft. contracted to provide the lighting necessary for the staircase & hall of the flats. At 5.10 p.m. on Nov. 23, pltf., who had never been to the flats before, entered the tradesmen's entrance & descended a winding flight of steps. At the bottom of the steps he found a small open archway, beneath which was a flagstone some 3 ft. or 4 ft. across. He stepped on to the flagstone & took one step forward, which brought him just under the archway which was in darkness, although means for lighting the same were in existence. Pltf. stretched out his right hand in order to feel which way to go, & moved slightly forward, with the result that he fell down a flight of stairs, not owing to any defect in the stairs, & sustained injuries:—*Held*: there was no evidence of negligence on the part of deft. to go to the jury, there being no invitation to pltf. to walk down a staircase which was in darkness, & of the condition of which he was perfectly aware.—*LEWIS v. RONALD* (1909), 101 L. T. 534; 26 T. L. R. 30; 54 Sol. Jo. 32, D. C.]

*Annotations*:—*Mentd.* *Latham v. Johnson*, [1913] 1 K. B. 398; *Dickson v. Scott* (1914), 30 T. L. R. 256.

**2388. Right of tenant to enjoyment of staircase—Removal by landlord—Payment of compensation—Injunction.**—[Pltf. in this case was lessee of a set of rooms in a large building, under a lease from deft. co. for seven years from Michaelmas 1891. The lease expressly demised the rooms together, in common with the other tenants of the lessor, with the use of the entrance hall & stairs leading to the said rooms; & the co. covenanted for quiet enjoyment of the premises thereby demised together with the use of the said entrance hall & stairs. In 1893 some application was made by deft. co. to pltf. to consent to an alteration of the staircase, but he refused to do so except on terms which the co. did not accept. On Mar. 4, 1895, defts., M. & P., to whom the co. had shortly before leased the greater part of the building for the purposes of a club, began to pull down the staircase. Pltf. was away from his rooms at the time, he returned on Mar. 7. An action was commenced on that day, but the writ & notice of motion were not actually served till the afternoon of Mar. 8, by which time the staircase had been pulled down. Pltf. amended his notice of motion by asking for a mandatory injunction restraining defts. from

permitting the staircase to remain removed. The evidence showed that there was access by another staircase to pltf.'s rooms, but it was admittedly circuitous, & as pltf. alleged, inconvenient:—*Held*: pltf. had a legal right to the enjoyment of the staircase, which defts. could not be allowed to take away by payment of compensation; he would therefore be entitled to a mandatory injunction at the hearing, & as there was no ground for supposing that any fresh evidence could be adduced at the hearing, it ought to be granted on this motion.—*ALLPORT v. SECURITIES CORPN.* (1895), 64 L. J. Ch. 491; 72 L. T. 533; 11 T. L. R. 310; 39 Sol. Jo. 362; 13 R. 420.

#### SUB-SECT. 3.—THE ROOF.

**2389. Flooding from rain water—Extent of landlord's liability.**—[Pltfs. hired of deft. the ground floor of a warehouse, the upper part of which was occupied by deft. himself. The water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains. A hole was made in the box by a rat, through which the water entered the warehouse & wetted pltfs.' goods. Deft. had used reasonable care in examining & seeing to the security of the gutters & the box. In an action by pltfs. against deft. for the damage so caused:—*Held*: deft. was not liable, either on the ground of an implied contract, or on the ground that he had brought the water to the place from which it entered the warehouse.—*CARSTAIRS v. TAYLOR* (1871), L. R. 6 Exch. 217; 40 L. J. Ex. 129; 19 W. R. 723.

*Annotations*:—*Distd.* *Hargroves, Aronson v. Hartopp*, [1905] 1 K. B. 472. *Consd.* *Stanton v. Southwick*, [1920] 2 K. B. 642; *Cockburn v. Smith*, [1924] 2 K. B. 119. *Refd.* *Ross v. Fedden* (1872), L. R. 7 Q. B. 661; *Humphreys v. Cousins* (1877), 46 L. J. Q. B. 438; *Gill v. Edouin* (1894), 11 T. L. R. 93; *Blake v. Woolf*, [1898] 2 Q. B. 426; *Hart v. Rogers*, [1916] 1 K. B. 646.

**2390.** ———. **Neglect to repair after notice.**—[Pltfs. were tenants of a floor in a building of which defts. were landlords. A rain water gutter in the roof, the possession & control of which was retained by defts., became stopped up. Notice of the stoppage was given by pltfs. to defts., but defts. neglected to have the gutter cleared out till after the lapse of four or five days from the receipt of the notice, & in the meantime pltfs. had suffered damage by reason of rain water having found its way into their premises in consequence of the stoppage:—*Held*: the fact of the gutter being under the control of defts. imposed upon them a duty to take care that it was not in such a condition as to cause damage to pltfs., & as they had notice of its being stopped up & neglected to clear it out within a reasonable time after the receipt of the notice, they were guilty of a want of due care, & were consequently responsible for the damage done.—*HARGROVES, ARONSON & CO. v. HARTOPP*, [1905] 1 K. B. 472; 74 L. J. K. B. 233; 92 L. T. 414; 53 W. R. 262; 21 T. L. R. 226; 49 Sol. Jo. 237, D. C.]

*Annotations*:—*Expld.* *Cavaller v. Pope*, [1906] A. C. 428. *Consd.* *Cockburn v. Smith*, [1924] 2 K. B. 119. *Refd.* *Lucy v. Bawden*, [1914] 2 K. B. 318; *Hart v. Rogers*, [1916] 1 K. B. 646; *Fairman v. Perpetual Investment Bldg. Soc.*, [1923] A. C. 74; *Booth v. Thomas* (1925), 42 T. L. R. 111.

**2391.** ———. **Whether obligation absolute.**—[A landlord who lets an unfurnished flat, but retains control of the roof of the building in which the flat is situate, is under an absolute obligation

*SPRENGEL*, [1909] S. C. 566; 46 Sc. L. R. 413; [1909] 1 S. L. T. 220.—*SCOT*.

*a. Trap door beside common staircase—Liability of landlord.*—*JOUBERT*

*v. SCOTT, GUTHRIE & Co.* (1903), T. S. 214.—*S. AF.*

#### PART X. SECT. 5, SUB-SECT. 3.

**2389 i. Flooding from rain water—**

*Extent of landlord's liability.*—*GOLDING v. HUMPHREY'S ESTATE & FINANCE CO., LTD.* (1908), 4 Hong Kong L. R. 179.—*HONG KONG*.

**Sect. 5.—Flats, chambers and offices: Sub-sects. 3 & 4. Sects. 6 & 7: Sub-sect. 1.]**

to keep the roof in repair, & is liable to the tenant in damages if the flat is not reasonably inhabitable by reason of non-repair of the roof. Such damages cannot, however, be set off against a claim for rent.

A landlord, who had let an unfurnished top floor flat to a tenant, but who had retained control of the roof of the building, sued the tenant for the two last quarters' rent due under his agreement of tenancy. During this period heavy snow storms occurred, causing snow water to flow into the flat through cracks in the roof, & rendering the flat not reasonably inhabitable. The tenant accordingly removed from the flat to other apartments before the expiration of his tenancy, & counterclaimed for damages caused by non-repair of roof:—*Held*: the landlord had used reasonable care to keep the roof in repair, but there was imposed on him an absolute duty to do so, & in consequence of his breach the tenant was entitled to damages for discomfort & interference with his tenancy & for the cost of substituted rooms.—*HART v. ROGERS*, [1916] 1 K. B. 646; 85 L. J. K. B. 273; 114 L. T. 329; 32 T. L. R. 150.

*Annotations*:—*N.F. Dunster v. Hollis*, [1918] 2 K. B. 795. *Expld.* *Cockburn v. Smith*, [1924] 2 K. B. 119. *Reid*, (Groves v. Western Mansions (1916), 33 T. L. R. 76; *Murphy v. Hurly*, [1922] 1 A. C. 369; *Fairman v. Perpetual Investment Bldg. Soc.*, [1923] A. C. 74.

**2392.** ————.]—The owner of a block of flats let one of the top flats to a tenant, but kept the roof of the building & the guttering appurtenant thereto in his own possession & control. The guttering became defective, & rain water which should have been carried away escaped & flowed upon the wall of the tenant's flat & made the flat so damp that the tenant suffered injury to her health & sustained damage. The landlord had notice of the defect, but was dilatory & negligent in remedying it:—*Held*: deft. was under an obligation to take reasonable care to remedy defects in the roof & guttering of which he had notice & which were a source of damage to pltf.; & even if this duty was purely contractual it was not modified or excluded by the fact that the landlord had expressly agreed in the contract of tenancy to keep the staircases, passages, & landings in good repair.—*COCKBURN v. SMITH*, [1924] 2 K. B. 119; 93 L. J. K. B. 704; 131 L. T. 334; 40 T. L. R. 476; 68 Sol. Jo. 631, C. A.

**2393. Roof used as drying ground.—By leave of landlord—Duty to fence & repair fence.**—Deft. was the landlord of a house which was let out in apartments to several tenants, each of whom had the privilege of using the roof, which was flat & covered with lead, having an iron rail on its outer edge, for the purpose of drying their linen; the access to the roof being by means of a low door at the stairhead about two feet from the rail. Pltf., the occupier of one of the rooms, went upon the roof for the purpose of removing some linen, when, his foot slipping, & the rail being out of

repair (& known by the landlord to be so), he fell through to the courtyard below, & was injured:—*Held*: the mere licence to the lodgers to use the roof as a drying ground imposed no duty upon deft. to fence it or to keep the fence in repair.—*IVAY v. HEDGES* (1882), 9 Q. B. D. 80, D. C.

*Annotation*:—*Consd.* *Batchelor v. Fortescue* (1883), 11 Q. B. D. 474.

**SUB-SECT. 4.—ENTRANCE HALL AND LIFT.**

**2394. Entrance hall—Extent of tenant's right of user—Reasonable user.**—Defts., who were the owners of a large building in the City of London containing business offices, granted to pltf. a lease for twenty-one years of a set of offices in the building, & defts. covenanted to keep in good repair the main walls of the building & the passages & other internal parts used in common by the tenants of the various offices. The building had an entrance door 10 ft. wide leading to a hall 17 ft. 9 in. wide which opened by an archway 6 ft. wide into an inner hall. Pltf., for the purpose of making shops, proposed to reduce the passage way from the entrance door through the hall to a uniform width of 6 ft. In an action for an injunction to restrain defts. from so doing:—*Held*: pltf. had not a right to go over every part of the surface of the hall, but had a right to a reasonable user of the way for the purpose of the reasonable enjoyment of their offices, & upon the evidence a passage 6 ft. wide was not sufficient for the purpose.—*STRICK & CO., LTD. v. CITY OFFICES CO., LTD.* (1906), 22 T. L. R. 667.

**2395. Lift—Landlord's liability for injury therefrom.**—*STEER v. ST. JAMES'S RESIDENTIAL CHAMBERS CO.* (1887), 3 T. L. R. 500.

**2396.** ————.]—The owners of certain flats provided for the convenience of their tenants a lift for the purpose of being used for the delivery of goods by tradesmen. The lift was in the form of a box with a weight on the top, & was pulled up & down from below. It ran outside the building in iron grooves & communicated with the scullery windows of the different flats. Pltf., a domestic servant employed by a tenant of one of the flats, was summoned to the lift to receive some goods. She was engaged in taking the articles from the lift when it was pulled down from below & she was injured. The lift which was of a usual pattern, was not out of repair at the time, & had been in use for eighteen years without any accident having occurred. The jury found that the owners of the flats were guilty of a breach of duty in supplying & maintaining a lift which was a source of danger to those likely to use it, & judgment was entered for pltf.:—*Held*: upon the above facts defts. had not been guilty of any negligence, & pltf. was not entitled to recover.—*POWELL v. THORNDIKE* (1910), 102 L. T. 600; 26 T. L. R. 399, D. C.

**2397.** ————.]—**User of—Whether user permitted to servant.**—*PROCTER v. MOIR* (1889), 5 T. L. R. 682.

**PART X. SECT. 5, SUB-SECT. 4.**

**b. Entrance hall—Extent of landlord's obligation towards tenants.**—Where a lessor leases only certain rooms of a building, retaining possession & control of the halls, staircases & approaches of the building, the only implied obligation towards his tenants & their employees is to provide a reasonably safe access to the building, i.e., an access which is not in the nature of a trap & does not contain any concealed danger.—*ERICKSON v. TRADERS' BUILDING ASSOC.* (1916),

33 W. L. R. 372; 9 W. W. R. 989.—*CAN.*

**c. ————.]—Alterations by landlord—Causing inconvenience to tenant.**—The proprietor of an urban tenement let to the tenant the second flat of the house for writing-chambers, the access to the flat being by a door from the street, through a passage & up a common stair. After the tenant had entered upon his lease, the landlord made an opening for a door in the inner wall at the end of the passage, for the purpose of obtaining access from the street to a printing establishment:—*Held*: the

tenant was entitled to interdict against the use so proposed to be made of the passage.—*ALEXANDER v. COWPER* (1840), 3 Dunal. (Cl. of Sess.) 249; 16 Fac. Coll. 193.—*SCOT.*

**2395 i. Lift—Landlord's liability for injury therefrom.**—*DE ALBA v. FREEHOLD INVESTMENT & BANKING CO., LTD.* (1895), 21 V. L. R. 204.—*AUS.*

**2395 ii.** ————.]—*CONNOR v. HOWDEN*, [1924] N. Z. L. R. 181.—*N.Z.*

**2395 iii.** ————.]—*MATHIESON v. POLLOCK (Aikman's Trustees)*, [1910] S. C. 11.—*SCOT.*

## SECT. 6.—HERBAGE.

**2398. What words will pass.**—Lessee for years of the pannage of the Park of H. grants all his goods & chattels, movable & immovable, within the said Park:—*Held*: the lease of the pannage passeth by these words.—*ANON.* (1572), 3 Leon. 19; Dal. 82; 74 E. R. 514.

**2399. Joint tenants—Proportionate contribution to rent.**—*Assumpsit* for money paid for the use of deft. It appeared at the trial, that pltf. & deft. had jointly taken the eatage of some pasture land, & had put on it their respective cattle; but there was no proof in what proportion each was to contribute to the payment of the rent, nor of how many cattle each might, or had, put on the land. Pltf. brought his action for the moiety of the rent which he had paid; & the jury having returned a verdict for the sum claimed:—*Held*: there was no evidence to warrant them in finding a verdict for the moiety.—*SHARPE v. CUMMINGS* (1844), 2 Dow. & L. 505; 14 L. J. Q. B. 10; 4 L. T. O. S. 141; 9 Jur. 68.

**2400. Power of highway authority to let—Pasturage on roads—Tenant's right of action for disturbance.**—By an award made under an Inclosure Act, passed in 1766, two private roads, E. & H., were set out. About 1818, the road E. became a public highway. Down to 1863, the surveyors of highways for the parish of C., within which E. & H. were situate, had from time to time let the pasturage upon E. & H. to various persons. A local board was formed in 1863 for the parish of C. who in 1876 let the pasturage upon E. & H. to pltf. He thereupon commenced to depasture the herbage with his cattle on the roads. Deft. interfered with pltf.'s enjoyment of the pasturage. By Public Health Act, 1875 (c. 55), s. 4, a street includes any highway. By sect. 144 every local board are within their district surveyors of highways. By sect. 149, all streets shall vest in & be under the control of the local board:—*Held*: (1) by force of the above enactment the property in the soil of E. being a "street" so far vested in the local board that they could demise the right of pasturage thereon to pltf., who was entitled to maintain an action; (2) the local board having no power to demise H., being a private way, pltf. had not sufficient exclusive possession as occupier to enable him to maintain an action.—*COVERDALE v. CHARLTON* (1878), 4 Q. B. D. 104; 48 L. J. Q. B. 128; 40 L. T. 88; 43 J. P. 268; 27 W. R. 257, C. A.

*Annotations*:—*Asto* (1) *Expld.* *Rolls v. St. George the Martyr, Southwark, Vestry* (1880), 14 Ch. D. 785. *Consd.* *Wands worth Board of Works v. United Telephone Co.* (1834), 13 Q. B. D. 904; *Tunbridge Wells Corp. v. Baird*, [1896] A. C. 434; *Salt Union v. Harvey* (1897), 61 J. P. 375. *Refd.* *Burgess v. Northwich L. B.* (1880), 6 Q. B. D. 264; *A.-G. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301; *Bradford v. Eastbourne Corp.*, [1896] 2 Q. B. 205; *St. Mary, Battersea, Vestry v. County of London & Brush Provincial Electric Lighting Co.* (1899), 80 L. T. 31; *Escott v. Newport Corp.*, [1904] 2 K. B. 369; *Westminster Corp. v. Johnson, Westminster Corp. v. Fuller*, [1904] 2 K. B. 737; *Pensel & Wilson v. Tucker*, [1907] 2 Ch. 191; *Wedgesbury Corp. v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78; *Foley's Charity Trustees v. Dudley Corp.*, [1910] 1 K. B. 317; *Jones v. Rew* (1910), 103 L. T. 165. *Generally.* *Mentd.* *Nutter v. Accrington L. B.* (1878), 4 Q. B. D. 375; *It. v. London County Keepers of Peace & J.J.* (1890), 25 Q. B. D. 357; *Fareham L. B. & Fareham Electric Light Co. v. Smith* (1891), 7 T. L. R. 443; *Hill v. Wallasey L. B.*, [1894] 1 Ch. 133; *Finchley Electric Light Co. v. Finchley U. D. C.*, [1903] 1 Ch. 437; *Nesbitt v. Mablethorpe U. D. C.*, [1918] 2 K. B. 1.

**2401. "Exclusive right to feed the grass."**—Cattle were distrained while on a holding pursuant to an agreement by which the tenant, in consideration of £2, allowed the owner "the exclusive right to feed the grass on the land for four weeks":—*Held*: the cattle were not "taken in" by the

tenant "to be fed at a fair price," within Agricultural Holdings Act, 1883 (c. 61), s. 45, & were therefore not privileged from distress.—*MASTERS v. GREEN* (1888), 20 Q. B. D. 807; 59 L. T. 476; 52 J. P. 597; 36 W. R. 591, D. C.

*Annotation*:—*Mentd.* *Richards v. Davies*, [1921] 1 Ch. 90.

## SECT. 7.—LICENSED PREMISES.

## SUB-SECT. 1.—USUAL COVENANTS.

Usual covenants generally, see Part XI., Sect. 2, *post*.

**2402. Not to carry on any other business.**—*BENNETT v. WOMACK*, No. 2498, *post*.

**2403. Purchase of beer from one brewery.**—*FLEUGER v. ALLEN* (1858), 31 L. T. O. S. 86.

**2404. Power of re-entry on lessee's bankruptcy.**—Where a lessee, by an agreement for a lease, stipulated that he would not assign other than to a responsible person, to be approved of by the lessor, & not to assign by way of mtge. or deposit for money to be lent, & declared that other provisions usually inserted in leases of similar property should be introduced into the lease:—*Held*: the agreement would sanction the extension of a proviso for re-entry by the lessor if the lessee should become bkpt. or insolvent, or make any assignment for the benefit of his creditors, or if any sale or assignment of the premises should be attempted under any execution against the lessee.—*HAINES v. BURNETT* (1859), 27 Beav. 500; 29 L. J. Ch. 289; 1 L. T. 18; 24 J. P. 4; 5 Jur. N. S. 1279; 8 W. R. 130; 51 E. R. 198.

*Annotation*:—*Obtd.* *Hampshire v. Wickens* (1878), 7 Ch. D. 555. *Haines v. Burnett* appears to me to be opposed both to principle & authority, & it must now be treated as distinctly overruled by *Hodgkinson v. Croice* (1875), 10 Ch. App. 622 (*JESSEL, M.L.*).

**2405. Assignment to be registered with ground landlord—Payment of fee for registration.**—By a contract for the sale of a public-house, the vendor agreed to assign & the purchaser agreed to take the lease, "subject to the yearly rent of £90 & the performance of the covenants thereby reserved & contained, such covenants being common & usual in leases of public-houses." Upon investigating the title, the purchaser found that the lease under which the premises were held contained this clause: "Provided always & these presents are upon this express condition, that all & every underlease, deed of assignment, etc., which shall be made & executed during the term, shall be left with the solr. of the ground landlord within two months of its date, for the purpose of registration, & a fee of one guinea paid for such registration," & a power or re-entry in case of "breach or non-performance of any of the covenants or other stipulations hereinbefore contained or referred to." The purchaser refused to complete, on the ground that this was not a common & usual covenant; & the jury so found:—*Held*: whether the proviso in the head lease was a "covenant" in the strict sense or not, it was at all events a covenant within the contemplation of the agreement, & therefore the purchaser was not bound to complete.—*BROOKES v. DRYSDALE* (1877), 3 C. P. D. 52; 87 L. T. 467; 26 W. R. 331.

*Annotation*:—*Consd.* *Westacott v. Hahn*, [1917] 1 K. B. 605.

**2406. Residence on premises & personal conduct of business.**—An agreement for the lease of a public-house, provided for a term of three years, with an option to renew for another seven years, & for possession to be given "within one month from this date," but contained no reference as to the covenants to be inserted in the lease. The

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lessor insisted upon covenants by the lessee, (a) to reside on the premises & personally conduct the business; (b) not to assign without consent; & that the proviso for re-entry should extend to the breach of any covenant. The lessee objected that these were not "usual" clauses:—*Held*: covenants *a* & *b* could not be insisted upon as usual covenants; &, on this point, the fact that the subject-matter of the lease was a public-house, made no difference, & the proviso for re-entry must be limited to the case of non-payment of rent.—*Re LANDER & BAGLEY'S CONTRACT*, [1892] 3 Ch. 41; 61 L. J. Ch. 707; 67 L. T. 521.

*Annotation*:—*Reid*. *Re Hughes & Ashley's Contract*, [1900] 2 Ch. 595.

**2407. No assignment without lessor's consent.]—***Re LANDER & BAGLEY'S CONTRACT*, No. 2406, *ante*.

**SUB-SECT. 2.—(COVENANT NOT TO ASSIGN WITHOUT CONSENT.**

Assignment of lease generally, *see* Part XXI, *post*.

**2408. Reasonable grounds for refusing consent—Refusal of assignee to accept tied house covenant.]—***FLEUGER v. ALLEN* (1858), 31 L. T. O. S. 86.

**2409. — Covenant to reside on premises—Assignment to limited company.]—**The lease of a public-house contained covenants on the part of the lessee to reside on the premises, & personally conduct the business, & not to assign without the consent of the lessor unless such consent was unreasonably withheld. The lessee proposing to assign the lease to a limited co.:—*Held*: the lessor could reasonably withhold his consent, a limited co. being unable to perform the covenant to reside on the premises & personally conduct the business.—*JENKINS v. PRICE*, [1908] 1 Ch. 10; 77 L. J. Ch. 41; 97 L. T. 734; 24 T. L. R. 70; 52 Sol. Jo. 43; 14 Mans. 343, C. A.

*Annotations*:—*Mentd*. *Dyson v. A-G.* (1910), 103 L. T. 707; *Evans v. Levy*, [1910] 1 Ch. 452; *Burghes v. A-G.*, [1911] 2 Ch. 139; *Guarantee Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536.

**2410. — Intention of assignee not to reside thereon.]—**In 1895 defts. by an underlease demised a public-house known as "The Porcupine" for a term of forty-five years from Mar. 25, 1895, at a certain rent. The underlessee covenanted (*inter alia*), not to assign or underlet the premises without the written licence of defts. & S. (the head lessor) first had & obtained, but the licence of defts. should not be arbitrarily withheld provided the licence from S. was obtained, & that the underlessee or the tenant or occupier of the premises for the time being should purchase all malt liquors to be sold or consumed on the premises from defts., but there was no covenant by the underlessee to reside on the premises or to carry on the business of a licensed victualler. There was the usual power of re-entry on breach of any of the covenants.

In 1919 the underlease was vested in pltf., who did not reside on the premises, & they contracted to sell the underlease to A., & applied to S. & defts. for their written licence to the transaction. A. was of German origin, but in 1912 had become a naturalised British subject & was in other respects a responsible & respectable person.

S. gave his written licence, but defts. refused for

these reasons: (a) that the purchaser's name & nationality of origin would tend to depreciate the trade of the house; (b) that in accordance with the regulations or requirements of licensing justices defts. now required that their licensees should be resident on their licensed premises, & that the purchaser had stated that it was not his intention to reside on the premises; & (c) that the purchaser was interested in other licensed & business premises & consequently could not give the attention & supervision to "The Porcupine" that should be bestowed upon it:—*Held*: pltf. were entitled to assign the underlease to A. without the written licence of defts., for that in the circumstances their refusal was wholly unreasonable.—*MILLS v. CANNON BREWERY CO.*, [1920] 2 Ch. 38; 89 L. J. Ch. 354; 123 L. T. 324; 84 J. P. 148; 36 T. L. R. 513; 64 Sol. Jo. 447.

**2411. — Name & nationality of assignee.]—***MILLS v. CANNON BREWERY CO.*, No. 2410, *ante*.

**2412. — Assignee interested in other licensed premises.]—***MILLS v. CANNON BREWERY CO.*, No. 2410, *ante*.

**SUB-SECT. 3.—(COVENANT TO MAINTAIN LICENSE.**

**A. In General.**

**2413. Covenant not implied—Parol letting.]—**Upon the letting by parol of a public-house there is no implied agreement or covenant that the tenant shall do no act whereby the license shall become forfeited.

A. took by parol a licensed public-house of B., but having been three times convicted of offences connected with the management of such house the magistrates refused to renew the license. Upon an action by B. against A. upon his implied covenant not to suffer the premises to be used in a manner calculated to produce a forfeiture of the license:—*Held*: no such covenant could be implied, & the action could not be maintained.—*MAW v. HINDMARSH* (1873), 28 L. T. 644.

**2414. —.]—***LACON & CO. v. LACEBY* (1897), 41 Sol. Jo. 405.

**2415. — Reversionary lease.]—**A reversionary lease was granted to deft. by pltf.'s predecessor for a term of years to take effect on the determination of the tenancy of the then tenant. One of the covenants of such lease was that the lessee should, during the continuance of the term thereby granted, use the demised premises as & for a fully licensed public-house only so long as the necessary license could be obtained for that purpose. The license was forfeited during the tenancy of the tenant, & before the date of the commencement of deft.'s lease. The premises accordingly were greatly depreciated:—*Held*: there was no implied condition in the lease that the premises should be maintained as a fully licensed public-house at the commencement of deft.'s lease, & deft. was therefore liable for the rent reserved under the lease.—*BLUM v. ANSLEY* (1900), 64 J. P. 184; 16 T. L. R. 249.

*Annotation*:—*Reid*. *Grimsdick v. Sweetman* (1909), 73 J. P. 450.

**2416. Runs with the land.]—**In the lease of a public-house the lessee covenanted that he would "conduct & manage the business of an inn, tavern, or beerhouse keeper in such proper & orderly manner as to afford no ground or pretext

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**d. Reasonable grounds for refusing consent—Assignment to incorporated company.]—***ROENFELDT v. FLECKER* (1901) 3 S. A. L. R. 136.—*AUS*.

whatever whereby the license or licenses should or might be suspended, discontinued, forfeited, or be in any danger of being suspended, discontinued, or forfeited." The lease contained a clause of re-entry for breach of covenant. A person who occupied by leave of the lessee was convicted of selling drink within prohibited hours, but the conviction was not indorsed on the license. The assignee of the reversion on the lease having brought an action to enforce the right of re-entry on the ground of a breach of covenant:—*Held*: (1) the covenant ran with the land, & might be enforced by the assignee of the reversion; (2) in the circumstances there had been no breach of the covenant.—*FLEETWOOD v. HULL* (1889), 23 Q. B. D. 35; 58 L. J. Q. B. 341; 60 L. T. 790; 54 J. P. 229; 37 W. R. 714; 5 T. L. R. 420.

*Annotations*:—*As to* (1) *Refd.* *White v. Southend Hotel Co.*, [1897] 1 Ch. 767; *Birmingham Breweries v. Jameson* (1898), 78 L. T. 37; *Rogers v. Hosegood*, [1900] 2 Ch. 388. *As to* (2) *Consd.* *Mumford v. Walker* (1901), 71 L. J. K. B. 19.

**2417. Absolute covenant—Binding lessee & assigns.**—Where a lease of a public-house contains a covenant whereby the lessee for himself & his assigns covenants with the lessor & his assigns in manner following—that is to say: "the lessee will at all times during the continuance of this demise use & keep open the said premises as a licensed public-house for the sale of ale, wife, beer & spirits therein, & will so conduct & manage the same as to afford no reasonable or lawful ground of pretence for the justices refusing to renew, indorsing, or objecting to renewal of the licenses now attached to the said premises for the sale of ale, wines & spirituous liquors, & which licenses are hereby agreed & declared to be the property of the lessor, but any indorsement which may be made on the said licenses shall not be deemed a breach of the covenant contained in this clause if the conviction in respect of which such indorsement shall have been made is reversed or annulled on appeal"—the covenant is an absolute one that the license shall not be endangered by any one, & therefore if a sub-lessee by demise of the public-house is convicted of opening the house in prohibited hours the covenant is broken & the lessee & his assigns will be liable at the suit of the lessor for the breach.—*MUMFORD v. WALKER* (1901), 71 L. J. K. B. 19; 85 L. T. 518; 18 T. L. R. 80.

**2418. Covenant to give no ground for "discontinuing license"—Interpretation of "discontinuing"—Applicable to forfeiture only—Not non-renewal.**—(1) The lessee of a public-house covenanted to conduct the business so as to afford no ground for "discontinuing the license":—*Held*: read with the context "discontinuing" meant not refusing to renew but forfeiting the license.

(2) Accordingly where licensing justices refused to renew a license in consequence of objection made that the licensee had been convicted for permitting drunkenness, & that four men had been convicted for being drunk on the premises on that occasion:—*Held*: this did not amount to a breach of the covenant & therefore the covenantor was not liable in damages.

It is quite clear that the word "wilfully" governs the word "suffer" as well as the word "do" & it cannot be contended that resps. did or wilfully suffered anything which could be considered a breach of the licensing laws & regula-

tions (LORD MACNAGHTEN).—*BRYANT v. HANCOCK & Co.*, [1899] A. C. 442; 68 L. J. Q. B. 889; 81 L. T. 96; 64 J. P. 84; 15 T. L. R. 490, II. L. *Annotations*:—*As to* (1) *Refd.* *Williams v. Lassell & Sharman* (1906), 22 T. L. R. 443. *As to* (2) *Expld.* *Mumford v. Walker* (1901), 71 L. J. K. B. 19. *Consd.* *Wilson v. Twamley*, [1904] 2 K. B. 99. *Distd.* *Palethorpe v. Home Brewery Co.*, [1906] 2 K. B. 5. *Refd.* *John Abergarw Brewery Co. v. Holmes*, [1900] 1 Ch. 188; *Holloway v. Hill*, [1902] 2 Ch. 612; *Villiers v. Oldcorn* (1903), 20 T. L. R. 11; *Teap v. Douse* (1905), 92 L. T. 319; *South of England Dairies v. Baker*, [1906] 2 Ch. 631.

**2419. Form of covenant—Where licensee holding under agreement for lease—License forfeited before lease granted.**—The lease of a public-house contained usual covenants to keep up licenses, etc. The lessor & lessee entered into an agreement for a new lease to contain covenants "similar to" those in the former lease. Under this agreement the lessee retained possession of the public-house for several years, & in the interim forfeited the license, which was not renewed. Specific performance of the agreement was decreed against the lessee but no inquiry was directed as to damages occasioned by breach of the covenant to keep up the licenses. The lessor having insisted that he was entitled to insert in the new lease a covenant by the lessee to keep up the licenses similar to that in the former lease:—*Held*: he was not entitled to such a covenant but only to a covenant that the lessee would use his best endeavours to obtain a license, & would, if he obtained it, then keep up the same in the terms of the old covenant.—*SHEPHEARD v. WALKER* (1876), 34 L. T. 230.

**2420. Continuance of obligation—Non-renewal of license.**—By an indenture of lease made in 1895 ptff. demised to deft. certain premises described as "all that beerhouse & premises with the bakehouse in the rear" for a term of twenty-one years. The lease contained covenants by deft. to continue the premises as a beerhouse at all times during the term & not to use the premises or permit them to be used in any other manner than as a beerhouse without the consent of ptff. The house had been licensed as a beerhouse since before the passing of Wine & Beerhouse Act, 1869 (c. 27). In 1905 the renewal of the license was refused under Licensing Act, 1904 (c. 23), on the ground that it was not necessary for the requirements of the neighbourhood, & in Aug. 1907, compensation was paid to ptff. & deft. In an action to recover a half-year's rent due in Jan. 1908:—*Held*: the non-renewal of the license had not the effect of putting an end to the lease, & deft. was therefore liable for the rent.—*GRIMSDICK v. SWEETMAN*, [1909] 2 K. B. 740; 78 L. J. K. B. 1162; 101 L. T. 278; 73 J. P. 450; 25 T. L. R. 750; 53 Sol. Jo. 717, D. C.

**2421. Covenant to insure against loss of license—To what losses extended—Loss through non-renewal for redundancy.**—By a lease of a public-house in 1898 it was provided that, if the licensing authority should for any cause whatsoever refuse to renew the license, the lease should determine, but the above provision should not take effect unless & until the lessee should have effected an insurance of the demised premises in accordance with the covenant thereafter contained; & the lessee covenanted with the lessor to insure & keep insured against loss or forfeiture the license of the premises in the sum of £400. The lessee insured the license, but excluded from the policy the risk

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**2420 i. Continuance of obligation—Non-renewal of license.**—*HART'S TRUS-*

*TEFS v. ARROL* (1903), 6 F. (Cl. of Sess.) 36; 41 Sc. L. R. 52; 11 S. L. T. 442.—*SCOT.*

*e. Surrender of license by executor*

*—Whether bound to take out license pending surrender.*—*BROWN v. WATSON*, [1901] 2 I. R. 218.—*IR.*

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appoint some fit & proper person to reside upon the premises & to hold the licenses under his supervision. The ct. made an order as asked.—*WHITBREAD & Co. v. GRAIN* (1907), 23 T. L. R. 462.

*Annotation:—Consd. Lency v. Callingham & Thompson, [1908] 1 K. B. 79.*

**2436.** ———. ]—The owner of licensed premises has sufficient *prima facie* interest in the business to entitle him to the appointment of a receiver of the license to secure its preservation pending litigation.

In an action by a lessor to recover possession of an hotel, where the lessee had covenanted to keep the hotel continuously open & not to do anything whereby the license might be endangered, the ct. appointed a receiver of the license & of the rents & profits, ordered the license to be delivered up to the receiver, & authorised him to keep the house continuously open as an hotel, & to do all such acts as might be necessary for that purpose, & for the purpose of preserving the license from forfeiture.—*LENEY & SONS, LTD. v. CALLINGHAM & THOMPSON*, [1908] 1 K. B. 79; 77 L. J. K. B. 64; 97 L. T. 697; 24 T. L. R. 55, C. A.

See, generally, RECEIVERS.

(b) *Liability of Lessee for Acts of Underlessees.*

See, generally, Part XXI., *post*.

**2437. Covenant not to suffer acts endangering license—Wilfully suffering.]—BRYANT v. HANCOCK & Co., No. 2418, *ante*.**

**2438.** — *Sub-lessee not agent or servant of lessee.*—A lease of a public-house contained a covenant by the lessee for himself, his heirs, exors., administrators, & assigns, that he would use the premises as a public-house or beerhouse only, & would carry on, or suffer, on the premises no other trade, business or manufacture during the term without the consent of the lessor, & that he would not do, or suffer to be done on the premises, any act whereby the licenses might be forfeited, or indorsed, or the renewal of them withheld. The lease of the premises having been assigned to defts., he underlet them to an underlessee, who was convicted of an offence against the licensing laws, by reason of which the renewal of the licenses was refused. In an action by pltf., as assignee of the reversion, against defts., as assignee of the lease, for breach of the above-mentioned covenant:—*Held*: the sub-lessee not being the servant or agent of defts., the latter could not be said to have done or suffered to be done the act by reason of which the license was not renewed, & therefore the action was not maintainable.—*WILSON v. TWAMLEY*, [1904] 2 K. B. 99; 73 L. J. K. B. 703; 90 L. T. 751; 52 W. R. 529; 20 T. L. R. 440, C. A.

*Annotations:—Consd. Palethorpe v. Home Brewery Co., [1906] 2 K. B. 5; Berton v. Alliance Economic Investment Co., [1922] 1 K. B. 742. Distd. Atkin v. Rose, [1923] 1 Ch. 522. Rejd. Prothero v. Bell (1906), 22 T. L. R. 370; Mackusick v. Carnulbach, [1917] 2 K. B. 581.*

**2439.** ———. ]—A lease of licensed premises to a co. contained the following covenant: "Provided always that the co. will not at any time during the continuance of the said term, without the consent of the lessor first had & obtained, convert the said demised premises into a shop, warehouse, or place of sale for goods or merchandise, or into a private dwelling-house, or open or use, or suffer the same to be opened or used, for any other purpose than as a beerhouse, & also will at all times during the

said term keep & conduct the same in a regular & proper manner in every respect, & will apply for & use their best endeavours when required to obtain a renewal of the existing licenses or permission of the justices for the vending of wines, ale, beer, & tobacco on the said demised premises; & shall not knowingly or willingly do or suffer any act whereby the same may become indorsed, forfeited, or the renewal thereof refused; & will not commit any offence against the licensing laws for the time being in force." The lessees having underlet the premises, the underlessee was convicted of an offence against the licensing laws, by reason of which the renewal of the licenses was refused. In an action by the lessor against the lessees for breach of the covenant:—*Held*: there had been a breach of the covenant at all times during the term to keep & conduct the premises in a regular & proper manner in every respect, for which the lessees were liable.—*PALETHORPE v. HOME BREWERY Co., LTD.*, [1906] 2 K. B. 5; 75 L. J. K. B. 555; 94 L. T. 871; 54 W. R. 489; 22 T. L. R. 505; 50 Sol. Jo. 463, C. A.

**2440. When liability absolute—Binding lessee & assigns.]—MUMFORD v. WALKER, No. 2417, *ante*.**

(c) *Remedies for Breach.*

**2441. Injunction not obtainable—Breach of covenant to carry on business.]—**The lessee of an inn covenanted to use & keep it open as an inn during the term, & not to do any act whereby the licenses might become forfeited. The lessee having threatened to do certain acts inconsistent with the first branch of the covenant, the lessor obtained an *ex p.* injunction, restraining him from discontinuing to use & keep open the premises as an inn, & from doing any act whereby the licenses might become forfeited or be refused. But the injunction was afterwards dissolved, the ct. having no jurisdiction to restrain a person from discontinuing to use premises as an inn, which was the same in effect as ordering him to keep an inn; & no intention having been shown on the part of defts. to violate the negative part of the covenant.—*HOOPER v. BRODRICK* (1840), 11 Sim. 47; 9 L. J. Ch. 321; 59 E. R. 791.

*Annotations:—Folld. L. C. & D. Ry. & S. E. & C. Ry. Managing Committee v. Spiers & Pond* (1916), 32 T. L. R. 493. *Rejd. Lumley v. Wagner* (1852), 1 De G. M. & G. 601; *Nuncleton L. B. v. General Sewage Co.* (1875), L. R. 20 Eq. 127.

**2442.** ———. ]—Defts. were the lessees of an hotel & restaurant from pltf., & had covenanted to use the premises as an hotel & restaurant during the term. Owing to loss of business during the war defts. proposed to close the hotel for the time being, but to continue the restaurant. On an application by pltf. for an *interim* injunction to restrain defts. from closing the hotel:—*Held*: as the effect of the injunction would be to order defts. to carry on the business of the hotel & it was not the practice to grant such an injunction the application must be refused.—*LONDON, CHATHAM & DOVER RY. Co. & SOUTH EASTERN & CHATHAM RY. Co.'s MANAGING COMMITTEE v. SPIERS & POND, LTD.* (1916), 32 T. L. R. 493.

**2443. Where covenant stipulates for liquidated damages.]—**In the lease of a public-house for a term of one year & thenceforward from year to year, the tenant covenanted that he would not do, or suffer to be done, or omit or suffer to be omitted, any act contrary to the provisions of any Licensing Act for the time being in force, whereupon a conviction should be made; & would, in that event, pay to the lessor the sum of £50, as & by way of liquidated damages for any & every



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land or not, *pltf.* C., as assignee of the benefit of it, was entitled to enforce it, upon the ground that *deft.*, having presumably obtained a lease of the house at a lower rent by reason of the restrictive covenant, ought to be restrained from dealing with the house in a way inconsistent with that covenant.

Then comes a question as to whether this contract is one which can be enforced in equity, having regard to the doctrine relating to specific performance & injunctions. If you treat the covenant to keep open this place as a public-house & to sell beer there as an affirmative covenant, you cannot treat the covenant as to the buying of beer as merely an affirmative covenant to buy beer of the lessors. You must put in the words, "& the lessors exclusively." If you get that, you get a negative portion of the covenant which can be properly enforced consistently with the doctrine applicable to cases of this kind; & therefore whether you regard it as an affirmative covenant with a negative element in it, or whether you regard it as split up, as it is here, into these two parts, partly affirmative & partly negative, that negative part can be properly enforced (*LINDLEY, L.J.*).—*CLEGG v. HANDS* (1890), 44 Ch. D. 503; 59 L. J. Ch. 477; 62 L. T. 502; 55 J. P. 180; 38 W. R. 433; 6 T. L. R. 233, C. A.

*Annotations:—As to (1) Apld. White v. Southend Hotel Co., [1897] 1 Ch. 767. Rejd. John Abergarw Brewery v. Holmes (1900), 48 W. R. 236; Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608. As to (2) Apld. White v. Southend Hotel Co., [1897] 1 Ch. 767. Consd. Birmingham Breweries v. Jameson (1898), 78 L. T. 512. Distd. Dewar v. Goodman, [1908] 1 K. B. 94. Apld. Hubbard v. Weldon (1909), 25 T. L. R. 356. Rejd. British Electric Traction Co. v. I. L. Comrs., [1902] 1 K. B. 441; Chapman v. Smith, [1907] 2 Ch. 97; L. G. C. v. Allen, [1914] 3 K. B. 642; Barnes v. City of London Real Property Co., Webster v. Same Co., Sollas v. Same Co., Kersey v. Same Co., Oakley, Sollas v. Same Co., [1918] 2 Ch. 18. As to (3) Distd. Birmingham Breweries v. Jameson (1898), 78 L. T. 512.*

**2449. — Severance of business from reversion.]**  
—*WHITE v. SOUTHERN HOTEL CO., No. 2460, post.*

**2450. —**—The owner of a leasehold public-house, subject to a first mtge., made a second mtge. to the partners in "J. Brothers," brewers, in consideration of an advance by them out of their partnership account, the partners being first described separately & afterwards referred to as J. Brothers.

By a separate deed of the same date, made between the same parties described as in the second mtge., the mtgor. in further consideration of the advance covenanted with "J. Brothers, their exors., administrators, & assigns," to bind the house to "J. Brothers" for the entire supply of beer, wines & spirits so long as he, his exors., administrators or assigns should be in possession or occupation.

Both mtges. were subsequent to the Conveyancing Act, 1881 (c. 41).

The transferee of the first mtge. & the assign of the equity of redemption, then in possession having together made an underlease to *deft.* a publican, with notice of the covenant, *pltf.*, who had purchased the business of J. Brothers together with their right of supply to the public-house, & had taken a transfer of the second mtge. & an assignment of the benefit of the deed of covenant, sought to enforce the tie against *deft.*—*Held*: on the construction & intention of the deeds

(1) the benefit of the covenant was not limited to the original firm of J. Brothers, but ran with their business; (2) the covenant bound any one deriving title under the original mtgor., including an underlessee with notice, who, though not an assign, could be bound in equity by a restrictive covenant; (3) *deft.*, though apparently deriving title to his underlease under the first mtgee. as well as under the mtgor. in possession, must be considered to hold under the better title, which, having regard to s. 18 (1) of Conveyancing Act, 1881 (c. 41), was that derived from the mtgor. in possession. He could not, therefore, set up the paramount title of the first mtgee. against *pltf.*s.

(4) On the above grounds *pltf.*s. were entitled to enforce the tie against *defts.*

The words [successors & assigns] are not essential, as that intention may be gathered from other indications (*KEKEWICH, J.*).—*JOHN BROTHERS ABERGARW BREWERY CO. v. HOLMES*, [1900] 1 Ch. 188; 69 L. J. Ch. 149; 81 L. T. 771; 64 J. P. 153; 48 W. R. 236; 44 Sol. Jo. 132.

*Annotation:—As to (2) Rejd. Wilkes v. Spooner, [1911] 2 K. B. 473.*

**2451. — Lessor's business incorporated with that of assignees of reversion.]**—In 1892 A. executed under seal an agreement to take an hotel as yearly tenant to B. & Co., & thereby covenanted to purchase all his beer of B. & Co. "and their successors in business." The covenant did not mention "assigns." B. & Co. did not execute the agreement, & there was nothing on the face of it to show that they were brewers. They were, in fact, brewers, & A. occupied the hotel under the agreement as their tenant & purchased beer of them. In 1899 B. & Co. sold & conveyed their brewery, tied houses, including the hotel, & business to C. & Co., who were brewers, & who incorporated B. & Co.'s business with their own. After the sale B. & Co. ceased to carry on business. Notice of the change of ownership was given by C. & Co. to A., & for a time he purchased beer of them. In an action by C. & Co. to restrain A. from committing a breach of the covenant:—*Held*: (1) the covenant was not personal to B. & Co., but ran with the land, & C. & Co., as successors in business of B. & Co. & owners of the reversion in fee of the hotel, were entitled to the benefit of it; (2) C. & Co., as assigns of B. & Co., being clearly entitled against A. to specific performance of the agreement under which he was in possession of the hotel, could sue him on the covenant in the same manner as they could have done, if B. & Co. had actually executed the original agreement. *Semble*: the benefit of the covenant was a chose in action, assignable in equity before Jud. Act, 1873, & by virtue of s. 25 (6) of that Act the covenant could after an absolute assignment thereof in writing & due notice given, be sued upon by the assignee.—*MANCHESTER BREWERY CO. v. COOMBS*, [1901] 2 Ch. 608; 70 L. J. Ch. 814; 82 L. T. 347; 16 T. L. R. 299.

*Annotations:—As to (2) Rejd. Torkington v. Magee, [1902] 2 K. B. 427; Rickett v. Green (1909), 79 L. J. K. B. 193; Gibbey v. Cossey (1912), 106 L. T. 607; Wedd v. Porter, [1916] 2 K. B. 91; Blane v. Francis, [1917] 1 K. B. 252; Cole v. Kelly, [1920] 2 K. B. 106; Gray v. Spyer, [1922] 2 Ch. 22. Generally, Mentd. County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.*

**(b) Devolution of Benefit.**

*See, now, Law of Property Act, 1925 (c. 20), ss. 78, 141.*

who knew of this agreement when the lease was assigned to him; but broke the covenant by purchasing & selling liquor not that of the brewery co.—

*Held*: the covenant ran with the land, & G. was bound by it to the same extent as M.—*RUDN* v. *MANAHAN* (1913) 94 W. R. 222.

798; 5 D. L. R. 565.—*CAN.*

**2448 II. —**—*O'LEARY v. DEASY*, [1911] 1 I. R. 220.

**2452. Whether subject of demise.]**—Deft. demised to pltf. for ten years a brewery & premises at S., “& also the exclusive or such other privilege as deft. then enjoyed of supplying ale, etc., to the Punch Bowl & certain other public-houses (naming them) which were then the property of deft. or were then under his control.” Deft., at the time of the demise, himself occupied the Punch Bowl, but during the term assigned it to one C. In an action upon the above covenant, pltfs. assigned as a breach that G. while tenant of the Punch Bowl, did not purchase all the ale, etc., consumed on the premises from pltfs., but purchased it from deft. & from divers other persons to pltfs. unknown:—*Held*: this breach was not well assigned.

*Qu.*: whether the supposed privilege could properly form the subject-matter of a demise; or, if it could, whether it could be implied from the word “demise.”—*HINDE v. GRAY* (1840), 1 Man. & G. 195; 1 Scott, N. R. 123; 9 L. J. C. P. 253; 4 Jur. 392; 133 R. R. 302.

*Annotations*:—*Reid*. Yates v. Tearle (1844), 8 Jur. 774; White v. Southend Hotel Co. (1897), 45 W. R. 434. *Mentd.* Briscoe v. Hill (1842), 10 M. & W. 735; Wright v. Howe (1843), 1 L. T. O. S. 314; Green v. Price (1845), 13 M. & W. 695; Slade v. Hawley (1845), 13 M. & W. 757; Dawson v. Wrench (1849), 3 Exch. 359; Allsopp v. Wheatcroft (1872), L. R. 15 Eq. 59; Rousillon v. Rousillon (1880), 14 Ch. D. 351; S. E. Ry. v. Railway Comrs. (1881), 6 Q. B. D. 586; Nordenfellt v. Maxim Nordenfellt Guns & Ammunition Co., [1894] A. C. 535.

**2453. Express assignment of benefit of covenant.]**—*CLEGG v. HANDS*, No. 2448, *ante*.

**2454. Successors & assigns not mentioned.—Intention appearing from deed.]**—*JOHN BROTHERS ABERGARW BREWERY Co. v. HOLMES*, No. 2450, *ante*.

**2455. Covenant with lessors & successors in trade.—Sale & removal of lessors' business.]**—Where the lessee of a public-house covenanted for himself, his exors., & assigns, with his lessors (brewers) to take all his beer of them or their successors in their said trade, & the lessors sold their trade & the public-house, with other premises, to third persons, who removed the plant, etc., to a distance of two miles, & there carried on the business of brewers:—*Held*: the trade of the lessors was thereby determined, & their assignee could not take advantage of the covenant, on the assignee of the lessee purchasing beer from another brewer.—*DOE d. CALVERT v. REID* (1830), 10 B. & C. 849; 8 L. J. O. S. K. B. 328; 109 E. R. 664.

*Annotations*:—*Distd.* Clegg v. Hands (1890), 44 Ch. D. 503. *Cons.* Birmingham Breweries v. Jameson (1898), 67 L. J. Ch. 403; Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608. *Reid*. Keppell v. Bailey (1834), 2 My. & K. 517.

**2456. — Reversion on lease vested in brewers.—Original lessor still carrying on business as brewer.]**—A lessor, described as a brewer, leased to deft.'s predecessors in title a beerhouse for a term of fourteen years, & the lessee covenanted that he, his exors., administrators, & assigns, & all other persons for the time being carrying on the business of a beer retailer or publican upon the premises, would during the term deal exclusively “with the lessor or his firm or his or their successors in business” for all beers, etc., sold upon the premises. The lease provided that, where the context allowed, the word “lessor” should include the exors., administrators, & assigns of the lessor. The reversion expectant on the lease became vested in pltfs., who were brewers, & the lease became vested in deft. The firm of the original lessor were still carrying on business as brewers, & were willing to supply deft., who was willing to deal with them:—*Held*: the context did not

allow of the insertion of the words “exors., administrators, & assigns” after the word “lessor” in the covenant to deal exclusively with the lessor, etc., & there was no breach of the covenant so long as deft. dealt with the firm of the original lessor, & no obligation on him to take his beer from pltfs.—*BIRMINGHAM BREWERIES, LTD. v. JAMESON* (1898), 67 L. J. Ch. 403; 78 L. T. 512; 14 T. L. R. 396; 42 Sol. Jo. 488, C. A.

*Annotation*:—*Consd.* Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608.

**2457. Covenant with lessors & assigns.—Assigns carrying on different brewing business.]**—*CLEGG v. HANDS*, No. 2448, *ante*.

**2458. Covenant with lessor by name.—Lessor ceasing to carry on business.]**—*ROBERTS v. LEATON* (1898), 42 Sol. Jo. 715.

### (c) Devolution of Burden.

*See, now*, Law of Property Act, 1925 (c. 20), ss. 79, 142.

**2459. Assignee named in covenant.]**—*Qu.*: whether a covenant by the lessee of a public-house that he & his assigns will buy all their beer of pltfs. is binding on the assignee.—*HARTLEY v. PEHALL* (1792), Peake, 178, N. P.

*Annotations*:—*Reid*. Keppell v. Bailey (1834), Coop. temp. Brough. 298. *Mentd.* Simmons v. Heseltine (1838), 5 C. B. N. S. 554.

**2460. Assignee not named in covenant.]**—A lease by a wine merchant of an hotel for thirty years at a rent of £1,500 a year contained a covenant by the lessee with the lessor, his heirs & assigns, that he, the lessee, would not during the term buy or sell on the premises any foreign wines other than should have been supplied by the lessor, his successors or assigns; & it was provided that so long as the lessee should observe this covenant the lessor should allow the lessee an abatement of £75 from each quarter's rent.

The lessor died during the term. Pltfs., who were his exors., sold his wine business to the firm of W. & P.; & the lessee assigned the lease of the hotel to defts. Defts. claimed that, so long as they continued to buy wines from W. & P., they were entitled to the abatement from each quarter's rent; but pltfs. insisted that, when the ownership of the wine business & the ownership of the reversion upon the lease were severed, the covenant to buy wines ceased to be operative, & consequently that defts. were not entitled to the benefit of the proviso:—*Held*: (1) although the covenant to buy wines did not in terms include the assigns of the lessee, the burden of it ran with the tenant's interest under the lease; (2) the assigns of the lessee were still bound by the covenant & entitled to the benefit of the proviso for abatement of rent.—*WHITE v. SOUTHEND HOTEL CO.*, [1897] 1 Ch. 767; 66 L. J. Ch. 387; 76 L. T. 273; 45 W. R. 434; 13 T. L. R. 310; 41 Sol. Jo. 384, C. A.

*Annotations*:—*As to* (1) *Reid*. Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608; Chapman v. Smith, [1907] 2 Ch. 97; *Itc* Stephenson, Poole v. Stephenson, [1915] 1 Ch. 802. *Generally*, *Mentd.* Rogers v. Hosgood, [1900] 2 Ch. 388.

**2461. — Taking with notice of covenant.]**—*JOHN BROTHERS ABERGARW BREWERY Co. v. HOLMES*, No. 2450, *ante*.

**2462. Covenant with brewer not landlord.—Assignee taking with notice of covenant.]**—In 1873 a public-house called the M. Arms was demised to C. In 1874 another public-house called the S. Arms was demised to C. & D., who covenanted for themselves, their heirs, exors., administrators, & assigns, that they would, during the residue of their respective terms, purchase all the malt

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liquors sold & consumed at the S. Arms, & also at the M. Arms, of plffs. Plffs. covenanted on their part to supply all the malt liquors so required, & that they should be of a certain quality & at a certain price. In 1874 the M. Arms was assigned by C. to deft., with notice of the covenant. Deft. then mortgaged the lease to plffs. to secure the repayment of money borrowed by him from them, & covenanted during the residue of his term to buy all the malt liquors brought into the M. Arms of plffs., whether he repaid the money or not. Deft. repaid the money & then refused to fulfil his covenant:—*Held*: deft. was an assignee with notice of the covenant in the lease of 1874, & therefore it was binding on him in equity; but it was conditional on plffs. fulfilling their covenant; & the covenant by deft. in the mtg. was subject to an implied obligation on the part of plffs. to supply good marketable beer.—*LUKER v. DENNIS* (1877), 7 Ch. D. 227; 47 L. J. Ch. 174; 37 L. T. 827; 26 W. R. 167.

*Annotations*:—*Consd.* Wilkes v. Spooner, [1911] 2 K. B. 473; L. C. C. v. Allen, [1914] 3 K. B. 612. *Mentd.* Wolverhampton Corp'n. v. Bilston Comrs., [1891] 1 Ch. 315.

**C. Condition as to Quality.**

**2463. Implied obligation to supply beer of good marketable quality.]**—(1) An agreement between a brewer & a publican, that the publican shall take all his beer of the brewer, cannot be enforced, unless the brewer supply the publican with good beer, such as ought to give satisfaction to his customers.

(2) In an action on this agreement, the quality of the beer cannot be proved by showing what sort of a commodity the brewer furnished to other publicans during the same period.—*HOLCOMBE v. HEWSON* (1810), 2 Camp. 391, N. P.

*Annotation*:—As to (2) *Apld.* Manchester Brewery Co. v. Coombs (1900), 82 L. T. 347.

**2464. —.]**—*THORNTON v. SHERRATT*, No. 2445, *ante*.

**2465. —.]**—*LUKER v. DENNIS*, No. 2462, *ante*.

**2466. Evidence as to quality.]**—*HOLCOMBE v. HEWSON*, No. 2463, *ante*.

**D. Condition as to Price.**

**2467. Implied covenant—To supply at fair & reasonable prices.]**—A tenant's covenant in a brewer's lease of a tied house not to sell on the demised premises any malt liquors other than such as shall have been purchased from the landlord imports an implied covenant by the landlord to supply malt liquors of good quality & at fair & reasonable prices. Such a tenant's covenant was contained in pltf.'s lease of one of their tied houses in the London metropolitan area, & deft. was the assignee of the lease. In June, 1909, in consequence of the increased license duties proposed in the Finance Bill of that year, plffs. & substantially all the London brewers agreed to raise the price of beers 6s. a barrel to the trade, leaving the trade to recoup themselves by raising the retail price to the public one farthing per half-pint. The increased prices were agreed to by the trade generally but deft. refused to pay them & purchased his malt liquors elsewhere at the old prices. In an action by plffs. to restrain deft. from committing a breach of his covenant:—*Held*: under the circumstances the increased prices were fair & reasonable, & plffs. were entitled to an injunction.

*Qu.*: as to the meaning to be attributed to the

words "current market prices" in a landlord's covenant in such a lease.—*COURAGE & CO., LTD. v. CARPENTER*, [1910] 1 Ch. 262; 79 L. J. Ch. 184; 101 L. T. 940; 26 T. L. R. 196.

**2468. "Fair current market price"—How ascertained.]**—Plffs., who were brewers & wine & spirit merchants, let a licensed house to deft., who covenanted to buy from them all liquors for consumption on the premises which they should be willing to supply at "the fair current market price." Plffs. issued price lists, & supplied the ordinary public at the full price on the list, & they supplied "free" licensed houses at a discount of 20 per cent. They allowed deft. & the tenants of their other tied houses a discount of 10 per cent. These were the usual prices charged by brewers generally:—*Held*: the words "fair current market price" meant a price which was fair & current in the case of tied houses, & which was not in excess of the general market rate, & the price did not cease to be fair & current because the tenants of free houses, who were exceptionally circumstanced, obtained lower prices by special bargain.—*PERRITT & CO., LTD. v. RADFORD* (1901), 17 T. L. R. 301.

*Annotation*:—*Consd.* Charrington v. Woode, [1914] A. C. 71.

**2469. —.]**—*RUSSELL v. CRAWFORD* (1910), cited in, [1914] A. C. at p. 88; 29 T. L. R. at p. 146, C. A.

*Annotation*:—*Consd.* Charrington v. Woode, [1914] A. C. 71.

**2470. "Fair market price"—How ascertained.]**—Resp. was the lessee of a public-house in London of which appls., a firm of brewers, were the owners. By his lease he covenanted that he would deal exclusively with them for all malt liquors which should be sold or consumed on the premises, "provided they shall be willing to supply the same at the fair market price." It was proved that of the public-houses in London about 93 per cent. were "tied" houses, & 7 per cent. were "free" houses, & that the London brewers supplied beers at standard prices, fixed by agreement among themselves, subject to discounts, & that the discounts allowed to "free" houses were larger than those allowed to "tied" houses. In an action brought by appls. to recover the balance of an account for beer supplied to resp., he counterclaimed for sums which he alleged that he had paid to appls. in excess of the fair market price for beer supplied to him. The jury found that there were two market prices—one for tied & one for free houses—and that resp. had been charged the fair market price as applying to a tied house:—*Held*: the term "market price" in a contract had not a fixed definite legal significance which attached to it invariably, but it must be construed with reference to the context & surrounding circumstances, & resp. was not entitled to recover on the counterclaim.—*CHARRINGTON & CO., LTD. v. WOODE*, [1914] A. C. 71; 83 L. J. K. B. 220; 110 L. T. 548; 30 T. L. R. 176; 58 Sol. Jo. 152, H. L.

*Annotation*:—*Mentd.* G. W. Ry. & Mid. Ry. v. Bristol Corp'n. (1918), 87 L. J. Ch. 414.

**2471. "Current market prices."]**—*COURAGE & CO., LTD. v. CARPENTER*, No. 2467, *ante*.

**2472. Addition of increase of duty—Lease providing for fixed price.]**—By a lease of a public-house the lessee agreed to take from the lessor, who was a brewer, all the beer to be consumed on the premises at a fixed price per barrel. Subsequently additional duty was imposed upon beer. The lessor supplied beer to the lessee from time to time after the additional duty had been imposed. The lessor claimed to add the extra duty to the price of the beer under s. 20 of the Customs

Consolidation Act, 1876 (c. 36), & s. 8 of Finance Act, 1900 (c. 7):—*Held*: as there was a new contract in respect of each order of beer, & as the lease merely fixed the price, the lessor could not recover the extra duty.—*NEWBRIDGE RHONDDA BREWERY CO. v. EVANS* (1902), 86 L. T. 453; 18 T. L. R. 396.

**2473.** — *Lease not providing for price.*—*NOAKES & CO., LTD. v. DAY* (1907), [1910] 1 Ch. 270, n.; 79 L. J. Ch. 186, n., C. A.

**2474.** — —.—*COURAGE & CO., LTD. v. CARPENTER*, No. 2467, *ante*.

#### *E. Breach of Covenant.*

##### *(a) What Amounts to Breach.*

**2475. Refusal by lessor to supply.**—(1) A covenant by a publican to buy all beer of his landlord's brewers is satisfied by buying as an undisclosed principal through an agent. (2) The publican is relieved from the obligation of such covenant with respect to any article his landlord will not supply. (3) *Semble*: where such a covenant is entered into by a tenant, there is, in the absence of express stipulation, an implied obligation on the part of the landlord to supply the tenant with such kinds of beer as he requires, & if this obligation is not fulfilled the tenant is at liberty to buy the beer which he requires elsewhere.—*EDWICK v. HAWKES* (1881), 18 Ch. D. 199; 45 L. T. 168; 29 W. R. 913; *sub nom.* *EDRIDGE v. HAWKER & CO.*, 50 L. J. Ch. 577.

*Annotation*:—*Generally*. *Mentd.* *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K. B. 720.

**2476. Purchase as undisclosed principal through agent.**—*EDWICK v. HAWKES*, No. 2475, *ante*.

**2477. Occasional supply inferior in quality.**—Pltf. demised a public-house to deft.; deft. to take all his malt of pltf.; pltf. upon every reasonable request to deliver good malt, & if he did not, deft. to be at liberty to buy it of any other. Breach, deft. used a quantity of malt, not bought of pltf., & without requiring pltf. to deliver such. Plea, that pltf. delivered bad malt to deft., who thereupon bought malt of others:—*Held*: the plea was bad; for as one failure by pltf. would not operate as a total suspension of the covenant, deft. should have alleged a request to send him good malt, & that he had purchased the malt of others on pltf.'s failure to do so.

I think each of these parties has a complete remedy, & must resort to the remedy by action on their respective covenants, & that the breach by pltf. of his covenant is no discharge of the present action (*DALLAS, J.*).—*WEAVER v. SESSIONS* (1815), 6 Taunt. 154; 1 Marsh. 505; 128 E. R. 992.

*Annotation*:—*Refd.* *Corcoran v. Proser* (1873), 22 W. R. 222.

**2478.** —.—*Deft., a brewer, let to pltf. a public-house, on the terms, among others, that pltf. should purchase of deft. all the malt liquor consumed on the premises: provided that, in case of any breach of that agreement, pltf. should forfeit, as liquidated damages, the sum of £50, secured by the promissory note of pltf. Deft. indorsed over the note for value; & pltf., having been compelled to pay it, entered a plaint in the county ct. against deft., & stated in the summons & particulars that "the cause of action was money paid for the use of deft. to the indorsees of the note, for which he never received from deft. any value or consideration."* At the trial before a

jury it appeared that, on pltf.'s taking possession of the premises in Oct. 1849, he commenced ordering beer from deft., & continued to do so until Feb. 1850. Pltf. proposed to prove that the beer supplied by deft. subsequently to Christmas, 1849, was unmarketable. This evidence was objected to, but received by the judge. Deft. submitted that there was no case for the jury, & pltf. must be nonsuited. Pltf. refused to be nonsuited; & the judge left it to the jury to say whether the liquor supplied by deft. was of a marketable quality; & they found a verdict for pltf. On appeal, the case, which was stated by the judge, set out his direction to the jury, though not necessary to render intelligible the points of law which he formally submitted for the opinion of the ct.:—*Held*: under County Courts Act, 1850 (c. 61), ss. 14, 15, the Ct. of Appeal is not confined to the precise questions submitted to them, but may decide upon the whole case as stated; & therefore, looking at the summing up in this case, it was erroneous; for the circumstance of deft. having on one or two occasions supplied pltf. with bad beer, did not authorise him to avoid the contract, but he should have returned the beer, & if better were not sent instead of it, he might, on the particular occasion, procure some elsewhere; & if deft. continued to send bad beer, he might sue him on the implied contract that he would supply beer reasonably fit to be drunk.—*STANCLIFFE v. CLARKE* (1852), 7 Exch. 439; 1 Saund. & M. 13; 21 L. J. Ex. 129; 16 J. P. 425; 16 Jur. 430; 155 E. R. 1020.

*Annotation*:—*Mentd.* *Kirby v. Williamson* (1852), 19 L. T. O. S. 203.

##### *(b) Remedies for Breach.*

**2479. Enforcement by injunction.**—*CATT v. TOURLE*, No. 2446, *ante*.

**2480.** —.—*BRANDON v. BERNHARDT* (1886), 30 Sol. Jo. 753.

**2481.** —.—*CLEGG v. HANDS*, No. 2448, *ante*.

**2482.** —.—*MANCHESTER BREWERY CO. v. COOMBS*, No. 2451, *ante*.

**2483. Occasional breach by brewer.**—*WEAVER v. SESSIONS*, No. 2477, *ante*.

**2484.** —.—*STANCLIFFE v. CLARKE*, No. 2478, *ante*.

**2485. Breach by lessee—Distress for increased rent.**—*COOPER v. TWIBILL* (1808), 3 Camp. 286, n.

**2486. Breach by brewer—Purchase by lessee elsewhere.**—*COOPER v. TWIBILL* (1808), 3 Camp. 286, n.

**2487.** —.—*EDWICK v. HAWKES*, No. 2475, *ante*.

#### SUB-SECT. 5.—OTHER COVENANTS.

**2488. Proviso for lessee to receive goodwill at determination of lease—Valuation.**—In Aug. 1845, deft.'s testatrix granted to pltf. a lease of a public-house for fourteen years, at a rent of £70 *per annum*, the latter paying £300 for the goodwill; & before the expiration of that lease, viz., in Mar. 1858, she granted him a further lease for fourteen years at a rent of £80 *per annum*. Each of these leases contained the following proviso:—“Provided also, & it is agreed & declared that, at the expiration or other sooner determination of the term hereby granted, all such sum & sums

#### PART X. SECT. 7, SUB-SECT. 5.

*n. Covenant to assign licenses to lessor on determination of lease.*—A covenant in the lease of an hotel by

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the lessee that at the expiration of the lease he will assign to the lessor the license, if any, then held by him is not a covenant binding upon the assignee of the term as such. It is merely a

personal covenant, having nothing to do with the land or its tenure.—*WALSH v. WALPER* (1901), 22 C. L. T. 49; 3 O. L. R. 158.—*CAN.*

**Sect. 7.—Licensed premises: Sub-sect. 5. Sects. 8, 9, 10, 11, 12, 13 & 14. Part XI. Sects. 1 & 2: Sub-sect. 1.]**

of money as shall or can be procured for the goodwill of the business of a licensed victualler in respect of the premises from an incoming tenant, shall be received by & belong to the lessee, his exors., etc." The second lease being about to expire, negotiations took place between pltf. & deft. for a renewal, but they failed to come to terms; & deft., with notice of pltf.'s claim under the above proviso, granted a lease of the premises to a new tenant for a term of fourteen years, at a rent of £160 *per annum*, & a premium of £1,300. Upon a case stated for the opinion of the ct. by an arbitrator, to whom it was to be referred to assess the amount of damages pltf. was entitled to recover for the breach (if any) of the above proviso, upon the principles to be laid down by the ct., it was found as a fact that "the rental of £160 *per annum* reserved in the lease granted to the new tenant was, without any premium, bonus, or other payment whatever, a full & sufficient rental for the premises under such a lease, whether intended for a licensed victualler's business or not": & further, that "the goodwill of the business carried on by pltf. would, if belonging to the owner of the house, have had a very considerable value, & if such owner had in that case been willing to grant a lease similar to that granted to the new tenant, a sum exceeding £1,300 would without difficulty have been obtained for the goodwill":—*Held*: the proviso was broken; & the arbitrator was to estimate the damages the pltf. was entitled to recover for such breach, in the same manner as one accustomed to value "goodwill" as between outgoing & incoming tenant would estimate them, & in so doing was not to disregard the increased value of the property in the neighbourhood generally.—*LEWELLYN v. RUTHERFORD* (1875), L. R. 10 C. P. 456; 44 L. J. C. P. 281; 32 L. T. 610.

**2489. Covenant to assign licences to lessor on determination of lease—Bankruptcy of lessee.]**—A lease of a public-house, determinable on the bkpcy. of the lessee, contained a covenant by the lessee upon the determination of the term to assign the licenses to the lessor. The lessee having become bkpt. before the expiration of the term:—*Held*: his trustee in bkpcy. took no interest in the licenses, & the covenant was valid, entitling the lessor to have the licenses delivered up to him, though they were not assignable.—*Re BRUNNOR, Ex p. ROYLE* (1877), 46 L. J. Bey. 85; 25 W. R. 500, D. C.

#### SECT. 8.—LIVE STOCK.

See *ANIMALS*, Vol. II., pp. 255 *et seq.*

**2490. Lease of sheep.]—SPENCER'S CASE**, No. 2798, *post*.

—**Along with land.]—See AGRICULTURE**, Vol. II., pp. 39, 40, Nos. 219–221.

#### SECT. 9.—LODGINGS.

See Part VI., Sect. 7, *ante*.

#### SECT. 10.—MARKETS AND FAIRS. See *MARKETS*.

#### SECT. 11.—MINES AND MINERALS. See *MINES*.

#### SECT. 12.—SPORTING RIGHTS.

**Lease of fishery.]—See FISHERIES**, Vol. XXV., p. 19, Nos. 165 *et seq.*

**Lease of game.]—See GAME**, Vol. XXV., p. 355, Nos. 64 *et seq.*

#### SECT. 13.—TITHES.

See *Ecclesiastical Leases Act*, 1765 (c. 17).

**Tithes & tithes rentcharge.]—See ECCLESIASTICAL LAW**, Vol. XIX., p. 476, Nos. 3339 *et seq.*

**Leases of ecclesiastical property.]—See ECCLESIASTICAL LAW**, Vol. XIX., p. 502, Nos. 3584 *et seq.*

#### SECT. 14.—OTHER CASES.

**2491. What leases may be granted—Bailiwick of manor.]**—If the lessee for years of a manor, with exception of wards, marriages, reliefs, etc., afterwards take a lease of the bailiwick of the manor, this shall not operate as a surrender of the first lease, notwithstanding the exception is void.—*GYBSON v. SEARL* (1607), Cro. Jac. 176; 79 E. R. 154.

*Annotation:—Reid. Roe d. Berkeley v. York* (Archbp.) (1805), 6 East, 86.

**2492. — Usual audience part of theatre.]**—By 1 Geo. 4, c. 160, s. 3, the "new renters" of Drury Lane Theatre, or their assigns, are entitled "to the free liberty & privilege of admission into the usual audience part of the theatre," & "in as full & effectual manner as the same hath been & is now enjoyed by the said new renters & their assigns." Since the passing of the above Act, a certain part of the then audience part of the theatre was railed off from the rest & converted into "orchestra stalls" distinctly numbered, fitted up at extra costs, & having a separate entrance. The right of the new renters to free admission to such stalls had been from time to time disputed, but none of them or their assigns had ever brought an action to try such right. Pltf., being the assignee of a new renter's share, had entered the theatre & according to present usage had signed his name in the renters' book, & was given a ticket, marked "renter"; he proceeded towards the dress circle, gave up the ticket to the check taker of the dress circle & passed in, & occupied a seat in the dress circle, which he afterwards desired to change for a seat in the stalls. He conformed to all the regulations of the theatre respecting such change of seat, except that he refused to pay the fee of 2s. as a consideration for the change, which fee was the customary consideration paid by the public for such change. Persisting in his alleged right to pass free into the stalls, he was ejected from the theatre, without any excess of force, by the servants of deft., the lessee of the theatre:—*Held*:

#### PART X. SECT. 8.

**o. Lease of racehorse.]**—Deft. leased a racehorse to pltf. subject to a stipulation that the lessee should keep the

horse in proper condition & should at the termination of the term, return the horse in good racing condition to the lessor:—*Held*: the stipulation imposed an absolute obligation on pltf., & if from

any cause the horse was not in fact in "proper condition," pltf.'s right to keep it was lost & deft. was entitled to retake possession.—*WILDING v. KELLY* (1922), 24 W. A. L. R. 58.—**AUS.**

the stalls were the usual audience part of the theatre, & pltf. was entitled to proceed there in the first instance. But the Act, being framed so as to incorporate a usage, there being no evidence of what that usage was, the present usage must, in the absence of such evidence, be deemed to be good, & therefore deft. was justified in disputing the right claimed, & was entitled to judgment, for pltf. having made his election of the part of the theatre, he intended to go to, & having given up his ticket, in accordance with present usage, became undistinguishable from the paying public, with no rights greater or less than they possessed, & was consequently, not entitled to pass free from the dress circle to the stalls.—*DAUNEY v. CHATTERTON* (1875), 45 L. J. Q. B. 283; 33 L. T. 628; *sub nom.* *DAUNEY v. CHATTERTON*, 40 J. P. 180, C. A.

**2493.** — *Stalls & boxes of theatre.*—*LEADER v. MOODY*, No. 2765, *post*.

**2494.** — *Advertisement hoarding.*—By an agreement between an owner of land & an advertising agent the owner agreed to let & the agent to take an advertising station at a yearly rent, the tenancy to commence from completion of erection, & continue seven years, & the agent agreed to pay rates & taxes. By another agreement an owner agreed to allow the advertising

agent the privilege of erecting an advertising hoarding, the agent to pay a yearly rent & the owner agreed to allow the agent the further privilege of removing a wall, the agreement to remain in force for three years, & be afterwards terminable by twelve months' notice, but if the owner should be obliged to give less than twelve months' notice he agreed to refund £20. In both agreements the dimensions of the hoardings to be erected were specified. Advertising hoardings supported on posts fixed into the ground were erected. In the first case the structure was used partly by the owner as a shed & partly by the advertising agent as a hoarding; in the second case, exclusively by the agent as a hoarding:—*Held*: each of the agreements created a tenancy, & conferred an exclusive occupation & not merely a licence & therefore the advertising agent was liable to be rated to the relief of the poor in respect of both hoardings as occupier of advertising stations.—*TAYLOR v. PENDLETON OVERSEERS* (1887), 19 Q. B. D. 288; 51 J. P. 613; 35 W. R. 762, D. C.

*Annotations*:—*Reid*. *Jones v. I. R. Comrs.*, *Sweetmeat Automatic Delivery Co. v. I. R. Comrs.*, [1895] 1 Q. B. 484; *National Telephone Co. v. I. R. Comrs.*, [1899] 1 Q. B. 250; *Provincial Pill Posting Co. v. Low Moor Iron Co.*, [1909] 2 K. B. 311.

## Part XI.—Covenants.

### SECT. 1.—IN GENERAL.

**Definition.**—*See* DEEDS, Vol. XVII., p. 389, Nos. 1983–1987.

**What constitutes a covenant.**—*See* DEEDS, Vol. XVII., pp. 389–395, Nos. 1990–2049.

**Provisoes construed as covenants.**—*See* DEEDS, Vol. XVII., pp. 406, 407, Nos. 2149–2157.

**Necessity for & effect of being under seal.**—*See* DEEDS, Vol. XVII., pp. 395, 396, Nos. 2050–2058.

**Absolute & qualified covenants.**—*See* DEEDS, Vol. XVII., pp. 397–402, Nos. 2061–2111.

**Dependent & independent covenants.**—*See* CONTRACT, Vol. XII., pp. 413–426, Nos. 3331–3421.

**Covenants with penalty.**—*See* DEEDS, Vol. XVII., pp. 402–404, Nos. 2112–2136.

**Parties to covenant—Party covenanting with himself.**—*See* CONTRACT, Vol. XII., p. 22, Nos. 11–13.

**Several, joint, & joint & several covenants.**—*See* BONDS, Vol. VII., p. 192, Nos. 320 *et seq.*; CONTRACT, Vol. XII., p. 24, Nos. 28 *et seq.*; BILLS OF EXCHANGE, Vol. VI., p. 49, Nos. 365 *et seq.*

**Effect of compulsory purchase on lessee's covenants.**—*See* COMPULSORY PURCHASE, Vol. XI., p. 279, Nos. 2064–2070.

**Provisoes.**—*See* DEEDS, Vol. XVII., pp. 405–408, Nos. 2138–2165.

### SECT. 2.—USUAL COVENANTS—WHAT ARE.

#### SUB-SECT. 1.—IN GENERAL.

**2495. Usual or proper covenants—Such as secure full effect of contract.**—*Qu.*: Whether under an agreement for a lease, containing all proper covenants, a covenant against assigning or underletting should be included.

There is no covenant almost, which a landlord can propose, that, generally speaking, could be called an improper covenant; for he has a right

to let his land upon any terms he may think fit to propose; & there are many covenants, not usual or common, that could not be objected to. But there are many covenants, though proper, that do not naturally flow out of the contract. The contract, *locatio & conductio*, does not naturally lead to many covenants, that have now found their way into most leases; & cannot be said to be improper in many of them. But that cannot be the sense with reference to the insertion of this covenant upon the expression in this agreement. It cannot mean those covenants which would not be unreasonable. It must mean such as are calculated to secure the full effect of the contract (*GRANT, M.R.*).—*JONES v. JONES* (1803), 12 Ves. 186; 33 E. R. 71.

*Annotations*:—*Reid*. *Vere v. Loveden* (1806), 12 Ves. 179; *Browne v. Raban* (1808), 15 Ves. 528; *Church v. Brown* (1808), 15 Ves. 258. *Mentd.* *Bowser v. Colby* (1841), 1 Hare, 109; *Walker v. Jeffreys* (1842), 1 Hare, 341; *Lowndes v. Bettle* (1861), 12 W. R. 399.

**2496.** — *Under an agreement for a lease the lessor is not, without express stipulation, entitled to a covenant restraining alienation without licences as a proper & usual covenant.*

I should have said that the meaning of the parties to a contract for a lease was that there should be proper covenants; & that the law implies what they are; as connected with the character & title of the lessor: covenants in this sense incidental; as regulating the obligations expressed & implied; not in contradiction to the quantity of interest, which the demise itself without special words was by the agreement to give to the lessee (*LORD ELDON, C.*).—*CHURCH v. BROWN* (1808), 15 Ves. 258; 33 E. R. 752, L. C.

*Annotations*:—*Consd.* *Blakesley v. Whieldon* (1841), 1 Hare, 170; *Hodgkinson v. Crowe* (1875), 10 Ch. App. 622. *Repld.* *Hampshire v. Wickens* (1878), 7 Ch. D. 555; *Re Lander & Bagley's Contract*, [1892] 3 Ch. 41. *Consd.* *Grave v. Portal*, [1902] 1 Ch. 727; *Jackson v. Simons*, [1923] 1 Ch. 373; *Keeves v. Dean, Nunn v. Pellegrini*, [1924] 1 K. B. 685. *Repld.* *Russell v. Beecham*, [1924] 1 K. B. 525. *Reid*. *Browne v. Raban* (1808), 15 Ves. 528; *Buckland v. Papillon* (1866), 15 W. R. 92; *Bartlett v.*

**Sect. 2.—Usual covenants—What are: Sub-sects. 1, 2, 3, 4 & 5.]**

Greene (1874), 30 L. T. 553; McKay v. McNally (1879) 41 L. T. 230; Abrahams v. Mac Fisheries, [1925] 2 K. B. 18. **Mentd.** Wall v. City of London Real Property Co. (1874), 30 L. T. 53; David v. Sabin, [1893] 1 Ch. 523; West Ham Central Charity Board v. East London Waterworks Co., [1900] 1 Ch. 624.

**2497.** ———.]—In case of an agreement for a lease, with a stipulation that the lessee should keep the premises in repair, a right of entry was uniformly reserved to the landlord as a right incidental to the interest reserved to him by the agreement. Covenants became usual & proper covenants only because, by common consent, they are found essential to perfect the contract between the parties (WIGRAM, V.-C.).—BLAKESLEY v. WHIELDON (1841), 1 Hare, 176; 11 L. J. Ch. 164; 6 Jur. 54; 66 E. R. 996.

**Annotations:—***Reid*. Hodgkinson v. Crowe (1875), 10 Ch. App. 622; Jacques v. Millar (1877), 6 Ch. D. 153; Pwllbach Colliery Co. v. Woodman, [1915] A. C. 634.

**2498.** ——— **Question for jury.**]—A party contracted for an assignment of a lease of a public-house, which was described as holden at a certain net rent, upon usual & common covenants. The lease contained a covenant by the tenant to pay land tax, sewers rate, & all other taxes, & a proviso for re-entry, if any business but that of a victualler should be carried on in the house, & it was proved that a considerable majority of public-house leases contained such a proviso:—*Held*: the covenant to pay land tax, etc., was a common covenant in a lease, reserving a net rent; & the proviso for re-entry must, with reference to a lease of a public-house, also be considered usual & common.

What are usual covenants is a question of fact for the jury, & not a question of construction for the ct. The phrase "usual covenants" in an agreement touching a lease, may be explained by reference to the nature of the premises, & the general practice with regard to leases of premises of that description.

The words "usual covenants" do not mean covenants universally inserted. That which is found in sixty leases out of a hundred is a usual covenant.

The clause of re-entry is to be found in six leases out of ten; & is a beneficial proviso with reference to property of this description.—BENNETT v. WOMACK (1828), 7 B. & C. 627; 3 C. & P. 96; 1 Man. & Ry. K. B. 644; 6 L. J. O. S. K. B. 175; 108 E. R. 856.

**Annotation:—***Reid*. Parish v. Sleeman (1860), 1 De G. F. & J. 326.

**2499.** ——— **Reference to nature of premises.**]—BENNETT v. WOMACK, No. 2498, *ante*.

**2500.** ———.]—Pltf. in replevin having taken & entered on a farm at a specified rent, & consented that an agreement should be prepared with the usual covenants, but no such agreement was prepared:—*Held*: although the words "usual covenants" might be construed in the popular sense as "usual terms," they did not apply to the periods of payment of rent, but referred to agricultural covenants, & evidence could not be given on the part of the landlord, of the usual terms or covenants in the same part of the country as to payment of rent, in order to show that it was payable quarterly, so as to justify a distress for rent, & on the same ground the lease of a former tenant of the same farm was not admissible in evidence.—HEYNES v. BROWN (1853), 21 L. T. O. S. 24.

**2501.** ——— **Reference to previous leases by lessor.**]—The words "usual covenants" used in an executory lease in a will may receive a construction from the circumstance in reference to which they are applied at variance with their ordinary meaning.

What is meant by "usual covenants" is, in my opinion, the covenants contained in the leases already granted by the testator; that is the ordinary meaning of the words, & when he says the "usual covenants" he meant the covenants he usually gave (LORD ROMILLY, M.R.).—HONYWOOD v. HONYWOOD (1868), 18 L. T. 316.

**2502.** ——— **Variable from time to time.**]—Agreement to accept a lease of a dwelling-house in London "to contain all usual covenants & provisos." The lease contained a covenant not to assign without lessor's consent. In an action to compel specific performance of the agreement:—*Held*: the covenant was not a "usual covenant," & the agreement could not be enforced.

Usual covenants may vary in different generations. The law declares what are usual covenants according to the then knowledge of mankind. What is well known at one time may not be well known at another time, so that you cannot say that usual covenants never change (JESSEL, M.R.).

—HAMPSHIRE v. WICKENS (1878), 7 Ch. D. 555; 47 L. J. Ch. 243; 38 L. T. 408; 26 W. R. 491.

**Annotations:—***Consd.* Bishop v. Taylor (1891), 60 L. J. Q. B. 556; *Re* Lander & Bagley's Contract, [1892] 3 Ch. 41.

— **Particular instances.**]—*See* Sub-sects. 2-9, *post*.

**2503. Presumption in favour of insertion.**]—*Qu.*: whether in executory agreements there is a presumption in favour of the insertion in the executed contract of all such stipulations as are customarily inserted in such contracts.—RICKETTS v. BELL (1847), 1 De G. & Sm. 335; 10 L. T. O. S. 105; 11 Jur. 918; 63 E. R. 1093.

**Liability of underlessee on usual covenants.**]—*See* Part IV., Sect. 10, sub-sect. 2, *ante*.

**Proviso for like covenants in underlease.**]—*See* Part IV., Sect. 6, *ante*.

**SUB-SECT. 2.—AGAINST ASSIGNMENT.**

**Assignment of leases generally.**]—*See* Part XXI., *post*.

**2504. Whether usual covenant.**]—Covenant not to assign without licence, does not come within a contract to grant a lease with common & usual covenants.—HENDERSON v. HAY (1792), 3 Bro. C. C. 632; 29 E. R. 738, I. C.

**Annotations:—***N.F.* Folkingham v. Croft (1796), 3 Anst. 700. *Consd.* Jones v. Jones (1803), 12 Ves. 186; Church v. Brown (1808), 15 Ves. 258. *Folld.* Browne v. Raban (1808), 15 Ves. 528. *Consd.* Blakesley v. Whieldon (1841), 1 Hare, 176; *Re* Lander & Bagley's Contract, [1892] 3 Ch. 41. *Reid*. Hodgkinson v. Crowe (1875), 10 Ch. App. 622; Hampshire v. Wickens (1878), 7 Ch. D. 555.

**2505.** ———.]—A covenant in a lease not to assign or underlet without leave of the landlord in writing is a fair & usual covenant.—MORGAN v. SLAUGHTER (1793), 1 Esp. 8, N. P.

**Annotations:—***Folld.* Folkingham v. Croft (1796), 3 Anst. 700. *Consd.* Jones v. Jones (1803), 12 Ves. 186. *N.F.* Browne v. Raban (1808), 15 Ves. 528; Church v. Brown (1808), 15 Ves. 258. *Reid*. Blakesley v. Whieldon (1841), 1 Hare, 176.

**2506.** ———.]—A. agrees for a lease of certain lands for three lives. The lease is prepared according to the agreement, except the inserting a clause to restrain the tenant from alienation,

**PART XI. SECT. 2, SUB-SECT. 1.**

**2498 i. Usual or proper covenant—Question for jury.**]—The question whether a covenant in a lease is a usual & reasonable covenant is a question of fact for the jury.—BLAKE v. LANE (1876), 2 V. L. R. 54.—**AUS.**

without the consent of the landlord. This clause being no part of the agreement, the landlord is bound to execute a lease without it.—**BLACKER v. MATHERS** (1759), 1 Bro. Parl. Cas. 334; 1 E. R. 604, H. L.

**2507.** —.—.]—On an agreement for a lease "with all usual & reasonable covenants" a covenant not to underlease or assign is implied where the custom of the place is not generally against it.—**FOLKINGHAM v. CROFT** (1796), 3 Anst. 700; 145 E. R. 1012.

*Annotations:—***Expld.** **Church v. Brown** (1808), 15 Ves. 258. **Refd.** **Jones v. Jones** (1803), 12 Ves. 186; **Blakesley v. Whieldon** (1841), 1 Hare, 176.

**2508.** —.—.]—**JONES v. JONES**, No. 2495, *ante*.

**2509.** —.—.]—*Qu.*: whether an agreement for a lease with usual covenants includes a covenant against assigning or underletting without licence. In this instance upon the particular construction of the agreement, for the lease of a farm, the words "such other clauses as are usual in such cases" had not that effect.—**VERE v. LOVEDEN** (1806), 12 Ves. 179; 33 E. R. 69.

*Annotations:—***Fold.** **Browne v. Raban** (1808), 15 Ves. 528; **Church v. Brown** (1808), 15 Ves. 258.

**2510.** —.—.]—**CHURCH v. BROWN**, No. 2496, *ante*.

**2511.** —.—.]—Under an agreement for a lease "with usual covenants" the lessor is not entitled to a covenant against assigning or underletting without licence.—**BROWNE v. RABAN** (1808), 15 Ves. 528; 33 E. R. 855.

*Annotation:—***Fold.** **Church v. Brown** (1808), 15 Ves. 258.

**2512.** —.—.]—**BUCKLAND v. PAPILLON**, No. 2187, *ante*.

**2513.** —.—.]—**HODGKINSON v. CROWE**, No. 2524, *post*.

**2514.** —.—.]—**HAMPSHIRE v. WICKENS**, No. 2502, *ante*.

**2515.** —.—.]—By an agreement in writing, contained in two letters, deft. agreed to grant to pltf., a brewer, a lease of a public-house for a certain term, at a certain rent, "a proper lease to be drawn up with all proper clauses, & approved of by" deft. & his solr. Afterwards deft. refused to grant a lease unless it contained a clause against underletting. In an action to enforce specific performance of the agreement:—*Held*: the clause was not a "proper clause"; deft. was bound to grant a lease without putting in any such clause; & specific performance decreed.—**MADIE v. ADDISON** (1882), 52 L. J. Ch. 80; 47 L. T. 543; 31 W. R. 320.

**2516.** —.—.]—A purchaser objected to complete the purchase of a term in leasehold premises upon the ground that the lease contained a covenant which had not been disclosed to him, that the lessee was not to assign or part with possession of the premises without the consent of the lessor, such consent not to be unreasonably withheld:—*Held*: this was not a "usual covenant," & the purchaser was entitled to repudiate his contract.—**BISHOP v. TAYLOR & Co.** (1891), 60 L. J. Q. B. 556; 64 L. T. 529; 55 J. P. 695; 39 W. R. 542; 7 T. L. R. 419, D. C.

**2517.** —.—.]—**Re LANDER & BAGLEY'S CONTRACT**, No. 2406, *ante*.

**2518.** —.—.]—An agreement for a lease of a house & land contained a provision that the lease should contain all covenants & conditions usually inserted in leases of such nature, & further provided that the term "lessee" should include heirs, exors., administrators, or assigns, but there was no express agreement that it should contain a covenant on the part of the lessee not to assign

either with or without the lessor's consent. There was a provision that the lessor should "not withhold except for exceptionally strong & good reasons" his consent to an assignment or sublease:—*Held*: a provision that the lease should contain a covenant by the lessee not to assign or sub-demise his interest without the consent of the lessor first had & obtained could not be introduced into the agreement by implication.—**DE SOYSA v. DE PLESS POL**, [1912] A. C. 194; 81 L. J. P. C. 126; 105 L. T. 642, P. C.

**2519.** —.—.]—**Agricultural lease.**—A. granted B. a lease containing a covenant against assignment. A. afterwards agreed to cancel the lease, & to grant B. a much more beneficial one, "as a reward for the great improvement he had made in the estate, & as an encouragement for his general industry." A. died before executing the second lease, & B. filed a bill for specific performance against his representatives. A compromise was effected for granting a lease for a reduced term, "the lease to contain all covenants usual & ordinary in farming leases." It was insisted by the tenant that under the compromise, there should be no restriction against assignment:—*Held*: the master, in settling the lease, was to have regard to the original lease & to the custom as to farming leases, if any.—**BELL v. BARCHARD** (1852), 16 Beav. 8; 21 L. J. Ch. 411; 51 E. R. 678.

**2520.** —.—.]—**Covenant coupled with proviso for re-entry.**—In 1852, deft. was entitled to the residue of a term of years of some lands of which pltfs. were seised in fee. After much negotiation drawing up of agreements, & alterations & modifications of these agreements, deft. signed in Apr. 1854, an agreement to surrender his existing interest, & to take a new lease, by which he was to covenant to build a large number of houses, & to lay out the premises & roads, & to build drains in the manner therein stated. He agreed further to covenant not to underlet or assign the premises without permission from pltfs., & in case of any breach of any of these covenants pltfs. were to be at liberty to re-enter on the whole of the premises. Ultimately, however, deft. demanded that the clause against underletting should be omitted in preparing the lease, & on pltfs. declining to accede to this demand, deft. refused to complete his contract on the ground of surprise & undue influence over him. Pltfs. then instituted this suit, praying by their bill a specific performance of the agreement. The judge made a decree in their favour from which deft. appealed:—*Held*: there existed no reason whatever for releasing deft. from the contract into which he had thus entered.—**HABERDASHERS' Co. v. ISAAC** (1857), 29 L. T. O. S. 350; 5 W. R. 855, L. J. J.; *affy.*, 3 Jur. N. S. 611.

#### SUB-SECT. 3.—IN RESPECT OF LICENSED PREMISES.

See Part X., Sect. 7, sub-sect. 1, *ante*.

#### SUB-SECT. 4.—MINING LEASES.

See MINES.

#### SUB-SECT. 5.—PAYMENT OF RATES AND TAXES BY TENANT.

**Covenants to pay rates & taxes generally.**—See Part XVI., Sect. 2, *post*.

**PART XI. SECT. 2, SUB-SECT. 5.**  
**p.** *When a usual covenant.—Building lease.*—In a building lease a cove-

nant that the tenant shall pay all rates & taxes imposed or to be imposed on the landlord is not a usual

covenant.—**STANTON v. CLAPP** (1852), 3 Nfld. L. R. 292.—**NFLD.**  
**q.** —.—.]—*Lease of municipal land.*

*Sect. 2.—Usual covenants—What are: Sub-sects. 5, 6, 7, 8 & 9. Sect. 3: Sub-sect. 1.]*

**2521. When a usual covenant—Lease of licensed premises.]—**BENNETT v. WOMACK, No. 2498, *ante*.

**2522. — Agricultural lease—Custom of country.]—**It is sworn & stands uncontradicted that according to the invariable custom of the country, where there is an agreement for a lease of a farm "on the usual terms" the lease makes the land tax & tithe commutation rentcharge fall upon the tenant (LORD CAMPBELL, C.).—PARISH v. SLEEMAN (1860), 1 De G. F. & J. 326; 29 L. J. Ch. 96; 1 L. T. 506; 24 J. P. 100; 6 Jur. N. S. 385; 8 W. R. 160; 45 E. R. 385, L. C.

*Annotations:—*Refd. Jeffrey v. Neale (1871), L. R. 6 C. P. 240; Lockwood v. Wilson (1874), 43 L. J. C. P. 179.

**2523. — Similar covenants in previous leases—By same lessor.]—**Where an agreement between applt. railway & resp. corp'n. provided for a renewable lease from the latter to the former of a large tract of land for railway purposes, but was silent as to payment of taxes by applt.:—*Held*: the lease should contain a covenant by applt. to pay the same, partly because the effect of the Assessment Act in force at the date of the contract was to impose such liability on the lessees of municipal lands without recourse to the corp'n., & partly because a covenant to that effect was shown to be a usual covenant in the sense that the corp'n. invariably insisted on it in their leases.—CANADIAN PACIFIC RY. CO. v. TORONTO CORPN., [1905] A. C. 33; 74 L. J. P. C. 15; 91 L. T. 703; 21 T. L. R. 44, P. C.

#### SUB-SECT. 6.—RE-ENTRY (CLAUSE.

**Re-entry generally.]—**See Part XXIV., Sect. 1, sub-sect. 2, *post*.

**2524. General rule—Re-entry for non-payment of rent—Not for every breach of covenant.]—***Held*: under an agreement for a lease to contain "all usual & customary mining clauses," the landlord was not entitled to have inserted in the lease a proviso for re-entry on breach of any of the covenants by the lessee, or otherwise than on non-payment of rent. *Semle*: the rule is not limited to mining leases.

A clause for re-entry for non-payment of rent is always inserted without any opposition by anybody (JAMES, L.J.).—HODGKINSON v. CROWE (1875), 10 Ch. App. 622; 44 L. J. Ch. 680; 33 L. T. 388; 23 W. R. 885, L. J.J.

*Annotations:—*Folld. *Re Anderton & Milner's Contract* (1890), 45 Ch. D. 476. *Consd. Re Lander & Bagley's Contract*, [1892] 3 Ch. 41. *Refd. Hampshire v. Wickens* (1878), 7 Ch. D. 555; *De Soysa v. De M'ess Pol*, [1912] A. C. 191.

**2525. — — — — —.]—**A., in consideration of £230, agreed to grant to B. a lease for seventy years at an annual ground rent of £12 12s., payable quarterly, "subject to the usual covenants to insure from loss by fire, repair, & pay rent & all outgoings that may be charged on the property & ground." The lease as prepared & settled by the conveyancing counsel contained a proviso for re-entry, not only for non-payment of the rent but also for the breach of any of the clauses, covenants, conditions, & assignments in the lease:—*Held*: the proviso for re-entry ought only to be made to extend to the non-payment of rent. The law on the subject is still the same as laid down in

*Hodgkinson v. Crowe*, No. 2524, *ante*, & has not been altered by Conveyancing & Law of Property Act, 1881 (c. 41), s. 14.—*Re ANDERTON & MILNER'S CONTRACT* (1890), 45 Ch. D. 476; 59 L. J. Ch. 765; 63 L. T. 332; 39 W. R. 44.

**2526. — — — — —.]—***Re LANDER & BAGLEY'S CONTRACT*, No. 2406, *ante*.

**2527. On bankruptcy of tenant.]—**HAINES v. BURNETT, No. 2404, *ante*.

**2528. — — — — —.]—**A memorandum of agreement for a lease of coal mines in North Staffordshire provided that the lease was to have all usual & customary mining clauses:—*Held*: this provision did not entitle the lessor to the insertion in the lease of a clause of forfeiture thereof in the event of the lessee becoming bkpt. or compromising with his creditors for less than 20s. in the pound, or of a clause in restraint of assignment.—HODGKINSON v. CROWE (1875), L. R. 19 Eq. 591; 44 L. J. Ch. 238; 32 L. T. 144; 23 W. R. 406.

*Annotation:—*Refd. *Hampshire v. Wickens* (1878), 7 Ch. D. 555.

**2529. — — — — —.]—**A power of re-entry in a lease, if the lessee & his assigns become bkpt., or make a composition with creditors, or if execution should issue against either of them, is unusual, & an intended assignee is not bound to accept an assignment of a lease containing such a covenant.—HYDE v. WARDEN (1877), 3 Ex. D. 72; 47 L. J. Q. B. 121; 37 L. T. 567; 26 W. R. 201, C. A.

*Annotations:—*Mentd. *Evans v. Davis* (1878), 10 Ch. D. 747; *Willmott v. Barber* (1880), 15 Ch. D. 96; *Burford v. Unwin* (1885), Cab. & El. 494; *Re Davis & Cavey* (1888), 58 L. J. Ch. 143; *Reeve v. Berridge* (1888), 20 Q. B. D. 523; *Barrow v. Isaacs* [1891] 1 Q. B. 417; *Bishop v. Taylor* (1891), 60 L. J. Q. B. 556; *Re White & Smith's Contract*, [1896] 1 Ch. 637; *Eastern Telegraph Co. v. Dent*, [1899] 1 Q. B. 835; *Dougherty v. Oates* (1900), 45 Sol. Jo. 119; *Molynaux v. Hawtrey*, [1903] 2 K. B. 487; *Harman v. Ainslie*, [1901] 1 K. B. 698; *Lewis v. Baker*, [1905] 1 Ch. 46.

**Application to licensed premises.]—**See Part X., Sect. 7, sub-sect. 1, *ante*.

#### SUB-SECT. 7.—RESTRICTIONS ON TRADE.

See Part XII., Sect. 3, sub-sect. 4, *post*.

#### SUB-SECT. 8.—REPAIR OR REBUILDING.

**Repair & rebuilding generally.]—**See Part XVIII., *post*.

**2530. Repair—Usual covenant.]—**The construction which we put upon this power is strengthened by the terms of the other power, to let for twenty-one years, in which the condition is only that the lease contain the covenants usually inserted in the lease of a house in London at a rack rent. In these leases the tenant merely covenants to repair (TAUNTON, J.).—DOE d. DYMOKE v. WITHERS (1831), 2 B. & Ad. 896; 1 L. J. K. B. 38; 109 E. R. 1375.

*Annotation:—*Refd. *Truscott v. Diamond Rock Boring Co.* (1882), 20 Ch. D. 251.

**2531. — Damage by fire or tempest—Whether excepted.]—**Under a contract for a lease of a mill, to contain "all usual & necessary covenants & provisoes," & particularly a covenant on the part of the lessee to keep the mill in good tenantable repair:—*Held*: the lessee was not entitled to have introduced into the covenant the words "damages by fire or tempest only excepted."

—*Re CANADIAN PACIFIC RY. CO. & CITY OF TORONTO CORPN.* (1902), 22 C. L. T. 235; 4 O. L. R. 134; 1 O. W. R. 255; 2 O. W. R. 385; 5

O. L. R. 717.—CAN.

**PART XI. SECT. 2, SUB-SECT. 6.**

*r. General rule.]—*In a building

lease a covenant that the landlord may re-enter is a usual covenant.—*STANTON v. CLAPP* (1852), 3 Nfld. L. R. 292.—NFLD.

**SHARP v. MILLIGAN** (1857), 23 Beav. 419; 53 E. R. 165; *sub nom.* **THORPE v. MILLIGAN**, 5 W. R. 336.

**2532.** ————.]—A., who was under an agreement to take the lease of a house, the lease to contain all "usual covenants" agreed to assign all his interest to B., & forwarded him a copy of the agreement for a lease. In answer to inquiries by B., A. stated that the lessee would not have to do substantial repairs. Upon bill by A. for specific performance:—*Held*: B. was bound to repair the house in the event of damage by fire.—**KENDALL v. HILL** (1860), 2 L. T. 717; 6 Jur. N. S. 968.

**2533.** ———— Or other casualty.]—In a draft lease, prepared in pursuance of an open contract, the lessor inserted the usual general covenant by the lessee to repair & leave in repair, damage by fire only excepted. The lessee required that the words "or other casualty" should be added to the exception:—*Held*: the proposed words were so ambiguous that they ought not to be inserted.—**CROSSE v. MORGAN** (1889), 60 L. T. 703; 37 W. R. 543.

**2534. Rebuild—Destruction by fire or tempest—Covenant by lessor.**]—Under a power to a tenant for life to lease for years, reserving the usual covenants, etc. a lease made by him, containing a proviso, that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease, is void; the jury finding that such covenant is unusual.—**DOE d. ELLIS & MEDWIN v. SANDHAM** (1787), 1 Term Rep. 705; 99 E. R. 1332.

*Annotations*:—*Reid*. **Hare v. Groves** (1796), 3 Anst. 687. *Mentd.* **MacLac v. Sutherland** (1854), 3 E. & B. 1.

#### SUB-SECT. 9.—OTHER COVENANTS.

**2535. Covenant to make quantity of malt—Lease of malthouse.**]—Specific performance refused of a written agreement for a lease, because it was proved by parol evidence, that one of the terms of the actual agreement, viz., that pltf. should make on the premises, which included a malthouse, five hundred coombs of malt annually, was not inserted in the written agreement. The insertion of such a covenant in a lease of a malthouse, cannot be insisted on without an express agreement, it not being an usual covenant.—**GARRARD v. GRINLING** (1818), 1 Wils. Ch. 460; 2 Swan. 244; 37 E. R. 196.

**2536. Affirmative covenant to carry on particular trade—Lease with liberty to carry on such trade.**]—A. agreed to let, & B. to take a piece of land, with liberty to build thereon such warehouses, glass-houses, kilns, houses for workmen, & other erections necessary for carrying on the business of a glass manufactory, as he should think fit, for sixty-one years, at a certain rent; & B. agreed to pay the rent, to build in a substantial manner, & not to use the premises for any other purpose than a glass

manufactory during the term. A lease & counterpart to be executed in conformity with the agreement, in which should be inserted all usual covenants:—*Held*: this agreement did not warrant the insertion in the lease of an affirmative covenant by the lessee, that he would carry on the business of a glass manufactory on the demised premises during the term.—**DOE d. BUTE (MARQUIS) v. GUEST** (1846), 15 M. & W. 160; 153 E. R. 804.

**2537. Registration of assignment of lease—With head lessor—Payment of fee.**]—**BROOKES v. DRYSDALE**, No. 2405, *ante*.

#### SECT. 3.—EXPRESS COVENANTS.

##### SUB-SECT. 1.—IN GENERAL.

**2538. Erection of building—Interference by covenantee.**]—**BARKER v. FLETWEL** (1586), Godb. 69; 78 E. R. 43.

**2539.** ————.]—Pltf., lessee of a farm, covenanted with deft., his lessor, to fetch & bring all such materials as should at any time during the continuance of the term be wanted in erecting a thrashing mill; which mill deft. covenanted with pltf. to erect during the continuance of the term, for the use of the lessee & the occupiers of an adjoining farm. Deft. pleaded, first, that within a reasonable time from the date of the indenture, & during the continuance of the term, he began to provide the necessary materials for erecting the mill, & whilst he was so doing, pltf. desired him not to erect the same, but to refrain from so doing until he should be requested by pltf.; & lastly, a plea of leave & licence during the term:—*Held*: on special demurrer, both these pleas were bad.—**CORDWENT v. HUNT** (1818), 8 Taunt. 596; 2 Moore, C. P. 660; 120 E. R. 516.

**2540. Subject to superintendence—Covenant to build absolute.**]—A lease contained a covenant by the lessor to do certain work, & at the end of the covenant were these words: " & the whole of which is agreed to be left to the superintendence of deft. & pltf.'s son ":—*Held*: this was neither a condition precedent to, nor concurrent with, the covenant.—**JONES v. CANNOCK** (1852), 3 H. L. Cas. 700; 10 E. R. 278, H. L.

*Annotations*:—*Consd.* **Neale v. Ratcliff** (1850), 15 Q. B. 916. *Reid*. **G. N. Ry. v. Harrison** (1852), 12 C. B. 576; **Westcott v. Hahn**, [1917] 1 K. B. 605.

**2541. Covenant to drain water—Entry of lessor.**]—**CARRELL v. READ** (1595), Owen, 65; Cro. Eliz. 374; 74 E. R. 904; *sub nom.* **CARITH v. READ**, Moore, K. B. 402.

**2542. Grant of new lease on surrender of old—Fine levied before grant.**]—Debt on bond for performance of a covenant by lessor, that if the lessee surrender at any time during the term, he will grant him a new lease. The lessor accepts a fine of the premises. This is a breach of the condition & the lessee need not show that he offered to surrender.—**MAYNIE v. SCOT** (1596), Cro. Eliz. 479;

#### PART XI. SECT. 3, SUB-SECT. 1.

**t. Erection of building—Proviso for payment for improvements construed as covenant.**]—A lessee covenanted to build on the demised premises during the term, "provided always, & it is the true intent & meaning of these presents, & the parties thereunto, that at the expiration of the demise the buildings erected shall be paid for at the valuation of two indifferent persons," etc.:—*Held*: a covenant to pay.—**McFATRIDGE v. TALBERT** (1845), 2 U. C. R. 156.—**CAN.**

**a. — Suable for purposes required**

—*Liability of assignees of lessor.*]—Notwithstanding the general rule that there is no implied covenant by a lessor of an existing building that it is fit for the purpose for which it was known to be intended to be used:—*Held*: deft. lessors were bound by their agreement to erect a building for their lessees, & to make that building suitable for the purposes for which the lessees required it; & deft. assignees of the lessors had assumed the liability of remedying the defects complained of in consideration of the tenants' relinquishment of their possible right of rescission.—**TARRABAIN v. FERRING**,

[1918] 2 W. W. R. 170.—**CAN.**

**b. Supply of water for mill.**]—**PARKER v. FAIRBANKS** (1874), 1 R. & C. 215.—**CAN.**

**c. Covenant to furnish—A continuing covenant.**]—**ROSSIN v. JOSLIN** (1839), 7 Gr. 198.—**CAN.**

**d. Independent covenants—Effect of.]**—By an agreement for lease the parties agreed that the lessee should have the right during the first year of erecting a windmill on the demised land. The lessor also agreed to fence the demised land within six months from the commencement of the term:

*Sect. 3.—Express covenants: Sub-sects. 1 & 2, A., B., C., D., E., F., G., H., I. & J.]*

78 E. R. 731; *sub nom.* MAINE v. SCOT, Moore, K. B. 452; *sub nom.* MAIN'S CASE, 5 Co. Rep. 20 b; Jenk. 256; *sub nom.* SCOT v. MAYN, Cro. Eliz. 449; Poph. 109.

*Annotations:—*Consd. Newton v. Willmot (1841), 8 M. & W. 711. *Refd.* Luxmore v. Robson (1818), 1 B. & Ald. 544; Sands v. Clarke (1849), 8 C. B. 751. *Mentd.* Ireland v. Coulter (1598), Cro. Eliz. 630; Bradley v. Copley (1845), 14 L. J. C. P. 222.

**2543. Supply of men to work mill—Mill converted to horse-mill.]**—On a covenant by a lessor to find men to work a mill, if the lessee convert it into a horse-mill, the covenant is discharged.—LONDON (CITY) v. GREYME (1607), Cro. Jac. 181; 79 E. R. 158; *sub nom.* LONDON CORPN. v. GRIMES, Moore, K. B. 877.

*Annotation:—*Consd. Worcester College, Oxford v. Oxford Canal Navigation (1911), 81 L. J. Ch. 1.

**2544. Covenant to make lease—Covenant for refusal to accept.]**—TRUMPLING v. RUSHTON (1666), 2 Keb. 83; 84 E. R. 53.

**2545. Covenant to pull down building—Right of way for lessor—Not reserved in demise.]**—If there is a covenant in a lease, that a lessee shall pull down part of a building for the lessor to make a way across the ground where such building stood, *pltf.*, in an action for breach of such covenant, can only recover nominal damages, unless he has reserved a right to use such way.—GOOD v. HILL (1798), 2 Esp. 689, N. P.

**2546. Covenant for joint use of pump with landlord—Joint liability to repair—Removed by landlord.]**—The lessor, after a demise of certain premises with a portion of an adjoining yard, covenanted that the lessee should have "the use of the pump in the yard jointly with himself, whilst the same should remain there, paying half the expenses of repair." The words *whilst, etc.*, reserve to the lessor a power of removing the pump at his pleasure; & it is no breach of the covenant though he remove it without reasonable cause, & in order to injure the lessee. But without those words it would have been a breach of covenant to have removed the pump.—RHODES v. BULLARD (1806), 7 East, 116; 3 Smith, K. B. 173; 103 E. R. 44.

**2547. Supply of lime—Implied obligation to burn lime.]**—Where a lessee covenanted that he would at all times & seasons of burning lime supply the lessor & his tenants with lime at a stipulated price for the improvement of their lands & repair of their houses:—*Held*: this was an implied covenant also that he would burn lime at all such seasons, & it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied.—SHREWSBURY (EARL) v. GOULD (1819), 2 B. & Ald. 487; 106 E. R. 444. *Annotation:—**Refd.* Gwillim v. Daniell (1835), 2 Cr. M. & R. 61.

—*Held*: the covenants were independent, & the breach by the lessor of the covenant to fence, did not operate as an extension of the time, for the erection of the mill by the lessee.—ROBERTS v. GHULAM LABIE (1911), 13 W. A. L. R. 156.—**AUS.**

*e.* —.—.—LEONARD v. WALL (1855), 5 C. P. 9.—**CAN.**

*f.* —.—.—THOMPSON v. CRAWFORD (1863), 13 C. P. 53.—**CAN.**

*g.* **Covenant to repurchase.]**—Where A. purchased a lease from B., & B. covenanted to repurchase it in three years for more than he paid, & after the three years A. tendered an assignment of the lease, which B. refused.—*Held*: A. was entitled to recover as the amount of damages the

price agreed upon by B. for the repurchase.—GIBSON v. CUBITT (1838), 1 Ont. Dig. 1559.—**CAN.**

*h.* **Covenant to appoint appraiser to value improvements.]**—ANLEY v. PETERS (1847), 3 Kerr, 543.—**CAN.**

*k.* **Covenant to make improvements.]**—A lease contained a covenant to the effect that it should be "competent" for the lessee to remove the then front window sashes, etc., & to put the best plate glass windows in the room of those removed, etc.:—*Held*: notwithstanding the introduction of the word "competent," the lessee covenanted to do the work specified.—MCDONALD v. COCHRANE (1856), 6 C. P. 131.—**CAN.**

*l.* —.—.—In an action by *pltf.*,

**2548. Indemnification of parish against paupers.]**

—WALSH v. FUSSELL, No. 2796, *post*.

**2549. Supply of water for mill—For specific number of hours per day.]**—BLATCHFORD v. PLYMOUTH CORPN., No. 2646, *post*.

**2550. Enforcement by underlessor of covenants against lessor—Underlessee empowered to sue in name of underlessor.]**—A railway co. leased to Messrs. R. certain refreshment rooms, with a covenant (*inter alia*) that certain trains should stop there for certain times. Messrs. R. demised the premises in question to G. That lease, after reciting the deed by which the premises were demised to Messrs. R. contained a covenant that Messrs. R. would, during the continuance of the term, do all such acts & things as should be necessary & proper for enforcing the fulfilment & performance of the covenants thereinbefore recited, for giving G. the full benefit & advantage of the refreshment rooms thereby demised, as fully as if G. were the assignee of the covenants; & that it should be lawful for G., in the name of Messrs. R., to bring, commence, or prosecute any action, suit, or other proceeding whatsoever, for enforcing the fulfilment & performance of the covenants & agreements in the recited indenture of lease, on the part of the co. or for or any of them, G. indemnifying Messrs. R. from & against all costs, charges, & expenses to be incurred, or defrayed in or about any such action, suit, or other proceeding as aforesaid. G. entered upon the demised premises; but by order of the co., certain express trains passed the station where the premises in question were, without stopping; in consequence of which G. sustained a loss. Of this breach of covenant Messrs. R. had due notice, & were thereupon requested by G. to file, in their own name, & at their own risk & costs, a bill in Chancery, to restrain the co. by injunction from directing or permitting, except in particular cases, express trains from passing the refreshment rooms without stopping for the prescribed time:—*Held*: assuming the filing such bill to be a necessary & proper act, Messrs. R. were bound to file such bill, & that the latter stipulation, empowering G. to sue in the names of Messrs. R. did not limit or qualify the general covenant, & therefore they were liable in an action of covenant for not filing such bill.—RIGBY v. GREAT WESTERN RY. CO. (1849), 4 Exch. 220; 18 L. J. Ex. 404; 14 L. T. O. S. 42; 14 Jur. 710; 154 E. R. 1191.

**2551. Construction of roads on building estate—Sufficiency of performance.]**—MASON v. COLE, No. 2345, *ante*.

**2552. No communication between points over demised land—Means of communication provided—No user.]**—On a covenant by lessee that there shall be no communication or way across the demised land to a certain other place. *Qu.*: whether the mere opening of doors in a wall is a

the lessee of a certain farm, against deft., the lessor, for breach of the covenant contained in the lease, to dig ditches, etc.:—*Held*: the measure of damages was the difference between the rentable value of the demised premises with the improvements made, & the value without such improvements.—MC EWEN v. DILLON (1886), 12 O. R. 411.—**CAN.**

*m.* **Covenant to return oats—On termination of lease—Action brought before termination.]**—Action to recover the value of seed oats supplied by *pltf.* to deft., pursuant to the terms of a lease:—*Held*: as the lease had not been terminated until some time after action brought, there had been no breach committed by deft. of the

breach, without any user of the communication; but a user across the demised land may be a breach, even although the doors have been opened by a third party. *Qu.*: whether the opening of the doors would be a breach of a covenant to uphold & maintain all buildings & erections on the demised premises, but the covenant would not apply to a wall not on the demised premises, nor to any fence not permanent.—*BOIKINIS v. EDWARDS* (1860), 2 F. & F. 111.

**2553. Purchase of material from lessor—Cessation of work for which required.**—Pltf. agreed to let, & defts. to take, for one year, at a stipulated rent, certain work & buildings; & pltf. agreed to supply to defts. the whole of the chlorine still-waste as it came from their stills, neither adding to nor taking anything from the same, at the rate of 2s. 6d. for every 21 cwt. of waste so supplied, with the understanding that defts. were to have the option of a lease of the premises for seven or fourteen years at the same rent, if they should feel disposed so to do, within three months from the date thereof. Pltf. agreed not to use or injure or part with any of the still-waste except to defts., so long as they should hold the works:—*Held*: defts. were bound to accept & pay for the whole of pltf.'s chlorine still-waste during the year or such further term as they should hold the works, & it was no answer to an action for not accepting it, that defts.' manufacture failed & was discontinued, & the chlorine still-waste proved useless, & was no longer necessary for their manufacture.—*BEATLEY v. STUART* (1862), 7 H. & N. 753; 31 L. J. Ex. 281; 8 Jur. N. S. 389; 158 E. R. 672.

**2554. Clay to be worked for sale—Sale unremunerative.**—A covenant in a lease binding the lessee to "get the demised clay to the fullest practicable extent consistent with the means of sale of bricks & tiles to be made therefrom," does not bind the lessee to go on working at a loss, even though a means of sale, at an unremunerative rate, may have been found for bricks made out of the demised clay.—*NEWTON v. NOCK* (1880), 43 L. T. 197.

**2555. No objection to be taken to works—On adjoining premises—Express demise of lights—Obstruction of lights.**—Under a lease, dated Sept. 20, 1894, W. became the lessee of certain premises for a term expiring in 1932. By a deed dated Aug. 3, 1899, W. demised the premises to H. for a term of twenty-one years, "together with all . . . lights, easements, . . . & appurtenances to the premises belonging." The deed contained a covenant by the lessee that he would not "object to any works to adjoining premises" that might be sanctioned by or on behalf of the lessor or the superior landlords or landlord. The lease also contained a covenant by the lessor for quiet enjoyment of the premises. A co. had acquired an interest in certain property adjoining to the demised premises & forming part of the same estate, & were proposing to erect thereon some buildings which, as H. alleged, would obstruct the

access of light hitherto enjoyed by his premises. He accordingly brought an action to restrain the co. from building<sup>so</sup> as to obstruct his light. The proposed buildings had been approved by the surveyor of the estate. In these circumstances, W., who was interested in the co., brought an action against H. to restrain him from objecting to the buildings then being erected by the co., on the ground that his action constituted a breach of the covenant; & he then moved for a stay of proceedings in H.'s action:—*Held*: the words "adjoining premises" did not extend to any buildings which were situated near enough to affect materially the demised premises by obstructing easements, but only to buildings which came into physical contact with the demised building: "adjoining" meant adjoining in the sense in which it was used in London Building Act, 1894 (c. ccciii), & could not be used in the sense of "neighbouring"; & therefore H. was not precluded on that ground from objecting to the erection of the buildings.—*WHITE v. HARROW, HARROW v. MARYLEBONE DISTRICT PROPERTY CO., LTD.* (1902), 86 L. T. 4; 50 W. R. 259; 18 T. L. R. 228; 46 Sol. Jo. 196, C. A.

*Annotation*:—*Consd. Cave v. Horsell* (1912), 106 L. T. 147.

#### SUB-SECT. 2.—PARTICULAR COVENANTS.

##### A. Agreements to refer to Arbitration.

**Whether reference condition precedent to right to sue.**—*See ARBITRATION*, Vol. II., p. 361, No. 310.

**Arbitration clause applying only to part of dispute.**—*See ARBITRATION*, Vol. II., p. 374, No. 389.

##### B. Agricultural Leases.

*See AGRICULTURE*, Vol. II., pp. 10 *et seq.*

##### C. Assignment or Sub-letting.

*See Part XXI.*, Sect. 1, sub-sect. 2, *post*.

##### D. Insurance of Premises.

*See Part XX.*, Sect. 1, *post*.

##### E. Leases of Licensed Premises.

*See Part X.*, Sect. 7, *ante*.

##### F. Mining Leases.

*See MINES.*

##### G. Payment of Rent.

*See Part XV.*, *post*.

##### H. Payment of Rates and Taxes.

*See Part XVI.*, Sect. 2, *post*.

##### I. Payment of Assessments and Charges.

*See Part XVII.*, *post*.

##### J. Delivery up of Possession.

*See Part XXV.*, *post*.

covenant to return the oats in question.—*ELLIS v. FOX* (1909), 11 W. L. R. 87.—*CAN.*

**n. Covenant to instal elevator.**—*IDEAL PHONOGRAPH CO. v. SHAPIRO* (1920), 48 O. L. R. 618; 58 D. L. R. 302; 19 O. W. N. 342.—*CAN.*

**o. Covenant to make open space round houses—Continuing obligation to keep open.**—The owner of the manor of B. demised lands, part of the manor, for a long term, with a covenant to build houses thereon, & to make an area

round such houses. The houses were built & an area made, according to the terms of the lease. The lessee subsequently subdemised one of the houses, by an instrument which did not recite, nor refer to, the original lease, nor contain any covenant respecting the area, but did contain a covenant to do suit & service to cts. of the manor of B. The sub-lessee, more than twenty years before the commencement of the suit, built over a portion of the area, & subsequently assigned his sub-lessee

to the resp.:—*Held*: that the covenant to make an area imposed a continuing obligation to keep the area open.

That the covenant to do service in the Manor Ct. was sufficient to have put the sub-lessee & his assignee on inquiry, & that the assignee was bound to carry out the terms of the original lease.

That, upon the portion covered in before his assignment, he was entitled to erect a porch.—*HERBERT v. MACLEAN* (1860), 12 L. Ch. R. 84.—*IR.*

**Sect. 3.—Express covenants: Sub-sect. 2, K., L., M., N., O., P. & Q. Sects. 4 & 5: Sub-sects. 1 & 2, A.]**

**K. Quiet Enjoyment.**

See Sect. 5, *post*.

**L. Relating to Railways.**

See RAILWAYS.

**M. Relating to Game.**

See GAME, Vol. XXV., pp. 352, 353, Nos. 39–43.

**N. Relating to Trees.**

See AGRICULTURE, Vol. II., pp. 98–100, Nos. 791–810.

**O. Renewal of Tenancies.**

See Part IX., Sect. 2, *ante*.

**P. Repair and Maintenance.**

See Part XVIII., *post*.

**Q. Restrictions on User of Premises.**

See Part XII., *post*.

**SECT. 4.—IMPLIED COVENANTS.**

**2556. Nature of covenant—Runs with the land.]**

—SPENCER'S CASE, No. 2798, *post*.

**Particular covenants—Quiet enjoyment.]—See**

Sect. 5, sub-sect. 3, *post*.

—**Title.]—See Sect. 7, *post*.**

**Exclusion of implied covenant by express covenant.]—See Sect. 5, sub-sect. 2, B., *post*.**

**SECT. 5.—COVENANTS FOR QUIET ENJOYMENT.**

**SUB-SECT. 1.—NATURE OF COVENANT.**

**2557. Runs with the land.]—H.** lets a house excepting two rooms, & is disturbed therein, covenant lies not; otherwise if excepting a passage thereto, & is disturbed in that.

The diversity is this. If the disturbance had been in the chamber, it is plain then no action of covenant would have lain, because it was excepted & so not demised: *aliter*, where the lessee agrees to let the lessor have a thing out of the demised premises, as a way common or other *profit à prendre*; in such case covenant lies for the disturbance & this covenant goes with the tenement & binds the assignee (*per Cur.*).—COLE'S CASE (1692), 1 Salk. 196; 91 E. R. 176; *sub nom.* BUSH v. COLES, Carth. 232; 12 Mod. Rep. 24; 1 Show. 388.

*Annotation:—*Reid. Oynevor v. Tennant (1888), 13 App. Cas. 279.

**2558. —.]—NOKE v. AWDER (1595), Cro. Eliz. 436; 78 E. R. 677; *sub nom.* AWDER v. NOKES, Moore, K. B. 419.**

*Annotations:—*Apld. Campbell v. Lewis (1820), 3 B. & Ald. 392. *Reid.* Lincoln College's Case (1595), 3 Co. Rep. 53 a. *Mentd.* Southern v. How (1616), J. Bridg. 125; Lyn v. Wyn (1665), O'Bridg. 122; Palmer v. Ekins (1728), 2 Ld. Raym. 1550; Cuthbertson v. Irving (1859), 4 H. & N. 742.

**2559. —.]—DERISLEY v. CUSTANCE (1790), 4 Term Rep. 75; 100 E. R. 902.**

*Annotation:—*Mentd. Paul v. Simpson (1846), 9 Q. B. 365.

**2560. —.]—CAMPBELL v. LEWIS, No. 2044, *post*.**

**2561. —.]—BOOTH v. THOMAS, No. 2690, *post*.**

**2562. —.]—MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. v. ANDERSON, No. 2709, *post*.**

**SUB-SECT. 2.—EXPRESS COVENANTS.**

**A. In General.**

**2563. Consideration for covenant—Occupation.]—PEARLE & EDWARD'S CASE (1588), 1 Leon. 102; 74 E. R. 95; *sub nom.* PEARLE v. UNGER, Cro. Eliz. 94.**

**2564. Validity—Where lease void.]—WALLER v. NORWICH (DEAN & CHAPTER) (1613), Owen, 136; 74 E. R. 956; *sub nom.* WALTER v. NORWICH (DEAN & CHAPTER), 1 Brownl. 21; Moore, K. B. 875; *sub nom.* WATERS v. NORWICH (DEAN & CHAPTER), 2 Brownl. 158.**

*Annotations:—*Fold. Capenhurst v. Capenhurst (1661), T. Raym. 28. *Reid.* Lyn v. Wyn (1665), O'Bridg. 122; Pitman v. Woodbury (1848), 3 Exch. 4.

**2565. Whether controlled by covenant for title—& covenant for further assurance.]—The assignor of a lease, covenanted that for & notwithstanding any act or thing by him done, the lease was valid; & further, that it should be lawful for the assignee at all times during the term, quietly to enjoy, without the lawful let or interruption of the assignor, his exors., administrators, or assigns, or any of them, or any other person or persons whomsoever, claiming any estate or right in the premises, & that, clearly discharged by the assignor, his heirs, exors., or administrators, from all former incumbrances made or suffered by him, or by their or either of their acts of privity; then followed a covenant for further assurance by the assignor, his exors. & administrators, & all persons whomsoever, claiming under him:—*Held*: the general words in the covenant for quiet enjoyment were restrained by the restrictive words in the covenants for title & further assurance, which preceded & followed it, & therefore that such covenant was confined to the acts of the covenantor & those claiming under him.—NIND v. MARSHALL (1819), 1 Brod. & Bing. 319; 3 Moore, C. P. 703; 129 E. R. 746.**

*Annotations:—*Reid. Young v. Raincock (1849), 7 C. B. 310; David v. Sabin, [1893] 1 Ch. 523.

**2566. Operative words—"Warrant & defend."]—A., being tenant for life, with a leasing power, by indenture of lease bearing date in Mar. 1805, demised to B. for ninety-nine years, if three persons therein named should so long live: this indenture contained the following clause: "& A., for himself, his heirs & assigns, the demised premises, unto B., his exors., administrators, & assigns, under the rent, covenants, conditions, exceptions, & agreements, before expressed, against all persons whatsoever lawfully claiming the same, shall & will, during the said term, warrant & defend." This lease having, upon the death of A., been held to be void as against the remainderman by the judgment of a ct. of law, on the ground that it was not made in due conformity with the leasing power:—*Held*: (1) the clause in question operated as an express covenant**

**PART XI. SECT. 4.**

**p. Covenant to supply power.]—LYMAN v. SNARR (1861), 10 C. P. 462.—CAN.**

**q. —.]—COLEMAN v. REDDICK (1876), 25 C. P. 579.—CAN.**

**r. Covenant to give possession.]—Where the demise is by deed, an action may be maintained on an implied covenant to give possession, when there are any proper words to create a covenant by implication. *Scmble*: the word "demise" will have that effect.—SAUNDERS v. ROE (1867), 17**

C. P. 344.—CAN.

**t. Covenant to use premises in tenantlike manner.]—CRAWFORD v. BEAG (1886), 12 O. R. 8.—CAN.**

**a. —.]—WARREN v. WINTERBURN (1907), 6 W. L. R. 498.—CAN.**

for quiet enjoyment during the whole term granted by the lease; (2) consequently B., or his assignee, & the exors., etc., of such assignee, might recover against the exors. of A. the value of the term, the costs of defending an action of ejectment brought by the remainderman, & also the sum recovered by him for mesne profits.—**WILLIAMS v. BURRELL** (1845), 1 C. B. 402; 14 L. J. C. P. 98; 4 L. T. O. S. 415; 9 Jur. 282; 135 E. R. 596.

*Annotations*:—*As to* (1) **Refd.** Baynes v. Lloyd, [1895] 1 Q. B. 820. *As to* (2) **Apld.** Lock v. Furze (1866), L. R. 1 C. P. 441. Child v. Stenning (1879), 11 Ch. D. 82.

**2567. Covenant in agreement for lease—Title of lessor defective—Whether lessee entitled to full covenant.**—[Under a contract in writing for a lease of land, containing no words showing an intention to exclude the under surface & mines, which did not in fact belong to the intended lessor, but containing an agreement for an absolute covenant for quiet enjoyment:—**Held**: the lessee was entitled to a lease according to the contract, with an unqualified covenant for quiet enjoyment.—**ONIONS v. COHEN** (1865), 2 Hem. & M. 354; 5 New Rep. 400; 34 L. J. Ch. 338; 12 L. T. 15; 11 Jur. N. S. 198; 13 W. R. 420; 71 E. R. 501.

*Annotation*:—**Mentd.** Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520, n.

**2568. Lunacy of lessor before lease granted—Vesting order.**—[Pltf. had entered into a building agreement with deft. under which deft. was to grant leases to pltf. in the form of a draft lease, which contained an express covenant for quiet enjoyment. Before the leases were granted deft. became of unsound mind, not so found by inquisition:—**Held**: an order under Trustee Act, 1850 (c. 60), might be made vesting the legal term in pltf. pursuant to the contract, but such order would not give him the benefit of the covenant for quiet enjoyment by deft.—**COWPER v. HARMER** (1887), 57 L. J. Ch. 460; 57 L. T. 714; 4 T. L. R. 16.

**2569. Covenant does not enlarge grant—Rights confined to terms of demise—Access of light & air.**—[Pltf. took a lease for ninety-nine years, containing the usual covenant for quiet enjoyment, of a piece of ground upon which a house had been built for him by his lessor. A garden was attached to the house, having a wall round it seven feet high. Pltf.'s lessor subsequently let the adjoining land to deft., who erected thereon a mews, having a wall twenty-three feet high, running the whole length of pltf.'s garden. Pltf. filed a bill to restrain the erection of deft.'s wall, on the ground that it interfered with the free access of light & air to, & the enjoyment of, his garden:—**Held**: there was no contract, express or implied, in the covenant for quiet enjoyment or otherwise in the lease that the enjoyment of the garden as a garden should not be interfered with, & in the absence of such contract, interference with the access of light & air to the garden was not a ground for the interposition of the Court.

This is a covenant which relates solely to the land demised—it has no relation to any other land whatever. It professes to be a covenant for the quiet enjoyment of the land “hereby demised,” & nothing else; & all the contract is that the lessee shall enjoy the land hereby demised without any interruption by the lessor his heirs or assigns. In fact, a covenant for quiet enjoyment is nothing more than would have been implied from the terms of the demise (**MALINS, V.-C.**).—**POTTS v. SMITH** (1868), L. R. 6 Eq. 311; 38 L. J. Ch. 58; 18 L. T. 629; 33 J. P. 52; 16 W. R. 891.

**2570. — — — — —**—[There is no difference

in the right of an owner of land to the ordinary easement of light, whether it is acquired by twenty years' user or by grant from the owner of the servient tenement; & if the grant is accompanied by a covenant for quiet enjoyment of the premises, such covenant does not enlarge the right of the covenantee so as to entitle him to an injunction in equity to restrain an obstruction where the damage is not sufficient to enable him to maintain an action at law. But it is otherwise where the right to light claimed is not the ordinary easement, but a special right created by the covenant; in which case a ct. of equity will grant an injunction without regard to the amount of damage.—**LEECH v. SCHWEDER** (1874), 9 Ch. App. 463; 43 L. J. Ch. 487; 30 L. T. 586; 38 J. P. 612; 22 W. R. 633, L. JJ.

*Annotations*:—**Consd.** Davis v. Town Properties Investment Corp., [1903] 1 Ch. 797. **Refd.** Leader v. Moody (1875), L. R. 20 Eq. 145. **Mentd.** Manners v. Johnson (1875), 1 Ch. D. 673; Pennington v. Brinsop Hall Coal Co. (1877), 5 Ch. D. 769; Bayley v. G. W. Ry. (1884), 26 Ch. D. 434; Warren v. Brown, [1900] 2 Q. B. 722; O. N. Ry. v. I. R. Comrs. [1901] 1 K. B. 416; Briggs v. Thornton (1903), 73 L. J. Ch. 301; Colls v. Home & Colonial Stores, [1904] A. C. 179.

**2571. — — — — —**—**Tenant's user of premises.**—**DENNETT v. ATHERTON**, No. 2576, *post*.

**2572. — — — — —**—**Lessor's user of own premises—Creation of additional tenancy.**—[Deft. demised to pltf., for twenty-one years, a mansion house & land, with the sole licence of shooting & sporting over all other the lands, plantations, & coverts of deft., subject to the liberty for each tenant on his farm, to kill rabbits, with ferrets only. Deft. covenanted for quiet enjoyment, & that if, at any time during the term, any of the tenants of deft. of any such lands, plantations, coverts, etc., should obstruct pltf. in the enjoyment of the licence, or should destroy the game, rabbits, etc., then deft. would upon the requisition of pltf., give notice to quit to such tenants, & enforce the notice by such legal measures as should be necessary. Breach that, after the demise to pltf., deft. demised to R. for the term of twelve years one hundred acres of the plantations on which the exclusive right of killing rabbits had been granted to pltf., without any clause in the demise to prevent R. from obstructing pltf. in the enjoyment of the licence, or from destroying rabbits, & without reserving to deft. the power of giving R. notice to quit, or of enforcing such notice by such legal measures as should be necessary, the plantations not being at the time of the demise to pltf. parcel of any farm; & that R. did afterwards kill & destroy divers rabbits:—**Held**: the declaration was bad, as not containing any breach, the demise to R. not constituting any breach of deft.'s covenant.—**NEWTON v. WILMOT** (1841), 8 M. & W. 711; 10 L. J. Ex. 476; 151 E. R. 1226.

*Annotation*:—**Mentd.** Turquand v. Hennet (1849), 7 C. B. 179.

**2573. — — — — —**—[The covenant for quiet enjoyment has been recently extended, & is broken in the case of interference by the lessor, or those lawfully claiming under him, not only with the title to or possession of land, but also with the lawful enjoyment of the premises for the purposes for which they were let. Therefore, where a lessor has let premises to be used for a particular business—*e.g.* storing paper—he would be guilty of a breach of such a covenant if he or persons lawfully claiming under him were afterwards to do anything which would render these premises unfit for storing paper generally; but would not, in the absence of express stipulation, be guilty if the act done, being harmless in itself,

*Sect. 5.—Covenants for quiet enjoyment: Sub-sect. 2, A., B., C. & D.; sub-sect. 3, A.]*

were nevertheless detrimental to the storing of some particular class of paper.

We have here an agreement for a lease with nothing in it to show that goods requiring any particular protection were to be kept on the premises. *Bandy v. Cartwright*, No. 2598, *post*, shows that under a demise by parol there is an implied covenant for quiet enjoyment (LINDLEY, L.J.).—ROBINSON v. KILVERT (1889), 41 Ch. D. 88; 58 L. J. Ch. 392; 61 L. T. 60; 37 W. R. 545, C. A.

*Annotations: Consd.* Aldin v. Latimer Clark, Muirhead, [1894] 2 Ch. 437; Jaeger v. Mansions Consolidated (1902), 87 L. T. 690; Markham v. Paget, [1908] 1 Ch. 697. *Refd.* Tebb v. Cave, [1900] 1 Ch. 642; Budd-Scott v. Daniell, [1902] 2 K. B. 351; Davis v. Town Properties Investment Corp., [1903] 1 Ch. 797. *Mentd.* Heath v. Brighton Corp., [1908], 98 L. T. 718; Hoare v. McAlpine, [1923] 1 Ch. 167.

**2574.** ———— **Property acquired since lease.]**—In 1897 a lease of offices for a term of fourteen years was granted to pltf. by the then owner of the freehold. The lease contained the ordinary covenant by the lessor, for himself, his exors., administrators & assigns, for the quiet enjoyment of the demised premises by the lessee. In 1898 the lessor conveyed the reversion, subject to the lease, to defts. In 1900 defts. purchased from a stranger a house adjoining the demised premises, pulled it down, & erected on the site a new building of such a height that it caused one of pltf.'s chimneys to smoke so as to affect materially his enjoyment of one room:—*Held*: defts. were not liable for a breach of the covenant for quiet enjoyment, inasmuch as at the date of the demise the lessor had no interest in the adjoining premises, & could not & did not for the benefit of the lessee put any fetter on their enjoyment, but undertook to respect rights of the lessee which were limited by the fact that the owner of the adjoining land might, if he were so minded, build on it so as to interfere with the draught of the lessee's chimneys.

The ordinary covenant for quiet enjoyment does not enlarge the grant. So far as the covenant is personal or collateral it does not run with the land.

*Qu.*: whether an indirect interference with the enjoyment of demised land, not affecting the title or the possession, is a breach of the lessor's covenant for quiet enjoyment.—DAVIS v. TOWN PROPERTIES INVESTMENT CORPN., LTD., [1903] 1 Ch. 797; 72 L. J. Ch. 389; 88 L. T. 665; 51 W. R. 417; 47 Sol. Jo. 383, C. A.

*Annotations:—Apld.* Harmer v. Jumbil (Nigeria) Tin Areas, [1921] 1 Ch. 200 (*see*, [1921] 1 Ch. p. 214). *Refd.* Williams v. Gabriel, [1906] 1 K. B. 155; Jones v. Consolidated Anthracite Collieries & Dynevor, [1916] 1 K. B. 123.

**2575. Covenant for title & possession.]**—DENNETT v. ATHERTON, No. 2576, *post*.

*B. Exclusion of Implied Covenant.*

**2576. General rule.]**—In a conveyance in fee of land to deft. he covenanted with the grantor not to permit any part of the premises to be used for selling beer. Deft. afterwards granted a lease of part of the land, with covenants by the lessee not to carry on certain trades, but not mentioning that of a seller of beer, & with the usual covenant by the lessor for quiet enjoyment. The term was assigned to pltf., who having no notice of deft.'s

restrictive covenant used the premises as a beer-shop, & being restrained by injunction in Chancery, at the suit of the vendor of the fee, sued deft. for breach of the express covenant, for quiet enjoyment, & also for breach of a covenant for title alleged to be implied from the terms of the lease:—*Held*: the covenant for quiet enjoyment excluded any implication of such an implied covenant, & there had been no breach of the former covenant, as it did not guarantee to the tenant that he might lawfully use the land for any purpose not included in the restrictions in the lease.

The covenant for quiet enjoyment whether with or without a partially restrictive covenant has therefore been regarded as a covenant to secure title & possession, & not to guarantee to the tenant that he may lawfully use the land for any purpose not in the restriction. To give it a wider effect might involve some strange consequences. If a seller or lessor had worked out the mines, & the purchaser or lessee were to build a house, which sunk into the old workings, here would be a breach at once. In other words a warranty would be read in that the land was capable of being used for any purpose, or for any purpose not expressly excluded (WILLES, J.).—DENNETT v. ATHERTON (1872), L. R. 7 Q. B. 316; 41 L. J. Q. B. 165; 20 W. R. 442, Ex. Ch.

*Annotations:—Consd.* Sanderson v. Berwick-upon-Tweed Corp., (1884), 13 Q. B. D. 547; Tebb v. Cave, [1900] 1 Ch. 612. *Refd.* Porter v. Drew (1880), 5 C. P. D. 143; Robinson v. Kilvert (1889), 41 Ch. D. 88; Harrison, Ainslie v. Muncaster, [1891] 2 Q. B. 680; Spurling v. Bantoft, [1891] 2 Q. B. 384; Whitmores (Edenbridge) v. Stanford, [1909] 1 Ch. 427; Jones v. Consolidated Anthracite Collieries & Dynevor, [1916] 1 K. B. 123. *Mentd.* Aldin v. Latimer Clark, Muirhead, [1894] 2 Ch. 437.

**2577.** ———— **]**—A lease having been granted by deed in terms from which the law implies a covenant for title, & the lessor proving to have no title to part of the demised premises:—*Held*: the lessee might refuse to take possession of such part of the demised premises & elect to keep the remainder, & might in an action for rent due under the lease claim damages for breach of the implied covenant by way of counterclaim; the words "let" & "to hold the demised premises" in the lease implied a covenant for title & quiet enjoyment.

If there is an express covenant either for title or for quiet enjoyment then there is no implied covenant at all.

The case of *Hart v. Windsor*, No. 2613, *post*, is an authority that the word "let" has the same effect in this respect as the word "demise," & that any other equivalent word would have the same effect. I think we must take it on this record that the lease did contain the word "let" or "demise," & that there was no express covenant for title or quiet enjoyment (BRETT, J.).—MOSTYN v. WEST MOSTYN COAL & IRON CO. (1876), 1 C. P. D. 145; 45 L. J. Q. B. 401; 34 L. T. 325; 40 J. P. 455; 24 W. R. 401; 2 Char. Pr. Cas. 43.

*Annotations:—Refd.* Baynes v. Lloyd, [1895] 2 Q. B. 610; Budd-Scott v. Daniell, [1902] 2 K. B. 351; Markham v. Paget, [1908] 1 Ch. 697. *Mentd.* Brosilauer v. Barwick (1876), 36 L. T. 52; Carlisle v. Salt, [1906] 1 Ch. 335.

**2578.** ———— **]**—GROSVENOR HOTEL CO. v. HAMILTON, No. 2717, *post*.

**2579. Exclusion of covenant implied from word demise.]**—NOKES'S CASE, No. 2608, *post*.

**2580.** ———— **]**—If a lease contain a covenant for quiet enjoyment against the lessor & those who claim under him, the lessee cannot, upon an

**PART XI. SECT. 5, SUB-SECT. 2.—B.**

**2576 i. General rule.]**—The presence in a lease of an express covenant for quiet enjoyment negatives the existence of an implied covenant.—MURPHY v. BANDON CO-OPERATIVE, AGRICULTURAL & DAIRY SOCIETY, LTD., [1909] 2 I. R. 510.—IR.

eviction by a paramount title, recover under the implied covenant for general title implied in the word "demise."—*MERRILL v. FRAME* (1812), 4 Taunt. 329; 128 E. R. 357.

*Annotation* :—*Refd.* *Line v. Stephenson* (1838), 5 Bing. N. C. 183.

**2581.** —.]—*STANNARD v. FORBES*, No. 2827, *post*.

**2582.** —.]—The word demise, in a lease, implies a covenant for title & a covenant for quiet enjoyment; but both branches of such implied covenant are restrained by an express covenant for quiet enjoyment.—*LINE v. STEPHENSON* (1838), 5 Bing. N. C. 183; 1 Arn. 294; 7 Scott, 69; 132 E. R. 1075.

*Annotations* :—*Consd.* *Budd-Scott v. Dandell*, [1902] 2 K. B. 351. *Refd.* *Mostyn v. West Mostyn Coal & Iron Co.* (1876), 1 C. P. D. 145; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836; *Baynes v. Lloyd*, [1895] 2 Q. B. 610; *Stephens v. Junior Army & Navy Stores*, [1914] 2 Ch. 516.

**2583.** —.]—At law plff. could not recover damages, for there is no covenant express or implied which defts. have broken. The implied covenant which would have arisen from the demise is excluded by the express qualified covenant for quiet enjoyment (*BOWEN, L.J.*).—*CLAYTON v. LEECH* (1889), 41 Ch. D. 103; 61 L. T. 69; 37 W. R. 603, C. A.

*Annotations* :—*Refd.* *Baynes v. Lloyd*, [1895] 1 Q. B. 820. *Mentd.* *Debenham v. Sawbridge*, [1901] 2 Ch. 98; *Saunders v. Cockrill* (1902), 87 L. T. 30.

**2584. Express covenant by mortgagor lessor—Implied joint covenant by mortgagor & mortgagee excluded.**—Where mtgor. & mtgee. join in a lease containing an express covenant by the mtgor. only, for quiet enjoyment, no covenant by both for quiet enjoyment can be implied.—*SMITH v. POCKLINGTON* (1831), 1 Cr. & J. 445; 1 Tyr. 309; 148 E. R. 1497.

*Annotation* :—*Refd.* *Wakenfield v. Brown* (1816), 9 Q. B. 209.

#### C. Whether Performance Conditional.

**2585. On payment of rent.**—*ANON.* (1590), 4 Leon. 50; 74 E. R. 722.

*Annotation* :—*Refd.* *Bastin v. Bidwell* (1881), 18 Ch. D. 238.

**2586.** —.]—*OLIVER v. EAMS* (1662), 1 Keb. 342; 83 E. R. 983.

**2587.** —.]—*ALLEN v. BABINGTON* (1666), 1 Sid. 280; 2 Keb. 23; 82 E. R. 1105; *sub nom.* *BABINGTON v. ALLEN*, 2 Keb. 9.

**2588.** —.]—A clause in a lease, that the lessee "paying the rent & performing the covenants on his part to be performed shall quietly enjoy the premises," is not a condition but a covenant.—*HAYS (OR HAYES) v. BICKERSTAFFE* (1675), 2 Mod. Rep. 34; 1 Freem. K. B. 194; Vaugh. 118; 86 E. R. 926.

*Annotations* :—*Consd.* *Grey v. Friar* (1854), 4 H. L. Cas. 565; *Bastin v. Bidwell* (1881), 18 Ch. D. 238. *Refd.* *Jerritt v. Wearo* (1817), 3 Price, 575; *Dawson v. Dyer* (1833), 2 Nev. & M. K. B. 559; *Williams v. Burrell* (1845), 1 C. B. 402; *Markham v. Paget*, [1908] 1 Ch. 697. *Mentd.* *Fitzgerald v. Fauconberge* (1729), Fitz-G. 207.

**2589.** —.]—Premises were demised for a term, at a certain rent, with a proviso for re-entry if the rent should be in arrear twenty-one days: the lessee covenanted to pay the rent, & the landlord covenanted that he, paying the rent at the appointed times, should quietly enjoy, etc.:—*Held*: the lessee, having been disturbed in his possession, might bring covenant against the landlord, though at the time when the cause of action accrued the rent had been in arrear more

than twenty-one days; for the payment of rent was not a condition precedent to the performance of the covenant for quiet enjoyment.—*DAWSON v. DYER* (1833), 5 B. & Ad. 584; 2 Nev. & M. K. B. 559; 110 E. R. 906.

*Annotations* :—*Consd.* *Bastin v. Bidwell* (1881), 18 Ch. D. 238. *Fold.* *Edge v. Boileau* (1885), 16 Q. B. D. 117. *Refd.* *Stanley v. Hayes* (1842), 11 L. J. Q. B. 176.

**2590.** —.]—A lease contained a covenant by the lessors for quiet enjoyment by the lessee in the usual terms, viz., that the lessee paying his rent & performing his covenants should quietly enjoy the premises without interruption from the lessors or any one claiming under them. There were also covenants by the lessee to pay rent & keep the premises in repair. The rent being in arrear & the premises out of repair, the lessors caused notices to be served on the lessee's sub-tenants requiring them not to pay rent to the lessee but to themselves, & threatening legal proceedings in default of compliance with the notice. The lessors though requested to withdraw the notice by the lessee refused to do so for a period of several weeks, & in the meantime, in consequence of the notice, one of the lessee's sub-tenants paid rent to the lessors:—*Held*: there was evidence of a breach of the covenant for quiet enjoyment, & that covenant & the covenants by the lessee to pay rent & repair being independent covenants, an action was maintainable by the lessee.

It was contended that the covenant for quiet enjoyment & the covenants to be performed by plff. were not to be read independently, but as dependent covenants, & that the payment of rent & repairing were therefore conditions precedent. I should have thought that point was very clear even without authority. But there appears to be a case directly in point, viz., *Dawson v. Dyer*, No. 2589, *ante* (*POLLOCK, B.*).—*EDGE v. BOILEAU* (1885), 16 Q. B. D. 117; 55 L. J. Q. B. 90; 53 L. T. 907; 34 W. R. 103; 2 T. L. R. 100, D. C.

**2591.** —.]—*STANBURY v. PLYMOUTH DOCKS WATERWORKS CO.* (1887), 3 T. L. R. 326, C. A.

**2592. Repair.**—*EDGE v. BOILEAU*, No. 2590, *ante*.

#### D. Breach of Covenant.

See Sub-sect. 4, A., *post*.

#### SUB-SECT. 3.—IMPLIED COVENANTS.

##### A. From What Circumstances Implied.

**2593. Agreement to let—If amounting to present demise.**—By articles of agreement, dated May 2, 1838, deft. agreed with plff. that he would grant him a lease of a messuage, etc., for twenty-one years from Midsummer-day then next, at a rent of £45, payable quarterly, on the usual days of payment in every year during the term, the first payment to commence on Sept. 29, then next: to be entered upon immediately by plff., he having on the day of the date paid £25 to deft.: & in the lease were to be contained covenants to pay the rent, to repair, etc., etc., & all other usual & reasonable covenants, with a power to either party to determine the lease at the end of seven or fourteen years:—*Held*: this instrument amounted to an agreement for a lease only, &

#### PART XI. SECT. 5, SUB-SECT. 2.—C.

**2585 I. On payment of rent.**—There being a tenancy at will at a fixed rent, there is, as incident to it, the right to distrain, & a covenant for quiet enjoyment must be read as subject

to such right.—*PEGG v. INDEPENDENT ORDER OF FORESTERS* (1901), 21 C. L. T. 158; 1 O. L. R. 97.—*CAN.*

#### PART XI. SECT. 5, SUB-SECT. 3.—A.

**2593 I. Agreement to let—If amounting**

to present demise.]—Where an agreement to grant a lease does not amount to an actual demise though the lessee has entered into possession under the agreement & afterwards been ejected, the lessee cannot maintain an action

**Sect. 5.—Covenants for quiet enjoyment: Sub-sect. 3, A. & B.]**

not to an actual demise; & pltf. was not entitled to recover as for the breach of an implied promise for quiet enjoyment.—**BRASHIER v. JACKSON** (1840), 6 M. & W. 549; 8 Dowl. 784; 9 L. J. Ex. 313; 151 E. R. 530.

**Annotation:—Mentd.** Tennyson v. O'Brien (1855), 5 E. & B. 497.

**2594.** —.—.]—**HOARE v. CHAMBERS** (1895), 11 T. L. R. 185.

**2595.** —.—.]—**Agreement subject to undisclosed conditions.**—**MESSENT v. REYNOLDS**, No. 2627, *post*.

—.—.]—*Compare* Nos. 2602, 2609, *post*.

**2596. Relationship of landlord & tenant.**—He who lets, agrees to give possession, & if he fails to do so, the lessee may recover damages against him, & is not driven to bring an ejectment.—**COE v. CLAY** (1829), 5 Bing. 440; 3 Moo. & P. 57; 7 L. J. O. S. C. P. 162; 130 E. R. 1131.

**Annotations:—Apld.** Jinks v. Edwards (1856), 11 Exch. 775. **Refd.** Smart v. Jones (1864), 15 C. B. N. S. 717; Stranks v. St. John (1867), 16 L. T. 283; Wallis v. Hands, [1893] 2 Ch. 75. **Mentd.** Drury v. Macnamara (1855), 5 E. & B. 612.

**2597.** —.—.]—The declaration stated that whereas before & at the time of making the agreement thereafter mentioned, deft. held the house & premises thereafter mentioned, for the residue of a term of years, & thereupon afterwards, to wit, on etc., agreed to let to pltf., who then agreed to take of deft., the house & premises at a certain rent; & in consideration of the premises, deft. promised pltf. that he should quietly hold & enjoy the house & premises during the term, without any eviction from the parties entitled to the reversion; nevertheless he, pltf., was evicted by the party entitled to the reversion:—**Held:** on demurrer, the declaration was bad, inasmuch as, pltf. having declared on the simple relation of landlord & tenant, no such duty as that laid as deft.'s promise arose from that relation.—**GRANGER v. COLLINS** (1840), 6 M. & W. 458; 9 L. J. Ex. 172; 151 E. R. 492.

**Annotations:—Consd.** Kaye v. Dutton (1814), 2 Dow. & L. 291. **Expld.** Budd-Scott v. Daniell (1902), 87 L. T. 392.

**2598.** —.—.]—Under a parol demise, the law will imply an agreement for quiet enjoyment, but not for good title. Where, therefore, a tenant under a written demise, containing no agreement for quiet enjoyment or for good title, having been distrained on by the grantee of an annuity charged upon the land prior to the demise, in an action against his landlord alleged in his declaration breaches for quiet enjoyment, & for good title, & obtained a verdict, the ct. granted a new trial, on payment of costs by pltf., to enable him to amend by striking out of the declaration the allegation as to covenant for title.—**BANDY v. CARTWRIGHT** (1853), 8 Exch. 913; 1 C. L. R. 727; 22 L. J. Ex. 285; 21 L. T. O. S. 196; 1 W. R. 415; 155 E. R. 1624.

**Annotations:—Apprvd. & Apld.** Hall v. City of London Brewery Co. (1862), 2 B. & S. 737. **Consd.** Baynes v. Lloyd, [1895] 2 Q. B. 610. **Fold.** Budd-Scott v. Daniell, [1902] 2 K. B. 351. **Consd.** Markham v. Paget, [1908] 1 Ch. 697. **Refd.** Stranks v. St. John (1867), 16 L. T. 283; Robinson v. Kilvert (1889), 41 Ch. D. 88; Aldin v. Latimer Clark, Muirhead, [1894] 2 Ch. 437; Hoare v. Chambers (1895), 11 T. L. R. 185.

for breach of an implied covenant for quiet enjoyment.—**PINN v. BARBOUR** (1870), 1 V. L. (Law) 136.—**AUS.**

**2596 i. Relationship of landlord & tenant.**—In every lease, whether by deed, writing, or parol there is an implied undertaking on the lessor's part not to attempt to deprive the lessee of the enjoyment of the property

which is let.—**ROBERTS ET UXOR v. BIRKLEY** (1888), 14 V. L. R. 819.—**AUS.**

**2596 ii.** —.—.]—Pltf. declared on an indenture of lease, not setting out any covenant for quiet enjoyment, the lease itself in fact containing none:—**Held:** there was an implied covenant for quiet enjoyment.—**SMART v. STUART** (1836), 5 O. S. 301.—**CAN.**

**2599.** —.—.]—There is a contract for quiet enjoyment implied in a demise of a tenement. A declaration for a breach of such contract must allege an eviction by a person claiming title paramount.—**HALL v. CITY OF LONDON BREWERY CO.** (1862), 2 B. & S. 737; 31 L. J. Q. B. 257; 9 Jur. N. S. 18; 121 E. R. 1245.

**Annotations:—Fold.** Budd-Scott v. Daniell, [1902] 2 K. B. 351. **Consd.** Markham v. Paget, [1908] 1 Ch. 697. **Refd.** Baynes v. Lloyd, [1895] 2 Q. B. 610; Hoare v. Chambers (1895), 11 T. L. R. 185.

**2600.** —.—.]—**ROBINSON v. KILVERT**, No. 2573, *ante*.

**2601.** —.—.]—**BAYNES & CO. v. LLOYD & SONS**, No. 2629, *post*.

**2602.** —.—.]—(1) A covenant for quiet enjoyment is implied by law from the use in a tenancy agreement of the words "agrees to let," or any equivalent words creating the relationship of landlord & tenant.

(2) Whether there has, or has not, been a breach of a covenant or undertaking for quiet enjoyment is a question of fact in each case.—**BUDD-SCOTT v. DANIELL**, [1902] 2 K. B. 351; 71 L. J. K. B. 706; 87 L. T. 392; 51 W. R. 134; 18 T. L. R. 675; 40 Sol. Jo. 617, D. C.

**Annotations:—Consd.** Jones v. Lavington (1902), 51 W. R. 161; Markham v. Paget, [1908] 1 Ch. 697.

**Words implying covenant.**—*See* Sub-sect. 3, B., *post*.

**B. From What Words Implied.**

**2603. "Grant & demise."**—**ANON.** (1574), Dal. 110; 123 E. R. 315.

**2604.** —.—.]—(1) A contract for perpetual renewal will be specifically executed, if clearly appearing; but is not to be inferred from a general provision for the same covenants.

(2) There is a covenant for quiet enjoyment under the words "granted & demised" (**LORD HILDON, C.**)—**IGGULDEN v. MAY** (1804), 9 Ves. 325; 32 E. R. 628, L. C.; *subsequent proceedings* (1807), 2 Bos. & P. N. R. 449, Ex. Ch.

**Annotations:—As to (1)** **Refd.** Dowling v. Mill (1816), 1 Madd. 541; Browne v. Tighe (1834), 2 Cl. & Fin. 396; Swinburne v. Milburn (1881), 9 App. Cas. 814. *As to (2)* **Refd.** Baynes v. Lloyd, [1895] 2 Q. B. 610. *Generally.* **Mentd.** Smith v. Jersey (1821), 3 Bl. 290; Lewis v. Stephenson (1898), 67 L. J. Q. B. 296.

**2605. Lease by estoppel.**—The words demise & grant raise a covenant in law; & an action will lie, though the lease was good by estoppel.—**STYLE v. HEARING** (1605), Cro. Jac. 73; 79 E. R. 62.

**2606. "Demise."**—**SPENCER'S CASE**, No. 2798, *post*.

**2607.** —.—.]—**ANDREWS' CASE** (1591), Cro. Eliz. 214; 2 Leon. 104; 78 E. R. 469.

**Annotations:—Consd.** Baynes v. Lloyd, [1895] 2 Q. B. 610; Markham v. Paget, [1908] 1 Ch. 697. **Refd.** Cogges v. Bernard (1703), 2 Ld. Raym. 909; Ross v. Hill (1846), 2 C. B. 877.

**2608.** —.—.]—(1) The assignee of the lessee may have a writ of covenant upon the words demise, grant, etc.

(2) If there be a covenant that the lessee shall enjoy, etc., without eviction by the lessor, or any claiming under him, in debt on bond for not performing the covenants, etc., pltf. should show that the person evicting had an elder title.—**NOKES'S**

**PART XI. SECT. 5, SUB-SECT. 3.—B.**

**2606 i. "Demise."**—Not only the word "demise" but the word "let," or any equivalent words which constitute a lease, create an implied covenant for quiet enjoyment.—**BULMER v. R.** (1893), 3 Exch. C. R. 104.—**CAN.**

CASE (1599), 4 Co. Rep. 80 b; 76 E. R. 1056; *sub nom.* NOKES v. JAMES, Cro. Eliz. 674.

**Annotations:**—*As to* (1) **Consd.** Pomfret v. Ricroft (1669), 2 Keb. 569; Monypenny v. Monypenny (1861), 9 H. L. Cas. 114. **Refd.** Hacket v. Glover (1712), 10 Mod. Rep. 142; Dawson v. Dyer (1833), 5 B. & Ad. 584; Line v. Stephenson (1838), 5 Bing. N. C. 183; Mossent v. Reynolds (1846), 3 C. B. 194; Doughty v. Bownian & Fulford (1848), 12 Jur. 182; Dennett v. Atherton (1872), L. R. 7 Q. B. 316; Baynes v. Lloyd, [1895] 2 Q. B. 610. *As to* (2) **Refd.** Hayes v. Bickerstaff (1669), Vaugh. 118. **Generally, Mentd.** Trenchard & Hoskins Case (1628), Litt. 203; Brown v. Brown (1662), 1 Lev. 57; Pickering v. Watson (1776), 2 Wm. Bl. 1117; Browning v. Wright (1799), 2 Bos. & P. 13; Stephens v. Junior Army & Navy Stores, [1914] 2 Ch. 516.

**2609.** —[—]—**HOLDER v. TAYLOR** (1614), Hob. 12; 80 E. R. 103.

**Annotations:**—**Consd.** Baynes v. Lloyd, [1895] 2 Q. B. 610. **Refd.** Adams v. Gibney (1830), 4 Moo. & P. 491; Line v. Stevenson (1838), 1 Arn. 294; Monypenny v. Monypenny (1858), 4 K. & J. 174. **Mentd.** Pordage v. Cole (1669), 1 Sid. 423; Cloake v. Hooper (1673), Freem. K. B. 122; Thomas v. Cadwallader (1744), Willes, 496; Miles v. Tobin (1868), 16 W. R. 465; Westcott v. Hahn, [1917] 1 K. B. 605.

**2610.** —[—]—**POMFRET v. RICROFT** (1670), 1 Wms. Saund. 321; 2 Keb. 569; 1 Sid. 429; 1 Vent. 44; 85 E. R. 454, Ex. Ch.

**Annotations:**—**Apld.** Colebeck v. Girdlers Co. (1876), 1 Q. B. D. 234. **Refd.** Rhodes v. Bullard (1806), 7 East, 116; Seddon v. Senate (1810), 13 East, 63; Blakesley v. Whieldon (1841), 1 Hare, 176; Carstairs v. Taylor (1871), L. R. 6 Exch. 217. **Mentd.** Hodgson v. Field (1806), 7 East, 613; Bullard v. Harrison (1815), 4 M. & S. 387; Holmes v. Goring, Same v. Elliott (1824), 9 Moore, C. P. 166; Doe d. Douglas v. Lock (1835), 2 Ad. & El. 705; Hinchliffe v. Kinnoul (1838), 5 Bing. N. C. 1; Harris v. Ryding (1839), 5 M. & W. 60; Ricketts v. East & West India Docks, etc., Ry. (1852), 12 C. B. 160; Pinnington v. Galland (1853), 9 Exch. 1; M. S. & L. Ry. v. Wallis (1854), 14 C. B. 213; Gayford v. Moffatt (1868), 4 Ch. App. 133; Winch v. Thames Conservators (1872), L. R. 7 C. P. 458; Hoare v. Metropolitan Board of Works (1874), L. R. 9 Q. B. 296; London Corp'n. v. Riggs (1880), 13 Ch. D. 798; Goodhart v. Hyatt (1883), 25 Ch. D. 182; Serff v. Acton L. B. (1886), 31 Ch. D. 679; Buckley v. Buckley, [1898] 2 Q. B. 608; Titchmarsh v. Royston Water Co. (1899), 81 L. T. 673; Jones v. Pritchard, [1908] 1 Ch. 630; Pwllbach Colliery Co. v. Woodman, [1915] A. C. 634; Schwann v. Cotton, [1916] 2 Ch. 120; Sack v. Jones, [1925] Ch. 235.

**2611.** —[—]—An action of covenant will lie by the lessee against the lessor upon the word "demise" in the lease; but that word imports a covenant in law on the part of the lessor that he has good title, & that the lessee shall quietly enjoy during the term, & therefore if the lessee be ousted during the term, an action of covenant will lie by him against the lessor (LITTLEDALE, J.).—**BURNETT v. LYNCH** (1820), 5 B. & C. 539; 8 Dow. & Ry. K. B. 368; 4 L. J. O. S. K. B. 274; 108 E. R. 220.

**Annotations:**—**Refd.** Baynes v. Lloyd, [1895] 2 Q. B. 610. **Mentd.** Walker v. Moore (1829), 8 L. J. O. S. K. B. 159; Marzetti v. Williams (1830), 1 B. & Ad. 415; Hancock v. Caffyn (1832), 8 Bing. 358; Wolveridge v. Steward (1833), 1 Cr. & M. 644; Wright v. Doe d. Tatham (1834), 1 Ad. & El. 3; Humble v. Langston (1841), 7 M. & W. 517; Yates v. Aston (1843), 4 Q. B. 182; Edwards v. Bates (1844), 7 Man. & G. 590; Magnay v. Edwards (1853), 17 Jur. 839; Smith v. Peat (1853), 9 Exch. 161; Rolin v. Steward (1854), 14 C. B. 595; Walker v. Bartlett (1856), 18 C. B. 845; Mathew v. Blackmore (1857), 1 H. & N. 762; Nokes v. Fish (1857), 3 Drew. 735; Dutton v. Powles (1861), 2 B. & S. 174; Maughan v. Sharpe (1864), 17 C. B. N. S. 443; Grissell v. Bristowe (1868), L. R. 3 C. P. 112; Rudge v. Bowman (1868), L. R. 3 Q. B. 689; Sheppard v. Murphy (1868), 16 W. R. 948; Bowring v. Shepherd (1871), 24 L. T. 721; Moule v. Garrett (1872), L. R. 7 Exch. 101; Kellock v. Enthoven (1874), L. R. 9 Q. B. 241; Whitaker v. Forbes (1875), 45 L. J. Q. B. 140; Woodhouse v. Walker (1880), 5 Q. B. D. 404.

**2612.** —[—]—**LINE v. STEPHENSON**, No. 2582, *ante*.

**2613.** —[—]—There is no implied warranty attached by law to a demise of land or premises,

that they are fit for any particular purpose. *Semble:* in an agreement for a ready furnished house for immediate habitation, it is otherwise.

Considering this case without reference to the modern authorities, which are said to be at variance, it is clear that from the word "demise," in a lease under seal, the law implies a covenant, in a lease not under seal, a contract, for title to the estate merely, that is, for quiet enjoyment against the lessor & all that come in under him by title, & against others claiming by title paramount during the term; & the word "let," or any equivalent words, which constitute a lease, have, no doubt, the same effect, but not more. There is no authority for saying that these words imply a contract for any particular state of the property at the time of the demise; & there are many, which clearly show that there is no implied contract that the property shall continue fit for the purpose for which it is demised (PARKE, B.).—**HART v. WINDSOR** (1844), 12 M. & W. 68; 13 L. J. Ex. 129; 2 L. T. O. S. 440; 8 J. P. 233; 8 Jur. 150; 152 E. R. 1114; *previous proceedings*, 2 L. T. O. S. 377.

**Annotations:**—**Consd.** Surplice v. Farnsworth (1844), 7 Man. & G. 576; Mostyn v. West Mostyn Coal & Iron Co. (1876), 1 C. P. D. 145; Baynes v. Lloyd, [1895] 2 Q. B. 610; Jones v. Lavington, [1903] 1 K. B. 253. **Refd.** Searle v. Laverick (1874), L. R. 9 Q. B. 122; Wilson v. Finch Hatton (1877), 2 Ex. D. 336; Manchester Bonded Warehouse Co. v. Carr (1880), 5 C. P. D. 507; Westropp v. Elligott (1884), 9 App. Cas. 815; Sarson v. Roberts (1895), 73 L. T. 174; Budd-Scott v. Daniell, [1902] 2 K. B. 351; Markham v. Paget, [1908] 1 Ch. 697.

**2614.** —[—]—**MOSTYN v. WEST MOSTYN COAL & IRON CO.**, No. 2577, *ante*.

**2615.** —[—]—**BAYNES & CO. v. LLOYD & SONS**, No. 2629, *post*.

**2616.** "Grant." —**NOKES'S CASE**, No. 2608, *ante*.

**2617.** —[—]—**Deft.**, who was lessee of certain premises, granted & assigned them by indenture to pltf., who, having been distrained upon for rent in arrear to the superior landlord before the assignment, brought *assumpsit* to recover the money paid under the distress, & relied upon an express promise by *deft.* to repay it:—**Held:** as covenant would lie on the covenant implied in the word "grant," *assumpsit* would not lie on any implied contract to indemnify pltf., nor on the express promise, which was not founded on a new consideration.—**BABER v. HARRIS** (1839), 9 Ad. & El. 532; 1 Per. & Dav. 360; 2 Will. Woll. & H. 1; 8 L. J. Q. B. 153; 112 E. R. 1313.

**Annotation:**—**Refd.** Yates v. Aston (1843), 4 Q. B. 182.

**2618.** "Let." —**HART v. WINDSOR**, No. 2613, *ante*.

**2619.** —[—]—**MOSTYN v. WEST MOSTYN COAL & IRON CO.**, No. 2577, *ante*.

**2620.** —[—]—By an agreement, not under seal, operating as an immediate demise, *deft.* agreed to "let" to pltf. certain premises for the term of three years. *Deft.* was himself a lessee of the premises, which, by the terms of the lease to him, were subject to a restrictive covenant, of which pltf. had no notice, as to carrying on any business thereon. Pltf. entered into possession, & carried on his business on the premises until restrained by an injunction obtained by the superior landlord. In an action for breach of contract for quiet enjoyment:—**Held:** whether or not any contract for quiet enjoyment could be implied from the word "let," the use of that word did not create an unrestricted contract for quiet enjoyment which would cover lawful interruption by

**2618** l. "Let." —**BULMER v. R.** (1893), 3 Exch. C. R. 184.—**CAN.**

b. "Lease." —In a lease of land

the word "lease" implies a covenant for quiet enjoyment, & is sufficient therefor without the word "demise."

**FORREST v. GREAVES**, [1923] 3 D. L. R. 816; 3 W. W. R. 658.—**CAN.**

**Sect. 5.—Covenants for quiet enjoyment: Sub-sect. 3, B., C. & D.: sub-sect. 4, A. (a) i.]**

a person claiming under title paramount, & pltf. was not entitled to recover.—*JONES v. LAVINGTON*, [1903] 1 K. B. 253; 72 L. J. K. B. 98; 88 L. T. 223; 51 W. R. 161; 19 T. L. R. 77; 47 Sol. Jo. 109, C. A.

**Annotations:—***Consd.* Markham v. Paget, [1908] 1 Ch. 697. *Mentd.* Crawford v. White City Rink (Newcastle-upon-Tyne) (1913), 77 J. P. Jo. 111.

**2621.** —.]—In 1895 P., owner in fee of S. Hall, joined with other landowners in making a binding agreement for a lease of a coal seam under their land with a trustee for a co. afterwards formed. To the agreement was scheduled a draft lease which gave no express power to let down the surface, but had a clause enabling the co., if anticipating damage from subsidence, to leave coal for support without paying for it, & another providing that all clauses usual in leases in the district should be inserted. P. died leaving S. Hall to his widow & two other persons in trust for his widow for life, & in 1901 they joined the other landowners in demising the seam to trustees upon trust to make a lease to the co. in a form already prepared, such lease being immediately afterwards executed. It contained express power to let down the surface, & it made the lessors' consent necessary to the leaving of coal for support by the co. without payment. In 1904 the widow by an instrument not under seal, & containing no express covenant for quiet enjoyment agreed "to let" S. Hall to pltf. on a yearly tenancy. The co., anticipating damage by subsidence, applied for consent to the leaving without payment of a pillar to support S. Hall, but through the widow's influence it was withheld. The co. continued to work, & damage to pltf. ensued:—*Held*: (1) a contract for quiet enjoyment was to be implied by the widow letting to pltf.; (2) the widow could not claim indemnity from the co. under a covenant in their lease without joining the trustees with whom it was made.

*Semble*: (3) prior to *Jones v. Lavington*, No. 2620, *ante*, the implied contract though limited in duration by the lessor's estate extended to a lawful interruption by title paramount during the continuance of that estate.—*MARKHAM v. PAGET*, [1908] 1 Ch. 697; 77 L. J. Ch. 451; 98 L. T. 605; 24 T. L. R. 426.

**Annotation:—***Generally.* *Mentd.* Jones v. Consolidated Anthracite Collieries & Dynevor, [1916] 1 K. B. 123.

**2622.** "Agree to let."—*BAYNES & CO. v. LLOYD & SONS*, No. 2629, *post*.

**2623.** —.]—*BUDD-SCOTT v. DANIELL*, No. 2602, *ante*.

**Relationship of landlord & tenant.]—Compare** Nos. 2596–2602, *ante*.

**C. Duration Limited to Lessor's Interest.**

**2624. Lease by tenant for life—Death during currency of term.]—**Tenant for life made a lease for years, by demise & grant, rendering rent, by indenture & died within the term & the remainderman entered on the term:—*Held*: an action would not lie against the exors. but upon an express covenant, for the covenant in law expired with the term.—*SWAN v. STRANSHAM & SEARLES* (1506), 3 Dyer, 257 a; Benl. 150; 73 E. R. 570;

*sub nom.* *SWAIN v. SERLES & STRANSHAM*, 1 And. 12.

**Annotations:—***Foll.* Adams v. Gibney (1830), 6 Bing. 656. *Consd.* Williams v. Burrell (1845), 1 C. B. 402. *Foll.* Baynes v. Lloyd, [1895] 2 Q. B. 610. *Refd.* Spencer's Case (1583), 5 Co. Rep. 16 a; Foster & Wilson v. Mapes, [1589] 1 Leon. 324; Landydale v. Cheyney (1589), Cro. Eliz. 157; Andrew's Case (1590), 2 Leon. 104; Hyde v. Windsor (1597), Cro. Eliz. 552; Nokes's Case (1599), 4 Co. Rep. 80 b.; Pomfret v. Ricroft (1669), 2 Keb. 569; Penfold v. Abbott (1862), 32 L. J. Q. B. 67.

**2625.** —.]—A covenant in law shall not be extended to make a man do more than he can.

If a tenant for life make a lease for twenty years, & covenant that deft. shall enjoy it during the term, that shall be during his life, for the term endeth by his death (*per CUR.*).—*BRAGG v. WISEMAN* (1614), 1 Brownl. 22; 123 E. R. 640.

**Annotations:—***Consd.* Penfold v. Abbott (1862), 32 L. J. Q. B. 67. *Refd.* Adams v. Gibney (1830), 6 Bing. 656.

**2626.** —.]—A tenant for life, remainder over, by indenture demised to lessee, his exors., etc., for fifteen years, without any express covenant for quiet enjoyment; the lessee was evicted by remainderman after death of tenant for life, & before expiration of the fifteen years:—*Held*: lessee could not maintain covenant against exor. of tenant for life.—*ADAMS v. GIBNEY* (1830), 6 Bing. 656; 4 Moo. & P. 491; 8 L. J. O. S. C. P. 242; 130 E. R. 1434.

**Annotations:—***Consd.* Williams v. Burrell (1845), 1 C. B. 402. *Apld.* Messent v. Reynolds (1846), 3 C. B. 194; *Foll.* Penfold v. Abbott (1862), 32 L. J. Q. B. 67; Baynes v. Lloyd, [1895] 2 Q. B. 610. *Refd.* Monypenny v. Monypenny (1861), 9 H. L. Cas. 114. *Mentd.* Farrall v. Hilditch (1859), 5 C. B. N. S. 841.

**Powers of tenant for life.]—See, generally,** Settled Land Act, 1925 (c. 18), & SETTLEMENTS.

**2627. Underlease—Determination of interest of underlessor.]—**A., in 1841, agreed to let to B. premises, "subject to the same conditions as were mentioned in an agreement to A. from F.," at a certain yearly rent, for the term of eight years & a quarter, & that if F. was willing to accept B. as tenant instead of A., B. was willing to take the remainder of the lease or memorandum from F., & become his tenant. F. was tenant to D., & F.'s term expired in 1844, whereupon F. brought an action of ejectment against B., & recovered possession. In an action by B., on this agreement, alleging after mutual promises that deft. promised "that B. should & might quietly use, occupy, possess, & enjoy the said premises during the said term for which A. had so agreed to let them":—*Held*: (1) this claim was not made out, as the law would not imply from an agreement to let subject to conditions, in the absence of showing what they were, an absolute contract for quiet enjoyment, & it was not incumbent on deft. to show what they were; (2) at all events, the implied contract for quiet enjoyment, if indeed it could at all be implied from a mere agreement to let, was confined to the interest of A.; & in order to enable B. to recover, he ought to show the continuance of A.'s interest.—*MESSENT v. REYNOLDS* (1846), 3 C. B. 194; 15 L. J. C. P. 226; 7 L. T. O. S. 207; 10 Jur. 550; 136 E. R. 78.

**Annotation:—***As to* (1) *Refd.* Markham v. Paget, [1908] 1 Ch. 697.

**2628.** —.]—*BAKER v. LAWRENCE* (1850), 28 L. T. O. S. 101.

**2629.** —.]—(1) If a lessor's estate expires during the term & the lessee is thereupon

**PART XI. SECT. 5, SUB-SECT. 3.—C.**

**c. General rule.]—**The proposition that the implied covenant for quiet enjoyment in a lease ceases with the

estate of the lessor does not apply to cases where the loss or termination of the estate or interest of the lessor was caused by his default & the person interfering obtains title to the leased

property from or under the lessor.—*EAGLES HALL ASSOCN. OF SWIFT CURRENT, LTD. v. BERTIN*, [1922] 1 W. W. R. 374; 65 D. L. R. 232; 15 Sask. L. R. 171.—*CAN.*

evicted by title paramount no action can be maintained against the lessor for the breach of any implied covenant for title or for quiet enjoyment, any such implied covenant terminating with the expiration of the lessor's estate.

*Semble*: (2) no covenant for title or for quiet enjoyment is implied from the mere relationship of landlord & tenant, or from the words "agree to let" in a lease, but only from the word "demise."—*BAYNES & Co. v. LLOYD & SONS*, [1895] 2 Q. B. 610; 64 L. J. Q. B. 787; 73 L. T. 250; 59 J. P. 710; 44 W. R. 328; 11 T. L. R. 560; 14 R. 678, C. A.

*Annotations*:—*As to* (1) *Consd. Budd-Scott v. Daniell*, [1902] 2 K. B. 351; *Markham v. Paget*, [1908] 1 Ch. 697. *Refd. Jones v. Lavington*, [1903] 1 K. B. 253. *As to* (2) *N.F. Budd-Scott v. Daniell*, [1902] 2 K. B. 351. *Consd. Jones v. Lavington*, [1903] 1 K. B. 253. *N.F. Markham v. Paget*, [1908] 1 Ch. 697.

#### 2630. ——— Tenancy from year to year.]—

In an agreement by which A. agrees to let & P. to take premises for a year certain, & thence from year to year, & A. agrees, when required by P., to grant a lease for the remainder which shall then be unexpired of the term & interest of him A., wanting ten days, the implied promise for quiet enjoyment is limited to the duration of A.'s interest; & P. can maintain no action against A. for damages consequent on A.'s reversioner intervening after the commencement of the tenancy from year to year.—*PENFOLD v. ABBOTT* (1862), 32 L. J. Q. B. 67; 7 L. T. 384; 27 J. P. 341; 9 Jur. N. S. 517; 11 W. R. 169.

*Annotation*:—*Apld. Baynes v. Lloyd*, [1895] 1 Q. B. 820.

2631. ———.]—In a tenancy from year to year the law implies no covenant for quiet enjoyment against eviction by title paramount on the expiration of the landlord's interest, so that if, on the determination of the landlord's title, the tenant is evicted by the superior landlord, he has no right of action against his own landlord for damages for such eviction.

A., who held certain premises by lease, let the premises to B. as tenant from year to year, there being no express covenant for quiet enjoyment. A.'s lease having expired, B. was evicted by the superior landlord in the middle of one of the years of tenancy:—*Held*: B. had no right of action against A. for damages for such eviction.—*SCHWARTZ v. LOCKET* (1889), 61 L. T. 719; 38 W. R. 142, D. C.

2632. ———.]—*HOARE v. CHAMBERS* (1895), 11 T. L. R. 185.

#### D. Breach of Covenant.

See Sub-sect. 4, B., *post*.

#### SUB-SECT. 4.—BREACH OF COVENANT.

##### A. Express Covenants.

##### (a) In respect of What Persons.

##### i. Persons claiming by Title Paramount.

2633. Whether lessor liable.]—A. is bound to suffer his lessee to enjoy & that without interruption of himself or any others; a copyholder entering by an elder title is no breach unless A. actually procured the disturbance.—*ANON.* (1505), 3 Dyer, 255 a; 73 E. R. 565.

*Annotation*:—*Mentd. Knight v. Cole* (1691), 1 Show. 150.

2634. ———.]—*NOKES'S CASE*, No. 2608, *ante*.

2635. ——— Disturbance caused by default of lessor—Failure to pay annuity.]—If a lessor holds his estate on condition of paying an annuity, non-payment is a breach of covenant for quiet enjoyment, although no demand of it was made, & the lessee himself might have paid it.—*SMITH v. WARREN* (1599), Cro. Eliz. 688; 78 E. R. 924.

2636. ——— Failure to pay rent to superior landlord.]—An action of covenant by an under-lessee, etc.

Here is a breach of covenant on deft.'s part, by not paying of his rent according to the condition of his lease, & that for this cause pltf. has just cause of action for breach of covenant, his lease being avoided by deft.'s neglect & default (*per CUR.*).—*STEVENSON v. POWELL* (1612), 1 Bulst. 182; 80 E. R. 871.

2637. ———.]—The eviction of the sub-lessee, for rent due from the lessor to the superior landlord, is a breach of the lessee's covenant for quiet possession, against all claiming under, by, or through him.—*SCOTT v. HARTLEY* (1840), 7 L. T. O. S. 82.

2638. ——— Re-entry for breach of covenant in head lease.]—Covenant by lessor that lessee should hold the premises without any lawful let, suit, interruption, eviction by the lessor, or by or through the lessor's acts, means, right, etc. The lessor held, under a lease for a longer term which contained a clause of re-entry by the original lessor in case the premises should be used for a shop. The underlessee was not informed of this clause & underlet to a tenant, who incurred a forfeiture by using the premises for a shop; & the original lessor evicted him:—*Held*: this was not an eviction by means of the lessor within the meaning of the covenant in the underlease.—*SPENCER v. MARRIOTT* (1823), 1 B. & C. 457; 2 Dow. & Ry. K. B. 665; 1 L. J. O. S. K. B. 134; 107 E. R. 170.

*Annotations*:—*Apprvd. Dennett v. Atherton* (1872), L. R. 7 Q. B. 316. *Apld. Besley v. Besley* (1878), 9 Ch. D. 103. *Mentd. Thackeray v. Wood* (1861), 5 B. & S. 325.

2639. ———.]—An underlease contained a covenant by the lessor for quiet enjoyment of the demised premises by the lessee "without any interruption from or by him, the said lessor, his exors., administrators, or assigns, or any person or persons whomsoever lawfully claiming by, through, or under him." The owners of the reversion upon the original lease recovered possession of the premises under a condition of re-entry contained in such lease for non-payment of rent & breach of covenant:—*Held*: there was no breach of the covenant for quiet enjoyment in the underlease, the interruption being the act of the superior landlord, not that of the sub-lessee or any person claiming by, through, or under him.—*KELLY v. ROGERS*, [1892] 1 Q. B. 910; 61 L. J. Q. B. 604; 66 L. T. 582; 56 J. P. 789; 40 W. R. 516; 8 T. L. R. 554; 36 Sol. Jo. 485, C. A.

*Annotation*:—*Distd. Cohen v. Tannar*, [1900] 2 Q. B. 609.

2640. ——— Injunction enforcing restrictive covenant.]—*DENNETT v. ATHERTON*, No. 2576, *ante*.

2641. ——— Lessor improperly submitting to judgment.]—(1) Deft. was the lessee of a shop, the lease containing a covenant by him not to assign or underlet the premises. There was a

#### PART XI. SECT. 5, SUB-SECT. 4.— A. (a) i.

2633 i. Whether lessor liable.]—*SNARR v. BALDWIN* (1862), 11 C. P. 353.—*CAN.*  
2633 ii. ———.]—Where a lessee, under

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a lease made under C. S. U. C., c. 92, was evicted by title paramount to the lessor:—*Held*: he could not recover as for a breach of the covenant for quiet enjoyment, which is limited by the statute to acts of the lessor &

those claiming under him, nor under an implied covenant contained in the word "demise," as it is controlled by the express covenant for quiet enjoyment.—*DAVIS v. FITCHERS* (1875), 24 C. P. 516.—*CAN.*

**Sect. 5.—Covenants for quiet enjoyment: Sub-sect. 4, A. (a) i., ii. & iii.]**

condition for re-entry upon breach of any of the covenants in the lease. Deft. let the premises to pltf. for the remainder of the term, this lease containing a covenant by deft. for quiet enjoyment of the premises by pltf. without any interruption by deft. or any person lawfully claiming through him. Subsequently the original lessor assigned the reversion, & the assignees of the reversion brought an action against deft. to recover possession of the premises as upon the breach of covenant against assignment. Deft. gave pltf. notice of the action, telling him that there was no defence, & signed a consent to judgment for possession, under which pltf. was evicted:—*Held*: as deft. had a good defence to the action, the breach of covenant having occurred before the assignment of the reversion, the act of deft. in consenting to judgment for possession was the cause of the interruption of pltf.'s enjoyment, & was therefore a breach of the covenant for quiet enjoyment.

(2) There may no doubt be a breach of the covenant by an act of omission, but it must be the omission of some duty (VAUGHAN WILLIAMS, L.J.).—COHEN v. TANNAR, [1900] 2 Q. B. 609; 69 L. J. Q. B. 904; 83 L. T. 64; 48 W. R. 642, C. A.

*Annotations*:—As to (1) *Distd.* Malzy v. Elchholz (1916), 85 L. J. K. B. 1132. As to (2) *Refd.* Booth v. Thomas (1925), 42 T. L. R. 114. *Generally*, *Mentd.* Eastwood v. Ashton, [1913] 2 Ch. 39.

**2642.** —.—.]—Covenant for quiet enjoyment. Breach assigned, that such a one entered by a title prior to deft.'s deed to pltf. is good although not showing what title the stranger had.—BUCKLY v. WILLIAMS (1891), 3 Lev. 325; 83 E. R. 712; *sub nom.* RASHLEIGH v. WILLIAMS, 2 Vent. 61.

**2643.** —.—.]—Particulars of title paramount not shown.]—In assigning a breach of covenant, which was for quiet enjoyment, it is sufficient to allege that at the time of the demise to pltf. A. had lawful right & title to the premises; & having such lawful right & title entered, etc. & evicted him, etc.; without showing what title A. had; or that he evicted pltf. by legal process, etc.—FOSTER v. PIERSON (1792), 4 Term Rep. 617; 100 E. R. 1207.

*Annotations*:—*Folld.* Hodgson v. East India Co. (1799), 8 Term Rep. 278. *Distd.* Simons v. Farren (1834), 1 Blug. N. C. 272.

**2644.** —.—.]—Where A. being possessed of certain premises for a term of years assigned part of them over to B. for the residue of his term with a covenant for quiet enjoyment & afterwards B. assigned them over to C.:—*Held*: C. having been evicted by S. the lessor of A. for a breach of covenant committed by A. previously to the assignment to B. might maintain an action against A. upon the covenant for quiet enjoyment on the ground that there was a privity of estate between A. & C.—CAMPBELL v. LEWIS (1820), 3 B. & Ald. 392; 106 E. R. 706; *affg.* S. C. *sub nom.* LEWIS v. CAMPBELL (1819), 8 Taunt. 715.

*Annotations*:—*Expld.* Dewar v. Goodman, [1908] 1 K. B. 94. *Refd.* Ireland v. Birchem (1835), 4 L. J. C. P. 305. *Mentd.* David v. Sabin, [1893] 1 Ch. 523.

**2645.** —.—.]—Tenant for life, & his eldest son, the remainderman in tail, leased to E. for ninety-nine years, & gave E., who was acquainted with their title, a bond conditioned for the due observance of their covenant for quiet enjoyment. E. underlet to W. for sixty years, & covenanted with W. against eviction by any one claiming under

E., or by his acts, means, consent, neglect, default, privity or procurement. Tenant for life, & his eldest son being dead without issue, W. was evicted by the next remainderman in tail:—*Held*: E. was not liable on his covenant to W., the eviction being by title paramount, which E. had no means of defeating.—WOODHOUSE v. JENKINS (1832), 9 Bing. 431; 2 Moo. & S. 599; 2 L. J. C. P. 38; 131 E. R. 678.

*Annotation*:—*Mentd.* Thackeray v. Wood (1864), 33 L. J. Q. B. 275.

**2646.** —.—.]—Demise of a mill & the stream of water flowing in the leat belonging to the lessor, except so much of the water as should be sufficient for the supply of persons whom the lessor should already have contracted with or should thereafter contract to supply, provided that such a quantity should be left as should be sufficient to supply the mill for twelve hours a day. Covenant that the lessee should enjoy without interruption of the lessor, or of persons claiming by his act, means, consent, default, privity, or procurement:—*Held*: no demise of water for twelve hours a day, & diversions occasioned by contracts previous to the demise were no breach of the covenant for quiet enjoyment.—BLATCHFORD v. PLYMOUTH CORPN. (1837), 3 Bing. N. C. 691; 4 Scott, 429; 3 Hlodg. 86; 6 L. J. C. P. 217; 1 J. P. 196; 132 E. R. 577.

**2647.** —.—.]—Applt. contracted to sell to resp. certain "timber limits," that is to say, annual licences granted by the Crown to take possession of certain areas of land, & to cut timber within those limits. There is an express statutory provision that if any licence is found to cover ground occupied under a prior licence, the subsequent licence shall be to that extent, null & void. Applt. was unable to make a title to two of the licences which he had agreed to sell, & accordingly substituted two other licences in their place, with a warranty against disturbance generally, but when resp. attempted to work within the limits of the two last-mentioned licences he was stopped by a prior licensee:—*Held*: the warranty given by applt. did not extend to disturbance by reason of a prior grant, but only to his title to the licences for what they might be worth.—DUCONDU v. DUPUY (1883), 9 App. Cas. 150; 53 L. J. P. C. 12; 50 L. T. 129, P. C.

ii. *The Lessor.*

See Sub-sect. 4, A. (b), *post*.

iii. *Persons claiming under Lessor.*

**2648. Liability of lessor.**—A. made a lease of land to B. to commence five years afterwards; before the five years passed, A. made a lease for life of this land to C. with warranty; the five years expired; B. entered upon C. C. brought a *warrantia chartæ* against A. In this writ no damages nor chattel could be recovered; & it did not lie in this case. C. brought an action of covenant pending the *warrantia chartæ*, upon this warranty, for the eviction of five years. Adjudged that it will lay.—RUDGE'S CASE (1607), Jenk. 291; 145 E. R. 211; *sub nom.* PINCOMBE v. RUDGE, Hob. 3; Yelv. 139; *sub nom.* PINKARD v. RIDGE, Noy. 131; *sub nom.* RUDG v. PINCOMBE, 1 Roll. Rep. 25, Ex. Ch.

*Annotations*:—*Refd.* Williams v. Burrell (1845), 1 C. B. 402. *Mentd.* Cole v. Rawlinson (1702), 1 Salk. 234.

PART XI. SECT. 5, SUB-SECT. 4.—A. (a) iii.

**2648 i. Liability of lessor.**—McCLURE v. GRAFTON (1868), 19 C. P. 149.—CAN.

**2648 ii.** —.—.]—SHORR v. GREEN (1890), 6 Man. L. R. 322.—CAN.

**2649. — Necessity for describing evictor's title.**—In an action of covenant for quiet enjoyment, pltf. may state generally that A. lawfully claiming title under deft. entered by virtue of such title on pltf., without setting forth the particulars of A.'s title.—*HODGSON v. EAST INDIA CO.* (1799), 8 Term Rep. 278; 101 E. R. 1389.

*Annotation:*—*Distd. Simons v. Farren* (1834), 1 Bing. N. C. 272.

**2650. — Omission of "lawfully" from covenant.**—(1) The word "lawfully" is not in the covenant, but I do not think its omission is of any importance (*BRAY, J.*).

(2) It comes to this, that the lessor agrees to become bound for any act of interruption by himself or by any person whom he has expressly or impliedly authorised to do the acts. If the lessor parts with the property or with adjoining property to a person, & that person is in a position to rightfully claim under his title from the lessor that he is authorised to do those acts, the lessor will be responsible. This is reasonable & is what the parties might well have contemplated, because the lessor has really authorised the acts to be done; but to hold that the parties contemplated that the lessor was to be responsible for wrongful or negligent acts which he had not authorised would, in my judgment, be beyond reason (*BRAY, J.*).—*WILLIAMS v. GABRIEL*, [1906] 1 K. B. 155; 75 L. J. K. B. 149; 94 L. T. 17; 54 W. R. 379; 22 T. L. R. 217.

**2651. Who are persons claiming under lessor—All persons expressly or impliedly authorised.**—

(1) Deft. leased to the P. Mining co. a mine for the purpose of being worked as an iron mine; subsequently, he leased to pltf. an adjoining mine for the same purpose, the lease to pltf. containing a covenant for quiet enjoyment of the mine, "without any interruption or eviction by the lessor, his heirs or assigns, or any other person or persons claiming or to claim by, from, or under him." The P. co., while properly working their mine under the terms of their lease from the deft., struck a "feeder," with the result that a large body of underground water, the existence of which was unsuspected & the nature of which was uncertain, flooded their mine, & rising in the levels found its way through a natural fissure in the limestone rock into pltf.' mine, which was on a higher level, & caused considerable damage. Pltf. having brought an action to recover damages for breach of the covenant for quiet enjoyment:—*Held:* the interruption to the working of pltf.' mine by the irruption of water not having been caused by any direct act of interruption, or by any act the consequences of which either were foreseen or ought to have been foreseen by deft. at the time when the covenant was entered into, was not an interruption within the meaning of the covenant, & deft. was not liable.

(2) [A covenant for quiet enjoyment] has been construed to mean that the covenantee shall have quiet enjoyment of the thing demised, not interrupted by any act of the lessor, or of any person authorised by him: to that it has hitherto been confined. Therefore, in an action upon this covenant, pltf. does not prove his case by merely proving an interruption of his enjoyment; he

must further prove that it has been interrupted by an act of deft., the covenantor, or by the act of some person authorised by him (*LORD ESHER, M.R.*).

(3) The case of *Sanderson v. Berwick on Tweed Corp.*, No. 2697, *post*, is a clear authority that the interruption contemplated by the covenant need not necessarily be an interference with the title, but may extend to an interference with the enjoyment (*LORD ESHER, M.R.*).—*HARRISON, AINSIE & CO. v. MUNCASTER*, [1891] 2 Q. B. 680; 61 L. J. Q. B. 102; 65 L. T. 481; 56 J. P. 69; 40 W. R. 102; 7 T. L. R. 688, C. A.

*Annotations:*—*As to* (1) *Consd. Kelly v. Rogers*, [1892] 1 Q. B. 910. *Refd. Davis v. Town Properties Investment Corp.*, [1903] 1 Ch. 797. *As to* (2) *Consd. Jaeger v. Mansions Consolidated* (1902), 87 L. T. 690. *As to* (3) *Ald. Williams v. Gabriel*, [1906] 1 K. B. 155. *Refd. Jones v. Consolidated Anthracite Collieries & Dynevor*, [1916] 1 K. B. 123.

**2652. — — — — —**—*WILLIAMS v. GABRIEL*, No. 2650, *ante*.

**2653. — Joint lessors—Party claiming under one lessor.**—*MERRITON'S CASE* (1626), Lat. 161; 82 E. R. 325.

**2654. — Widow of lessor claiming under fine levied before lease.**—If a husband procure a fine of land to be levied to himself & his wife & his heirs, & afterwards let the land under a covenant that the lessee shall quietly enjoy it without disturbance of him, his heirs or assigns, or any other person by his means or procurement; an ouster by the wife, an extrix. of her husband, is a breach of the covenant.—*BUTLER v. SWINERTON (LADY)* (1623), Cro. Jac. 656; Palm. 339; 79 B. R. 567; *sub nom.* *SWINERTON (LADY) v. BUTLER*, 2 Roll. Rep. 286; *sub nom.* *ANON.*, Godb. 333.

*Annotations:*—*Distd. Woodhouse v. Jenkins* (1832), 9 Bing. 431. *Mentd. Thackeray v. Wood* (1864), 5 B. & S. 325.

**2655. — Remainderman under settlement made by lessor before lease.**—A fine being levied of a *feme covert's* estate, with a joint power to the husband & wife to declare the uses; & the uses being declared by the husband & wife in remainder to A.; if the husband make a lease & covenant for quiet possession against any person claiming under him, & A. evict the tenant, an action on the covenant will lie against the husband's exors.—*HURD v. FLETCHER* (1778), 1 Doug. K. B. 43; 99 E. R. 32.

*Annotations:*—*Fold. Evans v. Vaughan* (1825), 4 B. & C. 261. *Consd. Carpenter v. Parker* (1857), 3 C. B. N. S. 206. *Refd. Markham v. Paget*, [1908] 1 Ch. 697.

**2656. — — — — —**—*EVANS v. VAUGHAN*, No. 2149, *ante*.

**2657. — Collector of land tax—Due at date of demise.**—Premises were demised for a term, at a certain rent, with a covenant by the lessor, that the lessee, paying the rent & keeping the covenants, might quietly occupy, possess & enjoy the demised premises without the let, suit, trouble, denial, disturbance, eviction, or interruption of the lessor, his heirs or assigns, or any other person lawfully claiming "by, from, or under him:"—*Held:* an entry & distress upon the premises for arrears of land tax, due at the time of the demise, was not a breach of this covenant, not being an entry "by, from, or under" the lessor, but made adversely to him.—*STANLEY v. HAYES* (1842), 3

**2649 i. — Necessity for describing evictor's title.**—In order for a lessee to recover damages for an eviction in breach of the lessor's covenant for quiet enjoyment he must show that the eviction was by the lessor by someone claiming through or under him.—*HAAOK v. MARTIN*, [1926] 1 D. L. R. 76;

[1925] 3 W. W. R. 769.—*CAN.*

**d. Who are persons claiming under lessor—Assignee of prior mortgage.**—Deft. having executed a lease of certain premises to pltf., containing the ordinary statutory covenant for quiet enjoyment, pltf. was subse-

quently ejected by the assignee of mtges. thereon, created prior to the lease, & thereupon sued deft. for breach of the covenant:—*Held:* he could not recover, as the assignee of the mtges. was not a person "claiming by, from, or under deft.," but under deft.'s predecessor in title.—*BELLAMY v.*

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Q. B. 105; 2 Gal. & Dav. 411; 11 L. J. Q. B. 176; 6 Jur. 781; 114 E. R. 447.

*Annotations:—*Apprvd. *Kelly v. Rogers*, [1892] 1 Q. B. 910. Even if we thought that decision wrong or doubtful, which we do not, it has been decided many years, & all the leases since drawn must have been drawn on the faith of that decision (LORD ESHER, M.R.). *Mentd.* *Eastwood v. Ashton*, [1913] 2 Ch. 39.

**2658. — Prior appointee of lessor & another.]**

—B. covenanted with his lessee for quiet enjoyment as against any person "claiming by, from, or under" him. An eviction by a prior appointee of B. & C. is a breach of the covenant.—*CALVERT v. SEBRIGHT* (1852), 15 Beav. 156; 51 E. R. 496.

**2659. — Claimant under settlement made by lessor under power.]**—By a deed of settlement made by deft. in 1842, under a power contained in his father's will, a term of one thousand years in certain estates was limited to T. & W., in trust, by mtge., sale, or otherwise, to raise a sum not exceeding £10,000 for payment of deft.'s debts; & in 1843 the trustees assigned the term by way of mtge. to A. & B., deft. being a party to the deed, covenanting for payment of the principal & interest, & also for title in the trustees, & for quiet enjoyment by the mtgees. in case of default. This assignment contained a power to deft. to lease, by & with the consent & approbation of the mtgees., their heirs, etc. In 1846, deft., without having obtained the consent of the mtgees., granted a lease of part of the lands to pltf., with a covenant for quiet enjoyment during the term, "without the let, suit, trouble, denial, eviction, molestation, or disturbance of the lessor, his heirs or assigns, or any person or persons claiming or deriving, or to claim or derive, by, from, or under him, them, or any of them." Pltf. in 1851 received a notice from the surviving mtgee., informing him of the mtge., & that the principal & interest were unpaid & in arrear, & requiring pltf. to pay rent to him. Having consulted his attorney, & finding that he could not successfully resist the claim of the mtgee., pltf. consented to give up possession of the land to him, & the mtgee. entered & took possession, paying pltf. £75 as a compensation for certain improvements. Upon a case stated for the opinion of the ct.:—*Held*: pltf. was entitled to maintain an action upon the covenant for quiet enjoyment, the facts showing an eviction, or, at all events, a molestation & disturbance of pltf., by one claiming title by, from, or under deft.—*CARPENTER v. PARKER* (1857), 3 C. B. N. S. 206; 27 L. J. C. P. 78; 30 L. T. O. S. 166; 22 J. P. 7; 6 W. R. 98; 140 E. R. 718.

*Annotations:—**Reid* *Re Emery & Barnett* (1858), 4 C. B. N. S. 423. *Mentd.* *Eastern Counties Ry. v. Dorling* (1859), 5 C. B. N. S. 821; *Underhay v. Read* (1887), 58 L. T. 457.

**2660. — Not superior lessor.]**—*KELLY v. ROGERS*, No. 2039, *ante*.

**2661. — Assignee of reversion owner of adjoining land under independent title.]**—*DAVIS v. TOWN PROPERTIES INVESTMENT CORPN., LTD.*, No. 2574, *ante*.

**2662. — Lessee of minerals—Under demised property.]**—In 1806, A. & B., the then trustees of the will of C., leased certain mineral rights to a colliery co. by a mineral lease giving the colliery co. power to work minerals. In 1908 A. & B., the trustees of the will of C., leased the surface over

the said colliery on a ninety-nine years lease, with a messuage then in course of erection, & the lease contained a covenant for quiet enjoyment "without any lawful interruption from or by the lessors or any person rightfully claiming from or under them." The house was completed, & the lessee thereof alleged a subsidence, & a summons was issued to determine the liability of A. & B. or either of them on the assumption that the damage, if any, was caused by the proper working of the colliery:—*Held*: only A. was liable.—*Re GRIFFITHS, GRIFFITHS v. RIGGS* (1917), 61 Sol. Jo. 268.

**2663. — Lessees of adjoining land.]**—In 1911 the tenant for life of settled freehold estate in Cornwall granted a lease to pltf. of a small piece of land for twenty-one years at a rent of £7 for the express purpose of an explosives magazine, & he entered into a covenant with the tenant for quiet enjoyment, but no other express covenant. The lessor knew that the purpose for which the grant was made would involve the imposition of some restrictions. The lessee was aware of the nature of the restrictions imposed by a licence for the magazine under Explosives Act, 1875 (c. 17), & that if buildings were erected upon adjoining land of the lessor's within certain distances of the magazine the licence would be withdrawn; & both knew that there had been extensive working in the past of minerals in the immediate neighbourhood. In 1919 defts. obtained a lease from the freeholder of the same estate of adjoining land for the purpose of working the minerals, but in such a manner as not to interfere with the explosives magazine of pltf.'s or the rights of others, & subject thereto, to erect buildings for the purpose of working the minerals. Defts. reopened two shafts & erected three buildings or sheds within distances prohibited by pltf.'s licence under Explosives Act, 1875 (c. 17). In an action by pltf. to restrain defts. from allowing these buildings & works to remain, on the ground that the acts of defts. constituted a derogation of the lessor's grant:—*Held*: (1) under the circumstances in which the lease of 1911 was granted, there must be implied on the part of the lessor an obligation not to do anything which would violate the conditions under which the licence was held by pltf. & thereby cause, *ipso facto*, a forfeiture of the licence under the Explosives Act, 1875 (c. 17); the acts done by defts. would, if done by the lessor, have been in derogation of his grant; & inasmuch as defts. were for this purpose in the same position as the lessor, the acts must be regarded as done by him; (2) pltf. was entitled to the injunction he claimed, but its operation must be confined to the existing licence & would not extend to any future licence.—*HARMER v. JUMBIL (NIGERIA) TIN AREAS LTD.*, [1921] 1 Ch. 200; 90 L. J. Ch. 140; 124 L. T. 418; 37 T. L. R. 91; 65 Sol. Jo. 93, C. A.

iv. *Lessees holding under Same Lessor.*

**2664. Disturbance not warranted by terms of lease.]**—In 1857, A. demised to B. a farm called Upton Farm, containing two hundred & sixty-four acres, about forty of which consisted of timber & underwood, with furze covers in various other parts of the farm. This lease reserved to the lessor "all timber & other trees, mines, minerals, & quarries on the farm," & also "the

*BARNES* (1879), 44 U. C. R. 315.—*CAN.*

**C. — Assignee of his agent.]**—The assignee of the lessor & the person who effected the eviction & who acted as

agent of the assignee & also as agent of the transferee of the land:—*Held*: to be persons claiming through or under the lessor.—*HAACK v. MARTIN*, [1926] 1 D. L. R. 76; [1925] 3 W. W. R. 769.—*CAN.*

**PART XI. SECT. 5, SUB-SECT. 4.—**  
**A. (a) iv.**

**2664 i. Disturbance not warranted by terms of lease.]**—*BAUM v. RODE* (1905), T. S. 66.—*S. AF.*

exclusive right of shooting, fishing, & sporting on the farm," with liberty to the lessor, his servants, etc., & others by his authority, at all seasonable times to enter for any of the purposes contained in the reservations therein contained. In 1860, A. demised Upton Castle & about sixty acres of land adjoining it to C., & also, "the exclusive right of shooting & sporting over & taking the game, rabbits, & wild-fowl upon the premises & also upon the entire manor of Upton," including the two hundred & sixty acres under lease to B., reserving to the lessor "all trees, underwood, thorns, & bushes growing on the land, as well as all mines, minerals, & quarries," etc.; with a covenant for quiet enjoyment, without interruption by the lessor or any person or persons lawfully claiming by, from, or under him, etc. B., finding the rabbits too numerous, by means of ferrets & guns destroyed a large number of them; he also cut all the underwood on his farm, & grubbed up & destroyed the furze covers, & thereby materially interrupted & injured C.'s right of sporting:—*Held*: inasmuch as these acts on the part of B. were not warranted by the terms of the demise to him, they did not constitute a breach of A.'s covenant for quiet enjoyment in the lease of 1860.—*JEFFREYES v. EVANS* (1865), 19 C. B. N. S. 246; 34 L. J. C. P. 261; 13 L. T. 72; 11 Jur. N. S. 584; 13 W. R. 864; 144 E. R. 781.

*Annotation*:—*Apld.* Dick v. Norton (1916), 85 L. J. Ch. 623.  
**2665.** ———.]—*SANDERSON v. BERWICK-UPON-TWEED CORPN.*, No. 2697, *post*.

**2666.** ———.]—*No active participation of lessor.*—A lessor is not liable in damages to his lessee under a covenant for quiet enjoyment for a nuisance caused by another of his lessees because he knows that the latter is causing the nuisance & does not himself take any steps to prevent what is being done. There must be active participation on his part to make him responsible for the nuisance. A common lessor cannot be called upon by one of his tenants to use for the benefit of that tenant all the powers he may have under agreements with other persons.—*MALZY v. EICHTELZ*, [1916] 2 K. B. 308; 85 L. J. K. B. 1132; 115 L. T. 9; 32 T. L. R. 506; 60 Sol. Jo. 511, C. A.

*Annotations*:—*Apld.* A.-G. v. Cory, Kennard v. Cory (1918), 34 T. L. R. 621. *Refd.* Rainham Chemical Works v. Belvedere Fish Guano Co., [1921] 2 A. C. 465.

**User of adjoining premises.**—*See* Sub-sect. 4, A. (b) v., *post*.

**Flats & chambers.**—*See* Nos. 2367-2369, *ante*.

#### v. Strangers.

**2667. Qualified covenant—Lessor not liable—Unless disturber specified in covenant.**—*FOSTER & WILSON v. MAPPS* (1590), Owen, 100; 1 Leon. 324; Cro. Eliz. 212; 74 E. R. 929.

*Annotations*:—*Consd.* Tisdale v. Essex (1613), Hob. 34. *Refd.* Hayes v. Bickerstaff (1669), Vaugh. 118; Fowle v. Welch (1822), 2 Dow. & Ry. K. B. 133.

**2668.** ———.]—*Covenant that the lessee shall enjoy bindeth not against wrongful ejectment.*

The law shall never judge that I covenant against the wrongful act of strangers, except my covenant express to that purpose. . . . If I warrant land unto you expressly, yet I shall not depend against tortious entries (*per* CUR.).—*TISDALE v. ESSEX* (1617), Hob. 34; Moore, K. B. 861; 1 Roll. Rep. 397; 3 Bulst. 204; 1 Brownl. 23; 80 E. R. 185.

*Annotations*:—*Consd.* Hayes v. Bickerstaff (1669), Vaugh. 118. *Refd.* Lucy v. Leviston (1673), Freem. K. B. 103; Norman v. Foster (1673), 1 Mod. Rep. 101; Anon. (1676), Freem. K. B. 450. *Mentd.* Coggs v. Bernard (1703), 2 Ld. Raym. 909; Ross v. Hill (1846), 2 C. B. 877.

**2669.** ———.]—A general covenant for quiet enjoyment against all persons shall only extend to lawful disturbances: *secus* of a covenant against a particular person.—*LUCY v. LEVISTON* (1673), Freem. K. B. 103; 3 Keb. 163; 89 E. R. 70.

**2670.** ———.]—*HAYES (OR HAYS) v. BICKERSTAFF* (1675), Vaugh. 118; Freem. K. B. 194; 2 Mod. Rep. 34; 124 E. R. 997.

*Annotations*:—*Consd.* Jerritt v. Weare (1817), 3 Price, 575. *Refd.* Williams v. Burrell (1845), 1 C. B. 402; Markham v. Paget, [1908] 1 Ch. 697. *Mentd.* Fitzgerald v. Fauconberge (1729), Fitz.-G. 207; Dawson v. Dyer (1833), 2 Nev. & M. K. B. 559; Grey v. Friar (1854), 4 H. L. Cas. 565; Bastin v. Bidwell (1881), 18 Ch. D. 238.

**2671.** ———.]—*Covenant against "all claiming or pretending to claim."*—On a covenant for quiet enjoyment, a breach assigned, that having, or pretending to have a claim time out of mind, he entered & disturbed the lessee, is good.—*CHAPLAIN v. SOUTHGATE* (1717), 10 Mod. Rep. 383; 88 E. R. 774; *sub nom.* *SOUTHGATE v. CHAPLIN*, 1 Com. 230.

**2672.** ———.]—*ANON.* (1774), Loft, 460.

**2673.** ———.]—(1) Where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title (*LORD ELLENBOROUGH, C.J.*).

(2) It is, however, different where an individual is named; for, then, the covenantor is presumed to know the person against whose acts he is content to covenant, & may therefore be reasonably expected to stipulate against any disturbance from him whether by lawful title or otherwise (*LORD ELLENBOROUGH, C.J.*).—*NASH v. PALMER* (1810), 5 M. & S. 374; 105 E. R. 1088.

*Annotations*:—*As to* (2) *Fold.* Fowle v. Welch (1822), 1 B. & C. 29. *Generally, Refd.* Shaw v. Stanton (1858), 30 L. T. O. S. 352.

**2674.** ———.]—In covenant for quiet enjoyment by an assignee, it is sufficient if ptff. show how he is assignee; but the breach must show that the interruption was by title.—*WHITE v. EWER* (1601), Cro. Eliz. 823; 78 E. R. 1049.

*Annotation*:—*Refd.* Hodgson v. East India Co. (1799), 8 Term Rep. 278.

**2675.** ———.]—On a covenant for enjoyment without eviction, a breach that a stranger recovered in ejectment is not good, without showing elder title, although there is a rejoinder that the recovery was by covin.—*KIRBY v. HANSAKER* (1612), Cro. Jac. 315; 79 E. R. 270.

*Annotations*:—*Fold.* Wotton v. Hele (1670), 2 Saund. 177. *Distd.* Chaplin v. Southgate (1716), 10 Mod. Rep. 383. *Refd.* Mosse v. Archer (1687), 3 Mod. Rep. 135. *Mentd.* Crouther v. Oldfield (1706), 1 Salk. 364.

**2676.** ———.]—To establish a breach of covenant for quiet enjoyment, without incumbrance of any person, ptff. must show a lawful incumbrance.—*BROKING v. CHAM* (1617), Cro. Jac. 425; 1 Roll. Abr. 95; 79 E. R. 363.

*Annotations*:—*Refd.* Stanley v. Hayes (1842), 3 Q. B. 105. *Mentd.* Coggs v. Bernard (1703), 2 Ld. Raym. 909; Pasley v. Freeman (1789), 3 Term Rep. 51; Ross v. Hill (1846), 2 C. B. 877.

**2677.** ———.]—On a promise of quiet enjoyment, a breach that a stranger distrained, is not good, without showing elder title.—*LEIGH v. GOTYER* (1617), Cro. Jac. 444; 79 E. R. 380.

**2678.** ———.]—*CAVE v. BROOKESBY* (1636), W. Jo. 360; 82 E. R. 189.

**2679.** ———.]—*WOTTON v. HELE* (1670), 2 Saund. 175; 2 Keb. 684, 723; 1 Lev. 301; 1 Sid. 460; 1 Mod. Rep. 66, 290; 85 E. R. 935.

*Annotations*:—*Refd.* Foster v. Pierson (1792), 4 Term Rep. 617; Simons v. Farren (1834), 1 Bing. N. C. 272; Brooks v. Humphreys (1838), 6 Scott, 756; Williams v. Burrell (1845), 1 C. B. 402. *Mentd.* Cutting v. Williams (1703),

**Sect. 5.—Covenants for quiet enjoyment: Sub-sect. 4, A. (a) v., & (b) i., ii. & iii.]**

1 Salk. 24; Crouther v. Oldfield (1706), 1 Salk. 364; Hill v. Saunders (1824), 9 Moore, C. P. 238; Angus v. Dalton (1877), 47 L. J. Q. B. 163.

**2680.** ———.]—Such a covenant [for quiet enjoyment] does not extend to the acts of wrongdoers but only to persons claiming by a legal title.—**DUDLEY v. FOLLIOTT** (1790), 3 Term Rep. 584; 100 E. R. 746.

**Annotation:—***Mentd.* Ogden v. Folliott (1790), 3 Term Rep. 726.

**2681. Absolute covenant.]**—The lessor undertakes to his lessee that he shall enjoy without the interruption of any person. If a stranger tortiously enter, an action lies on this special *assumpsit*.—**MOUNTFORD v. CATESBY** (1573), 3 Dyer, 328 a; 3 Leon 43; 73 E. R. 741.

**Annotations:—***Consd.* Hayes v. Bickerstaff (1669), Vaugh. 118. *Follid.* Gregory v. Major (1677), Freem. K. B. 450. *Refd.* Penning v. Plat (1615), Cro. Jac. 383; Broking v. Cham (1617), Cro. Jac. 425; Hamond v. Dod (1625), Cro. Car. 5; Norman v. Foster (1673), 1 Mod. Rep. 101.

**2682.** ———.]—Demurrer to a plea in an action of covenant.

The covenant in this case is broken, though it be a stranger that entered & ousted the lessee (*ROLL, C.J.*).—**ANON.** (1647), Sty. 67; 82 E. R. 535.

**2683.** ——— **Whether confined to lawful disturbance.]**—**MOUNTFORD v. CATESBY**, No. 2681, *ante*.

**2684.** ———.]—**LUCY v. LEVISTON**, No. 2669, *ante*.

**2685.** ———.]—In *assumpsit* by a lessee, upon a general promise of quiet enjoyment, he need not show that the interruption was under a lawful title.—**GREGORY v. MAJOR** (1677), 1 Freem. K. B. 450; 2 Lev. 194; 3 Keb. 744; 89 E. R. 336; *sub nom.* **MAJOR v. GRIGG**, 2 Mod. Rep. 213.

**2686.** ———.]—**NASH v. PALMER**, No. 2673, *ante*.

**2687.** ——— **The Crown expressly excepted—Breach by patentee of Crown.]**—In a covenant that the lessee shall quietly enjoy, etc., with an exception of the King, his heirs & successors, an interruption by the King's patentee is a breach of the covenant.—**WOODROFF v. GREENWOOD** (1596), Cro. Eliz. 518; 78 E. R. 766.

**(b) In Respect of what Acts.**

**i. In General.**

**2688. Question for jury.]**—**SANDERSON v. BERWICK-UPON-TWEED CORPN.**, No. 2697, *post*.

**2689.** ———.]—**BUDD-SCOTT v. DANIELL**, No. 2602, *ante*.

**2690. Acts of commission & of omission.]**—In 1879 the owner of land, which was covered with slag & through which ran a natural stream, inclosed the stream in a culvert. In 1886 he granted to certain persons a lease for ninety-nine years of part of the land with the building on it, retaining the adjoining part through which the culvert ran. The foundations of the south wall of the building did not reach the soil, but rested on the slag. The lease contained an express covenant by the lessor for quiet enjoyment. In

1924 the culvert was in a bad state of repair, with the result that the stream broke through the culvert & scoured away the foundations of the south wall, so that it collapsed. At that time the lease was vested in *pltf.*, while the land under which the culvert ran & the reversion to the leased land, expectant on the determination of the lease, were vested in *def.*—**Held**: (1) confining the stream in an artificial structure incapable of retaining it was an act of *def.*, which had interrupted or disturbed the lessee's quiet enjoyment of the land, & therefore *pltf.* was entitled to succeed on the ground of breach of covenant for quiet enjoyment; (2) the covenant was not confined to active disturbance of enjoyment, & the omission to keep the culvert in repair was an omission of a duty by the owner to the adjoining landowner, which if neglected might cause damage to the adjoining property, & the owner was therefore bound to prevent such damage by taking reasonable precautions.

(3) A covenant for quiet enjoyment is one which runs with the land (*SARGANT, L.J.*).—**BOOTH v. THOMAS**, [1926] 1 Ch. 397; 95 L. J. Ch. 160; 134 L. T. 464; 42 T. L. R. 296; 70 Sol. Jo. 365, C. A.

— **Acts of omission.]**—*See* Sub-sect. 4, A. (b) *vii.*, *post*.

**ii. Legality of Act.**

**Disturbance by strangers.]**—*See* Sub-sect. 4, A. (a) *v.*, *ante*.

**2691. Disturbance by lessor—Illegality immaterial.]**—Debt upon an obligation conditioned for the performance of covenants. The breach assigned was, that *def.* lessor covenanted that it shall be lawful for *pltf.*, being lessee, quietly to enjoy the land; & that the lessor himself ousted him; & it was thereupon demurred; for this illegal ouster is no breach of the covenant. But, without argument, *pltf.* had judgment.—**CORUS v.** ——— (1597), Cro. Eliz. 544; 78 E. R. 791.

**2692.** ———.]—**CAVE v. BROOKESBY** (1636), W. Jo. 360; 82 E. R. 189.

**2693.** ——— **Entry under claim of right.]**—On a covenant "for quiet enjoyment free from all lawful interruption," a breach assigned that *def.*, "claiming title & lawful right under A. entered, etc." is sufficient, for it is not a breach from the act of a stranger but of the covenantor himself.—**CROSSE v. YOUNG** (1685), 2 Show 425; 89 E. R. 1021.

**Annotation:—***Apld.* Lloyd v. Tomkies (1787), 1 Term Rep. 671.

**2694.** ———.]—If a lessor covenant for quiet enjoyment against the lawful let, suit, entry, etc. of himself, his heirs & assigns; the declaration for a breach of the covenant need not expressly allege that he entered claiming title, if the disturbance complained of be such as clearly appears to be an assertion of right.—**LLOYD v. TOMKIES** (1787), 1 Term Rep. 671; 99 E. R. 1313.

**2695.** ——— **Exercise of lawful right.]**—If a man covenant that he will not interrupt the covenantee in the enjoyment of a close; the erection of a gate which intercepts it, is a breach of the covenant, although he had a right to erect

**PART XI. SECT. 5, SUB-SECT. 4.—A. (a) v.**

**2683 i. Absolute covenant—Whether confined to lawful disturbance.]**—A covenant for quiet enjoyment does not give a right of action to the lessee against the lessor where a third person has moved furniture into the premises & claims possession & in an action therefor obtains an *interim* injunction against the lessee, unless the lessee

shows that the third person has a right to put him out of possession.—**BOYLE v. TUSCONI**, [1921] 1 W. W. R. 354.—**CAN.**

**2683 ii.** ———.]—**UDAY KUMAR DAS v. KATYANI DEBI** (1922), 1 L. L. R. 49 Calc. 948.—**IND.**

**PART XI. SECT. 5, SUB-SECT. 4.—A. (b) ii.**

**2694 i. Disturbance by lessor—Entry**

**under claim of right.]**—**GOLD MEDAL FURNITURE MANUFACTURING CO. v. LUMBERS** (1999), 19 C. L. T. 357; 30 S. C. R. 55.—**CAN.**

**2695 i.** ——— **Exercise of lawful right.]**—**IRVING v. GRIMSBY PARK CO.** (1907), 16 C. L. R. 386; 11 O. W. R. 748.—**CAN.**

**2695 ii.** ———.]—The lessor covenanted that he would not disturb the lessee except for some just cause:—

it.—**ANDREWS v. PARADISE** (1724), 8 Mod. Rep. 318; 88 E. R. 228.

*Annotations*.—**Consd.** **Anderson v. Oppenheimer** (1880), 5 Q. B. D. 602. **Expld.** **Petty v. Parsons**, [1914] 1 Ch. 704. **Reid.** **Shaw v. Stanton** (1858), 30 L. T. O. S. 352; **Harrison, Ainslie v. Muncaster**, [1891] 2 Q. B. 680.

### iii. Substantial Interference with Enjoyment.

**2696. General rule.**—(1) A person having only an *interesse termini* cannot maintain an action on a covenant for quiet enjoyment.

(2) The essence of a breach of a covenant for quiet enjoyment in a lease appears to me to be a disturbance of the lessee's possession (**CHITTY, J.**).

(3) Such an implied covenant [for quiet enjoyment] is, speaking generally, an unqualified covenant, but extends only to lawful interruptions (**CHITTY, J.**).—**WALLIS v. HANDS**, [1893] 2 Ch. 75; 62 L. J. Ch. 586; 68 L. T. 428; 41 W. R. 471; 9 T. L. R. 288; 37 Sol. Jo. 284; 3 R. 351.

**2697. Interference not affecting title or possession.**—(1) In order to constitute a breach of covenant for quiet enjoyment in a lease of land, it is sufficient that the lessee's ordinary & lawful enjoyment of the demised land be substantially interfered with by the acts of the lessor or those lawfully claiming under him, although neither the title to the land nor the possession of the land be otherwise affected.

(2) By a general system of drainage made by defts. in a particular district, various farms in that district were drained by several underground drains, by which the water was carried through all such farms. Defts. let one of these farms to pltf. with the usual covenant for quiet enjoyment against the acts of the lessors or any person lawfully claiming through or under them. Defts. had previously let another of such farms adjoining, but lying above pltf.'s farm, to one C., with a right to use the drains through pltf.'s land, so far as they were adequate to carry the water from C.'s farm. C. during pltf.'s tenancy, first, by an excessive user of the drainage system, which was properly constructed for the purpose of drainage, caused the water passing down the drains in his farm to escape & overflow into pltf.'s farm & damage his crops; secondly, by a proper user by C. of the drains passing through pltf.'s farm damage was also done to a field in pltf.'s farm by the escape of water, but this arose from one of the drains there having been imperfectly & improperly constructed:—**Held**: defts. were liable to pltf. for a breach of their covenant for quiet enjoyment in respect of this last damage, as there had been within the meaning of such covenant a substantial interruption by a person who lawfully claimed through defts.; but defts. were not liable for the damage done by the excessive user by C. of the drainage system, which was properly constructed, either under their covenant for quiet enjoyment or under the law of trespass or nuisance.

(3) It appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted (**FRY, L.J.**).—**SANDERSON v. BERWICK-UPON-TWEED CORPN.** (1884), 13 Q. B. D. 547; 53 L. J. Q. B. 559; 51 L. T. 495; 49 J. P. 6; 33 W. R. 67, C. A.

*Annotations*.—*As to* (1) **Consd.** **Harrison, Ainslie v. Muncaster**, [1891] 2 Q. B. 680. **Reid.** **Wallis v. Hands**, [1893] 2 Ch. 75; **Davis v. Town Properties Investment Corpn.**,

[1902] 2 Ch. 635. *As to* (2) **Consd.** **Jaeger v. Mansions Consolidated** (1902), 87 L. T. 690; **Jones v. Consolidated Anthracite Collieries & Dynevor**, [1916] 1 Ch. 437. **Reid.** **Aldin v. Latimer, Clarke, Muirhead**, [1894] 2 Ch. 437. *As to* (3) **Expld.** **Jenkins v. Jackson** (1888), 40 Ch. D. 71. **Consd.** **Robinson v. Kilvert** (1889), 41 Ch. D. 88; **M. S. & L. Ry. v. Anderson**, [1898] 2 Ch. 394. **Consd. & Apld.** **Tebb v. Cave**, [1900] 1 Ch. 642. **Reid.** **Williams v. Gabriel**, [1906] 1 K. B. 155.

**2698.** —[**ROBINSON v. KILVERT**, No. 2573, ante.

**2699.** —[**HARRISON, AINSLIE & Co. v. MUNCASTER**, No. 2651, ante.

**2700. Interference must be physical.**—“Quietly” does not mean undisturbed by noise. When a man is quietly in possession it has nothing whatever to do with noise, though the word “quiet” is frequently used with reference to noise. “Peaceably & quietly” means without interference, without interruption of the possession (**KEKEWICH, J.**).—**JENKINS v. JACKSON** (1888), 40 Ch. D. 71; 58 L. J. Ch. 124; 60 L. T. 105; 37 W. R. 253; 4 T. L. R. 747.

*Annotations*.—**Consd.** **Jaeger v. Mansions Consolidated** (1902), 87 L. T. 690; **Williams v. Gabriel**, [1906] 1 K. B. 155. **Reid.** **Barber v. Penley**, [1893] 2 Ch. 447; **Phelps v. City of London Corpn.**, [1916] 2 Ch. 255; **A.-G. v. Cory, Kennard v. Cory** (1919), 83 J. P. 221.

**2701.** —[An injunction was granted to restrain the conversion into a club of a large part of a building, adapted to occupation in residential flats, at the instance of a tenant who held under an agreement in a common form binding the tenants to rules suitable only for residential purposes.

I do not understand the stipulation for quiet enjoyment to be one that means that pltf. is to enjoy the premises without the nuisance of a noise in the neighbourhood. A covenant for quiet enjoyment is a covenant from freedom from disturbance by adverse claimants to the property (**NORTH, J.**).—**HUDSON v. CRIPPS**, [1896] 1 Ch. 265; 65 L. J. Ch. 328; 73 L. T. 741; 60 J. P. 393; 44 W. R. 200; 12 T. L. R. 102; 40 Sol. Jo. 131.

*Annotations*.—**Consd.** **Alexander v. Mansions Proprietary** (1900), 16 T. L. R. 431. **Apprvd.** **Jaeger v. Mansions Consolidated** (1903), 87 L. T. 690. **Reid.** **Holford v. Acton (C.)**, [1898] 2 Ch. 240; **Reid v. Bickerstaff**, [1909] 2 Ch. 305. **Mentd.** **McNair v. Baker** (1903), 90 L. T. 24.

**2702.** —[**JAEGER v. MANSIONS CONSOLIDATED, LTD.**, No. 2368, ante.

**2703.** —[In Sept. 1905, a flat consisting of twelve rooms on the ground, first, & second floors of F. mansions was let to L. In Nov. 1907, a flat on the ground floor of the mansions was let to the pltfs. Both flats had windows overlooking a garden belonging to the lessors. L.'s agreement contained a clause prohibiting the use of her flat otherwise than as a dwelling-house, & pltfs. agreement comprised a covenant for quiet enjoyment & a stipulation that they should not use their flat otherwise than as a private residence. Each agreement contained a stipulation that the tenants would not do anything on the demised premises which might be a nuisance to the lessors or to the occupiers of adjoining premises or which might tend to lessen the value thereof. In 1909 Mrs. L. subdivided her flat &, with the consent of the lessors erected an open-work iron staircase from the garden to an entrance to her flat on the first floor; & in 1910 let it & the part of her flat to which it gave access to K. The staircase was situated between the windows of two of the bedrooms in pltfs. flat, & the fact

**Held**: “just cause” to justify disturbance must be a cause arising from the conduct of the tenant, & not merely from the interest of the landlord.—**DOOLEY v. M'HEUGH** (1918),

53 I. L. T. 19.—**IR.**

**PART XI. SECT. 5, SUB-SECT. 4.—**  
**A. (b) iii.**

**2696 l. General rule.**—To constitute

breach of a covenant for quiet enjoyment there must be an actual interference with the tenant's possession.—**WOODS v. OPSAL**, [1918] 1 W. W. R. 985.—**CAN.**

**Sect. 5.—Covenants for quiet enjoyment: Sub-sect. 4, A. (b) iii., iv., v., vi., vii. & viii.]**

that it was used as the only access to K.'s flat seriously affected the pltf's. privacy, for persons using the staircase could see directly into the rooms. Pltfs. brought this action claiming to have the staircase removed, an injunction, or compensation:—*Held*: L. had done nothing on her premises in breach of her covenant; the flats were not the subject of any general building scheme; the only interference with the pltf's. premises was interference with their comfort & privacy; that was not a sufficient interference to bring the case within the principle that a derogation from a grant was a breach of a covenant for quiet enjoyment; & the claim failed.

It appears to me that to constitute a breach of such a covenant there must be some physical interference with the enjoyment of the demised premises & that a mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy or otherwise is not enough (*PARKER, J.*).—*BROWNE v. FLOWER*, [1911] 1 Ch. 219; 80 L. J. Ch. 181; 103 L. T. 557; 55 Sol. Jo. 108.

*Annotation*:—*Consd. Harmer v. Jumbil (Nigeria) Tin Areas*, [1921] 1 Ch. 200.

**2704. Interference must be direct—Or capable of being foreseen at time of covenant.]—HARRISON, AINSIE & Co. v. MUNCASTER**, No. 2651, *ante*.

**2705. —.]—A lessor granted to the lessee a lease for twenty-one years of a certain house for the purpose of carrying on his profession of physician & surgeon. The lease contained the usual covenant for quiet enjoyment. At the date of the lessee entering into possession the lessor was erecting on adjoining property a large block of flats, which he subsequently completed. The flats were carried to a height which considerably exceeded that of the lessee's house, & the effect of this was to cause the smoke to be driven down pltf's chimneys by the impact of the wind on the flats, & thereby to render some of the rooms at times practically uninhabitable:—*Held*: what had been done by the lessor, although it did not affect the title to or possession of the house, was a substantial physical interference with its enjoyment, & therefore constituted a breach of the covenant for quiet enjoyment.—*TEBB v. CAVE*, [1900] 1 Ch. 642; 69 L. J. Ch. 282; 82 L. T. 115; 48 W. R. 318; 44 Sol. Jo. 262.**

*Annotations*:—*Obtd. Davis v. Town Properties Investment*

*Corpn., Ltd.*, [1900] 1 Ch. 257; *Consd. Harmer v. Jumbil (Nigeria) Tin Areas*, [1921] 1 Ch. 200.

**2706. —.]—DAVIS v. TOWN PROPERTIES INVESTMENT CORPN., LTD.**, No. 2574, *ante*.

**2707. —.]—*Held*: on the authority of *Davis v. Town Properties Investment Corpn.*, No. 2574, *ante*, the acts did not constitute a breach of the lessor's covenant for quiet enjoyment, inasmuch as they did not amount to a direct interference with the enjoyment of the demised land.—*HARMER v. JUMBIL (NIGERIA) TIN AREAS, LTD.*, [1921] 1 Ch. 200; 90 L. J. Ch. 140; 124 L. T. 418; 37 T. L. R. 91; 65 Sol. Jo. 93, C. A.**

**iv. Temporary Disturbance.**

**2708. Temporary inconvenience.]—LEADER v. MOODY**, No. 2765, *post*.

**2709. — Not affecting title to or possession of land.]—In 1893 an Act was passed enabling the pltf. co. to take compulsorily (*inter alia*) the property to which this action related. In 1894 the**

owner of the property let it to deft. for a term of years by a lease containing the usual covenant for quiet enjoyment. In 1895 the co. purchased the reversion of the property, subject to the lease. After this the co. proceeded with their works, & in so doing caused structural injury to deft.'s house; they also for some time rendered the access to his premises less convenient, by erecting hoardings which blocked up half the thoroughfare along the street in which his house stood, & by taking a great number of carts along that street. They also for three or four days incumbered a passage along which he had a right of way so that he could not use it. It was not alleged that the co. had exceeded their statutory powers or exercised them negligently. The co. sued deft. for rent, & he counter-claimed for damages for breach of the covenant for quiet enjoyment:—*Held*: (1) the covenant for quiet enjoyment was in force & was binding on the co., & they were liable to make compensation for any breach of it, but no action would lie against them for any breach of it committed in the reasonable & careful exercise of their statutory powers.

(2) Though structural injury to a house by the lessor is a breach of the covenant for quiet enjoyment, no temporary inconvenience caused by the lessor, but not affecting the title or possession of the tenant, is a breach of the covenant.—*MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. Co. v. ANDERSON*, [1898] 2 Ch. 394; 67 L. J. Ch. 568; 42 Sol. Jo. 609; *sub nom. ANDERSON v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. Co.*, *MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. Co. v. ANDERSON*, 78 L. T. 821; 14 T. L. R. 489, C. A.

*Annotations*:—*As to* (1) *Consd. Long Eaton Recreation Grounds Co. v. Mid. Ry.*, [1902] 2 K. B. 574. *Refd. Metropolitan Water Board v. Solomon*, [1908] 2 Ch. 214. *As to* (2) *Consd. Tebb v. Cave*, [1900] 1 Ch. 642. *Refd. Jones v. Consolidated Anthracite Collieries & Dynevor*, [1916] 1 K. B. 123; *Phelps v. City of London Corpn.*, [1916] 2 Ch. 255.

**2710. —.]—PHELPS v. CITY OF LONDON CORPN.**, No. 1817, *ante*.

**v. User of Adjoining Premises.**

**2711. Causing physical interference.]—By indenture, deft. demised to pltf's. a coal mine for a term of years, with liberty to dig & sink pits, etc., for obtaining the coal; & deft. covenanted with pltf's. that they might peaceably & quietly have, hold, occupy, possess & enjoy the mine during the term, without any molestation, interruption or disturbance whatever of, from, or by deft. After the making of the indenture deft. excavated a quarry of ironstone, lying under some of the closes under which the demised mine was situate, but above that mine; & made holes from the strata of ironstone into the demised mine; & thereby caused quantities of water to percolate into the demised mine; & deft. also by excavating the quarry caused parts of the roof of the demised mine to fall in, & by reason of the premises the demised mine became flooded, & the working of the coal was rendered impracticable:—*Held*: though deft. had a right to excavate the quarry, yet as the excavation had caused an interruption of pltf's. occupation of the demised mine, deft. was liable for a breach of his covenant for quiet enjoyment.—*SHAW v. STENTON* (1858), 2 H. & N. 858; 27 L. J. Ex. 253; 30 L. T. O. S. 352; 6 W. R. 327; 157 E. R. 353.**

*Annotations*:—*Expld. Jenkins v. Jackson* (1888), 40 Ch. D. 71. *Consd. Harrison, Ainsie v. Muncaster*, [1891] 2 Q. B. 680. *Refd. Anderson v. Oppenheimer* (1880), 5 Q. B. D. 602; *Davis v. Town Properties Investment Corpn.*, [1902] 2 Ch. 635; *Williams v. Gabriel*, [1906] 1 K. B. 155.

**2712. Alteration to adjoining house.]—A.**, being the owner of two adjoining houses, demises one to B., & afterwards demises the other to C. Neither A. nor C. can make such alterations on the premises demised to the latter as will prevent the comfortable enjoyment of the house demised to B.

If C. threatens & begins to make alterations which the ct. is satisfied will prevent the comfortable enjoyment of B.'s house, an injunction will be granted.—**PALMER v. PAUL** (1824), 2 L. J. O. S. Ch. 154.

**2713. Building on adjoining land—Interference with light & air.]—POTTS v. SMITH**, No. 2569, *ante*.

**2714. ———.]—**Having regard to the circumstances existing at the date of the lease & known to both parties:—*Held*: defts. had committed no breach of a covenant for quiet enjoyment by building on adjoining ground & so interfering with pltf.'s light & air.—**ROBSON v. PALACE CHAMBERS, WESTMINSTER CO., LTD.** (1897), 14 T. L. R. 56.

**2715. ———.]—TERR v. CAVE**, No. 2705, *ante*.

**2716. ———.]—DAVIS v. TOWN PROPERTIES INVESTMENT CORPN., LTD.**, No. 2574, *ante*.

**2717. Vibration from works.]—**In an action by lessor against lessee for rent, the lessee counter-claimed for damages from a nuisance caused by the lessor. It appeared that the lessor during the lease had pumped water from land adjacent to the demises premises by means of powerful engines, & that the lessee's house was damaged by the vibration caused by the working of such engines, to such an extent that the premises became useless to him, & that he was obliged to remove his business to another house, & in consequence incurred expense. There was evidence that the house at the commencement of the term was old & unstable, & that a house of ordinary stability would not have been injured by the vibration:—*Held*: (1) pltf. was liable for damages under the counterclaim, for there was an implied obligation on his part not to derogate from his grant by using his adjoining property so as to interfere with the stability of the premises which he had let, & he could not, therefore, rely upon any defence founded upon the state of such premises at the commencement of the term: (2) the damages recoverable by deft. were not confined to the value of the term which he had lost, but included all loss which had happened to him as a natural consequence of the wrongful acts of pltf., such as the expense of removing his business to other premises.

(3) Where there is an express covenant for quiet enjoyment it excludes any implied one (**LINDLEY, L.J.**).—**GROSVENOR HOTEL CO. v. HAMILTON**, [1894] 2 Q. B. 836; 63 L. J. Q. B. 661; 71 L. T. 362; 42 W. R. 626; 10 T. L. R. 506; 9 R. 819, C. A.

*Annotations:—As to (1) Consd. Browne v. Flower*, [1911] 1 Ch. 219; *Malzy v. Eichholz*, [1916] 2 K. B. 308; *Hoaro v. McAlpine*, [1923] 1 Ch. 167. *Refd. Markham v. Paget*, [1908] 1 Ch. 697.

**2718. User known at time of demise.]—CESSFORD v. DOVER HARBOUR BOARD** (1898), 42 Sol. Jo. 451.

#### vi. Acts Prior to Demise.

**2719. Lessor not liable.]—**Deft. was owner of a house, which he let out in floors to separate tenants. Pltf.'s became tenants of the ground floor & basement under a lease, by which deft. covenanted

that pltf's. might "peaceably hold & enjoy the demised premises during the term without any interruption by deft." The different floors were supplied with water by a cistern at the top of the house, & the water was distributed by a main pipe connected with the cistern, each floor having a separate branch inserted in the main pipe. Deft. paid the water rate, receiving from pltf's. one-half of the amount so paid, & the cistern was not demised to any one of the tenants. In consequence of the bursting of the branch service pipe supplying the first floor, a quantity of water flowed into the basement & injured pltf's. goods. At the trial the jury found that the branch pipe was reasonably fit & proper for the purpose for which it had been fixed, & that deft. had not been guilty of any negligence in keeping & maintaining it:—*Held*: under the circumstances there had been no breach of deft.'s covenant for quiet enjoyment, & as the water had been stored in the cistern for the benefit of pltf's. as well as of the other tenants, the doctrine laid down in *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330, did not apply.

It has been argued that a breach of the covenant for quiet enjoyment has been committed. But I think that the covenant is prospective in its operation. Deft. covenanted that from the time of granting the lease pltf's. enjoyment of the premises demised to them shall not be obstructed by any act done by deft. or any one for whom he is responsible. But the only act done by deft. was done before the lease was granted to pltf's. . . . The covenant being prospective no breach of it was committed (**BRETT, L.J.**).

I agree then an act of omission may be tantamount to an act of commission so as to be a breach of the covenant [for quiet enjoyment] (**COTTON, L.J.**).—**ANDERSON v. OPPENHEIMER** (1880), 5 Q. B. D. 602; 49 L. J. Q. B. 708, C. A.

*Annotations:—Consd. Harrison, Ainslie v. Muncester*, [1891] 2 Q. B. 680; *Booth v. Thomas* (1925), 42 T. L. R. 114. *Refd. Jenkins v. Jackson* (1888), 40 Ch. D. 71; *Gill v. Edouin* (1894) 71 L. T. 762; *Blake v. Woolf*, [1898] 2 Q. B. 426; *Williams v. Gabriel*, [1906] 1 K. B. 155.

#### vii. Act of Omission.

**2720. Whether lessor liable.]—**A parson let his rectory for three years, & covenanted that the lessee should have & enjoy it during the term without expulsion or anything done or to be done by the lessor, & was also bound in an obligation to the lessee to perform the covenant. Afterwards for not reading the articles he was deprived *ipso facto* by 13 Eliz. (c. 12). The patron presented another, who being inducted ousted the lessee:—*Held*: no cause of action for the lessee was not ousted by any act done by the lessor, but rather for non-feasance, & so out of the compass of the covenant.—**ANON.** (1577), 4 Leon. 38; 74 E. R. 714.

**2721. ———.]—ANDERSON v. OPPENHEIMER**, No. 2719, *ante*.

**2722. ——— Amounting to breach of duty.]—COHEN v. TANNAR**, No. 2641, *ante*.

**2723. ——— Failure to keep culvert in repair.]—BOOTH v. THOMAS**, No. 2690, *ante*.

#### viii. Particular Acts constituting Breach.

**2724. Interference with reaping of crops.]—ANON.** (1583), Godb. 22; 78 E. R. 14.

**2725. Action for tithes—After determination of term.]—**Covenant in a lease that the lessee should

#### PART XI. SECT. 5, SUB-SECT. 4.—A. (b) vii.

**2720 I. Whether lessor liable.]—MENZIES v. WHYTE** (1888), 15 R. (Ct. of Sess.) 470; 25 So. I. R. 354.—**SCOT.**

**2720 II. ———.]—FOTHERGILL v. SOUTH AFRICAN BREWERIES** (1900), 17 S. C. 410.—**S. AF.**

**Sect. 5.—Covenants for quiet enjoyment: Sub-sect. 4, A. (b) *viu.*, B. & C.]**

quietly enjoy the estate discharged from tithes, is broken by a suit for them after the expiration of the term.—*LANNING v. LOVERING* (1603), Cro. Eliz. 916; 78 E. R. 1137.

**2726. Interference with payment of rent.]—**To forbid a tenant to pay rent is not in itself a breach of a covenant for quiet enjoyment without let, trouble, interruption, etc., contained in an indenture.—*WITCHCOT & LINESEY v. NINE* (1612), 1 Brownl. 81; 123 E. R. 679.

*Annotation:—*Consd. *Edge v. Bolleau* (1885), 16 Q. B. D. 117.

**2727. Re-entry for rent.]—***POPE v. DAY* (1636), 1 Rep. Ch. 95; 21 E. R. 518.

**2728. Action for waste.]—***MORGAN v. HUNT* (1690), 2 Vent. 213; 86 E. R. 400.

*Annotations:—*Refd. *Dennett v. Atherton* (1872), L. R. 7 Q. B. 316; *Tebb v. Cave* (1900), 82 L. T. 115. *Mentd.* *Thorpe v. Thorpe* (1701), 1 Ld. Raym. 662.

**2729. Disturbance of way of necessity.]—**An action on the covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity.—*MORRIS v. EDGINGTON* (1810), 3 Taunt. 24; 128 E. R. 10.

*Annotations:—*Refd. *Barlow v. Rhodes* (1833), 1 Cr. & M. 439. *Mentd.* *Wilson v. Bagshaw* (1830), 5 Man. & Ry. K. B. 448; *Plant v. James* (1833), 6 B. & Ad. 791; *Phoysey v. Vicary* (1847), 16 M. & W. 484; *Tatton v. Hammersley* (1849), 3 Exch. 279; *Dodd v. Burchell* (1862), 1 H. & C. 113.

**B. Implied Covenants.**

**2730. Implied from words of demise.—Whether lessor liable for unlawful act of stranger.]—***ANON.* (1574), Dal. 110; 123 E. R. 315

**2731. ———.]—***ANDREWS' CASE* (1591), Cro. Eliz. 214; 2 Leon. 104; 78 E. R. 469.

*Annotations:—*Consd. *Baynes v. Lloyd*, [1895] 2 Q. B. 610. *Markham v. Paget*, [1908] 1 Ch. 697. *Refd.* *Coggs v. Bernard* (1703), 2 Ld. Raym. 909; *Ross v. Hill* (1846), 2 C. B. 877.

**2732. ———.]—***HAYES v. BICKERSTAFF* (1675), Freeman. K. B. 104; Vaugh. 118; 89 E. R. 138; *sub nom.* *HAYS v. BICKERSTAFFE*, 2 Mod. Rep. 34.

*Annotations:—*Refd. *Jorritt v. Weare* (1817), 3 Price, 575; *Markham v. Paget*, [1908] 1 Ch. 697. *Mentd.* *Fitzgerald v. Fauconberg* (1729), Fitz. G. 207; *Barker v. Dixie* (1736), Lee temp. Hard. 279; *Dawson v. Dyer* (1833), 2 Nev. & M. K. B. 559; *Williams v. Burrell* (1845), 1 C. B. 402; *Grey v. Friar* (1854), 4 H. L. Cas. 565; *Bastin v. Bidwell* (1881), 18 Ch. D. 238.

**2733. ———.]—***WALLIS v. HANDS*, No. 2696, ante.

**2734. Implied from relationship of tenancy.—Entry by title paramount.—Entry by superior landlord for rent.]—**Deft., a leaseholder, underlet to N. & put him in possession under an agreement to grant a lease when N. should have paid £1,200, which he was to do by instalments in three years, in the meantime paying rent at certain days to deft., subject to distress for nonpayment. Deft. received rent from N. but omitted to pay the superior landlord, who distrained on N. for arrears due from deft. N. having become bkpt. :—*Held*: the damage incurred by this distress was a cause of action on which his assignee might sue.

The second objection is that, admitting the existence of the tenancy, there is no such implied duty on the part of the landlord as this action supposes. The duty alleged is, that C., by paying over to the superior landlord the rent received from the undertenant, should protect the under-

tenant from the superior landlord's distress; & that is no more than one of the necessary consequences of the implied agreement on the part of every landlord for his tenant's quiet enjoyment. Even if there be no actual agreement by the mesne landlord to pay over to the superior landlord the rent received from the undertenant in order to secure his quiet enjoyment, still, in the case of *Burnett v. Lynch*, No. 2611, ante, it was held to be an implied duty on the part of the assignee of a lease to perform the covenants contained in it, in order to keep the assignor harmless: if that be a duty in the assignee, it is not easy to see why it should not be correlatively the duty of the assignor to protect the assignee by paying over to the lessor the rent received from the assignee (*TINDAL, C.J.*).—*HANCOCK v. CAFFYN* (1832), 8 Bing. 358; 1 Moo. & S. 521; 1 L. J. C. P. 104; 131 E. R. 432.

*Annotations:—**Mentd.* *Chapman v. Bluck* (1838), 4 Bing. N. C. 187; *Beckham v. Drake* (1849), 2 H. L. Cas. 579; *Re Daines, Ex p. Assignees* (1867), 16 L. T. 127.

**2735. ———.]—Express agreement by sub-lessee to pay rent.]—**Pltf. took of deft. a house, at a yearly rent, under an agreement by the terms of which the latter undertook, that, up to the date of the agreement, he had paid or would pay or discharge "all arrears of rent, rates, taxes, or assessments"; & the former agreed, that, "from & after that day, same should be kept paid by him for the period he might occupy the premises." At the expiration of the first quarter, the superior landlord distrained for rent :—*Held*: there was no implied duty in deft. to indemnify pltf. against this claim, although the agreement between them stipulated for a yearly rent; deft. having, by the subsequent clause, expressly undertaken to keep the reserved rent paid.—*UPTON v. FERGUSON* (1833), 3 Moo. & S. 88.

**2736. ———.]—***BANDY v. CARTWRIGHT*, No. 2598, ante.

**2737. ———.]—***HALL v. CITY OF LONDON BREWERY CO.*, No. 2599, ante.

**2738. ———.]—***BAYNES & CO. v. LLOYD & SONS*, No. 2629, ante.

**2739. ———.]—***JONES v. LAVINGTON*, No. 2620, ante.

**2740. ———.]—***MARKHAM v. PAGET*, No. 2621, ante.

**2741. Disturbance from user of adjoining premises.—Vibration.]—**Implied obligations in a contract must be governed by the common intention of the parties.

In an action by resps. as lessees against applts. for an injunction & damages, it appeared that both parties had agreed to a rebuilding of applts.' printing house on terms that resps. were to rent from applts. the upper floors as additional bedrooms for their adjoining hotel & applts. were to have on the ground floor an engine house & printing machinery for the prosecution of their business, both parties believing that the noise & vibration which were the cause of action would be so slight that it might be disregarded :—*Held*: in the absence of evidence that applts. had erected the building or worked the machinery & plant improperly the action must be dismissed. Both parties contemplated that applts. should keep on printing, & that resps. should have reasonably quiet bedrooms but the later intention could not

**PART XI. SECT. 5, SUB-SECT. 4.—**  
A. (b) *viu.*

**2727 i. Re-entry for rent.]—***PURSER v. BRADBURN* (1875), 25 C. P. 108.—*CAN.*

**PART XI. SECT. 5, SUB-SECT. 4.—B.**

**1. Implied from relationship of landlord & tenant.—Entry by title paramount.—Entry by superior landlord for rent.]—***KEARNS v. OLIVER* (1889), 24 L. R. Ir.

**473.—IR.**

**g. ———.]—Refusal of possession.]—***SMART v. STUART* (1836), 6 O. S. 301.—*CAN.*

**h. ———.]—Disturbance by plague**

be enforced if it would frustrate the former.—*LYTTELTON TIMES CO., LTD. v. WARNERS, LTD.*, [1907] A. C. 476; 76 L. J. P. C. 100; 97 L. T. 496; 23 T. L. R. 751, P. C.

*Annotations*.—*Expld.* *Pwllbach Colliery Co. v. Woodman*, [1915] A. C. 634; *Phelps v. City of London Corp.*, [1916] 2 Ch. 255. *Refd.* *Jones v. Pritchard*, [1908] 1 Ch. 630; *Harmer v. Jumbil (Nigeria) Tin Areas*, [1921] 1 Ch. 600; *Seabrook v. Eassey*, [1907] 1 Ch. 35. *Mentd.* *Hansford v.*

### C. Action for Breach.

**2742. Against whom maintainable—Executors of lessor.**—Lessor covenants for quiet enjoyment, & devises his estate in trust to pay debts. Lessees, being evicted, recover against his exors., & assign the judgment.—*BATH (EARL) v. BRADFORD (EARL)* (1754), 2 Ves. Sen. 587; 28 E. R. 374, L. C.

*Annotations*.—*Mentd.* *Armstrong v. Storer* (1846), 9 Beav. 277; *Morse v. Tucker* (1846), 5 Hare, 79.

**Actions by & against representatives generally.**—*See* EXECUTORS, Vol. XXIV., pp. 716 *et seq.*

**2743. By whom maintainable—Person having only interesse termini.**—Deft., a lessee, covenanted that pltf., paying rent, etc. should have quiet enjoyment of a term upon an underlease to commence in 1836: deft. having afterwards forfeited his own term by non-payment of rent to the superior landlord, pltf. could not come into possession of the term to commence in 1836:—*Held*: pltf. could not sue on the covenant for quiet enjoyment; at all events not before 1836.—*IRELAND v. BIRCHAM* (1835), 2 Bing. N. C. 90; 2 Scott, 207; 4 L. J. C. P. 305; 132 E. R. 36.

**2744.** ———.]—*WALLIS v. HANDS*, No. 2696, ante.

**2745.** ———.]—**Party entitled to benefit of covenant—Only on making covenantees parties.**—*MARKHAM v. PAGET*, No. 2621, ante.

**2746. When maintainable—Before entry by lessee—Express & implied covenant distinguished.**—H. brought an action of covenant against T., & declared for a lease for years made by deft. by the word [*demise*] which imports a covenant, & then shows, that at the time of the lease made, the lessor was not seised of the land, but a stranger, and so the covenant in law broken. But he did not lay any actual entry by force of his lease, nor any ejectment of the stranger, nor any claiming under him; whereupon it was objected, that no action of covenant would lie, because there was no expulsion. But the whole ct. was of opinion that an action did lie; for the breach of covenant was, in that the lessor had taken upon him to demise that which he could not; for the word [*demisi*] imports a power of letting as [*dedi*] a power of giving. It is not reasonable to enforce the lessee to enter upon the land, & so to commit a trespass. But if it were an express covenant for quiet enjoying there perhaps it were otherwise.—*HOLDER v. TAYLOR* (1614), Hob. 12; 80 E. R. 163.

*Annotations*.—*Consd.* *Baynes v. Lloyd*, [1895] 2 Q. B. 610. *Refd.* *Adams v. Gibney* (1830), 4 Moo. & P. 491; *Line v. Stevenson* (1838), 1 Arn. 294; *Westacott v. Hahn*, [1917] 1 K. B. 605. *Mentd.* *Pordage v. Cole* (1669), 1 Sid. 423; *Cloake v. Hooper* (1673), Freem. K. B. 122; *Thomas v. Cadwallader* (1744), Willes, 496; *Monypenny v. Monypenny* (1858), 4 K. & J. 174; *Miles v. Tobin* (1868), 16 W. R. 465.

**2747.** ———.]—It is a sufficient breach of a covenant for quiet enjoyment, to show a good title in another, without alleging an entry by pltf. &

an eviction.—*CLOAKE v. HOOPER* (1673), 1 Freem. K. B. 122; 3 Keb. 202; 89 E. R. 90.

**2748.** ———.]—**Stranger in possession under prior demise—Action of ejectment by lessee.**—In covenant for quiet enjoyment, the declaration stated that before the demise to pltf. deft. had made a demise to A. which was then subsisting; that in order to get into possession pltf. brought an ejectment, but was nonsuited on account of that prior demise; & that he had never been in possession; plea that for the first half year of pltf.'s lease pltf. might have enjoyed, etc., but that for non-payment of the rent for twenty-one days after that half year deft. had a right to enter according to a proviso in the lease, & that he did re-enter, etc.:—*Held*: this plea was no answer to pltf.'s demand. *Qu.*: whether there must be a demand of rent previous to a re-entry.—*LUDWELL v. NEWMAN* (1795), 6 Term Rep. 458; 101 E. R. 647.

**2749.** ———.]—Where pltf. declares on a covenant, in a lease by deft., that pltf. shall have, occupy, & enjoy the demised premises from a day named, for & during a certain term, & alleges as a breach that pltf. on the day entered upon the demised premises, & became possessed of them for the term, but that he was not able to occupy & enjoy the premises in this, viz. that, pltf. being so possessed, deft. entered into the premises & upon pltf.'s possession, & expelled & kept him out; to which deft. pleads that he did not enter & expel, etc.; such breach is not proved by evidence that pltf. came to take possession, but was refused entrance by deft., who continued occupying the premises, & never admitted him. It makes no difference that by a clause in the lease, stated in the declaration, it was agreed that, at a time previous to the above-named day, pltf. should be at liberty to enter the arable lands fit for wheat, for the purpose of sowing, paying at a certain rate for such lands as should be sown; & that pltf. had entered on a part of said arable lands, & sown before the day fixed for his taking possession of the premises generally, such entry being alleged in the declaration according to the fact.—*HAWKES v. ORTON* (1836), 5 Ad. & El. 367; 6 Nev. & M. K. B. 842; 111 E. R. 1204.

**2750. Land situate abroad—Jurisdiction of court—Specific performance of covenant.**—In July, 1896 pltfs. entered into an agreement with defts. under which the sole & exclusive right to work certain lands situate in the island of Milos & belonging to defts. was granted to pltfs. for a period of five years; the agreement also contained a provision for a renewal of the period for three further periods of five years each. The right conferred by this agreement, was expressed to be granted for the purpose of enabling pltfs. to get & work manganese, & they were to pay by quarterly payments certain royalties therefor, & a minimum royalty was fixed. Clause 6 of the agreement provided that in the event of any royalties being in arrear for three months or a breach of any of the provisions of the agreement defts. might determine the licence & re-enter the premises. On May 17, 1898, a further agreement was made modifying the first agreement & providing for the payment of the royalties half yearly on Apr. 8 & Oct. 8, in each year. A dispute having arisen between the original

*officials.*—*MERWANJIMANCHERJICAMA v. SYED SIRDAR ALI KHAN* (1899), I. L. R. 23 Bom. 510.—IND.

*k.* ———.]—*Entry by assignor of reversion.*—*AL LOP v. DONALD* (1906),

26 N. Z. L. R. 218.—N.Z.

### PART XI. SECT. 5, SUB-SECT. 4.—C.

1. *Right to injunction—Restraining continuance of breach.*—A tenant is

entitled to an injunction to restrain his landlord from continuing a breach of his covenant for quiet enjoyment in the lease.—*RICKETSON v. SMITH* (1896), 16 N. S. W. Eq. 221.—AUS.

**Sect. 5.—Covenants for quiet enjoyment: Sub-sect. 4, C. & D. Sect. 6: Sub-sect. 1.]**

grantors of the lands & debts., & the former having requested ptfs. to pay the royalties to them instead of to debts., ptfs. on Oct. 7 declined to pay to debts. the royalties due on Oct. 8, & offered to refer the question to arbitration. On Oct. 12 debts. took forcible possession of the lands, & remained in possession of same. On Oct. 18 ptfs. tendered to debts. the money due, but the tender was refused. On Nov. 2 ptfs. instituted this action & now moved for an injunction to restrain debts. from taking or keeping possession of the lands in question & of the machinery & stock of manganese in or about the premises. The registered offices of ptfs. & debts. respectively were situate in London:—*Held*: if there was jurisdiction to grant the injunction sought for, such jurisdiction ought to be exercised with great caution, & as debts. were in actual possession of the lands they ought not to be disturbed & the motion must be refused.

What I am really asked to do is, in substance, in this action to give specific performance of an implied covenant for quiet enjoyment with reference to the lands, & in the present state of the authorities it is sufficient for me to say, for the present purpose, that if there be such a jurisdiction it is one which ought to be exercised with the greatest caution (STIRLING, J.).—BLACK POINT SYNDICATE, LTD. v. EASTERN CONCESSIONS, LTD. (1898), 70 L. T. 658; 15 T. L. R. 117.

**D. Damages.**

See, generally, DAMAGES, Vol. XVII., pp. 78 et seq.

**2751. Right to damages—Conveyance on sale distinguished.]**—(1) The rule that where a contract for the sale of real estate goes off in consequence of a defect in the vendor's title, the purchaser is not entitled to damages for loss of the bargain, does not apply to the case of a lease granted by one who has no title to grant it.

A. was in possession of premises under a lease from B., which would expire on Dec. 4, 1864. In Feb. 1860, A., in consideration of a premium of £400, obtained from B. a further lease of the same premises for twenty-one years & twenty-one days, to commence from the expiration of the former lease. On the death of B., in 1863, it was found that B. was only tenant for life, with power to grant leases in possession, & not in reversion, & consequently that the lease so granted by him to A. in Feb. 1860, was void. A. thereupon obtained from the reversioners a fresh lease for seven years, at a considerable increase of rent, & sued C., B.'s exor., upon the covenant for quiet enjoyment contained in the void lease:—*Held*: (2) A. was entitled to recover, besides the £400 premium which he had paid to B., & the costs of preparing the void lease, the value of what he had lost by B.'s breach of contract, substantially the difference between the value of the term professed to be granted to him by the lease of Feb. 1860, & that of the seven years' term which he obtained from the reversioners.—LOCK v. FURZE (1866), L. R. 1 C. P. 441; Har. & Ruth. 379; 35 L. J. C. P. 141;

15 L. T. 161; 30 J. P. 743; 14 W. R. 403, Ex. Ch.; affg. (1865), 19 C. B. N. S. 96.

*Annotations*:—As to (1) *Refd.* Wall v. City of London Real Property Co. (1874), 30 L. T. 53. As to (2) *Refd.* Wignell v. School for Indigent Blind (1882), 8 Q. B. D. 357; Wallis v. Hands, [1893] 2 Ch. 75; Grosvenor Hotel Co. v. Hamilton, [1894] 2 Q. B. 836. Generally, *Mentd.* Re Gray, [1901] 1 Ch. 239.

**2752. Measure of damages—Premium paid to lessor.]**—Deft. supposing himself the legal representative of lessee for years sold the term, & delivered the lease to ptlf. but without any assignment or formal conveyance, saying the premises were his & if any thing happened he would see ptlf. righted:—*Held*: ptlf. might maintain an action against him for money had & received, the rightful administrator or tenant for years having ousted ptlf. by ejectment.—CRIPPS v. READE (1796), 6 Term Rep. 606; 101 E. R. 728.

*Annotations*:—*Refd.* Clare v. Lamb (1875), L. R. 10 C. P. 334; Allen v. Richardson (1879), 13 Ch. D. 524. *Mentd.* Jones v. Ryde (1814), 1 Marsh. 157; Smith v. Mercer (1815), 6 Taunt. 76; Hall v. Conder (1857), 2 C. B. N. S. 22.

**2753.** — — —.]—LOCK v. FURZE, No. 2751, ante.

**2754.** — — —.]—Value of term.]—WILLIAMS v. BURRELL, No. 2566, ante.

**2755.** — — —.]—A lessor covenanted with his lessee for quiet enjoyment of the demised premises, & afterwards devised his real estate, subject to & charged with the payment of his debts. After the death of the lessor, the lessee was evicted, & brought his action of covenant against the exors. of the lessor, who pleaded *plene administravit*; whereupon the lessee took out judgment of assets, *quando*, etc., & procured the damages to be assessed upon a writ of inquiry. He then filed his bill against the devisees of the lessor, for satisfaction of the damages & costs out of the real estate of the lessor devised by his will:—*Held*: (1) although damages recovered in an action of covenant, brought in respect of breaches of covenant happening after the death of testator, were not a debt within 3 Will. & Mar. c. 14, yet they were a debt payable out of the real estate of testator, under the charge of debts thereon created by his will; (2) the devisees were not bound by the action brought, or the inquiry as to damages had against the exors., but were entitled to have the question of the liability of the estate of testator on the covenant tried in an action defended by the devisees themselves; (3) the lessee having recovered damages upon the covenant in the action directed by the ct., to which the devisees were parties, was entitled, as against the devisees, to the amount of such damages, to his costs of the ejectment, of the action brought against the exors., of the action on the covenant to which the devisees were parties, & of the suit, & also to interest on the damages & costs, to be computed from the time the amount was ascertained & judgment entered up in the action to which the devisees were parties.—MORSE v. TUCKER (1846), 5 Hare, 79; 15 L. J. Ch. 162; 6 L. T. O. S. 389; 10 Jur. 173; 67 E. R. 835.

*Annotations*:—As to (1) *Fold.* Hamer's Devisees' Case (1852), 2 De G. M. & G. 366. *Refd.* Varlo v. Faden (1859), 1 De G. F. & J. 211.

**2756.** — — —.]—How value calculated.]—LOCK v. FURZE, No. 2751, ante.

**PART XI. SECT. 5, SUB-SECT. 4.—D.**

**2756 1. Measure of damages—Value of term—How value calculated.]**—The measure of damages recoverable by a lessee for breach of a covenant of quiet enjoyment is the value of the unexpired term. In determining such value in the case of the lease of a farm

on a crop-payment rental the cost of working the farm & the probable profits must be considered.—HAACK v. MARTIN, [1926] 1 D. L. R. 76; [1925] 3 W. W. R. 769.—CAN.

m. — — — & other actual damage sustained.]—Where a covenant for quiet enjoyment in a lease is broken & the lessee put out of possession of

the premises, the damages to which he is entitled are the value of the unexpired portion of the term & such other actual damage as he has sustained.—EAGLES HALL ASSOCN. OF SWIFT CURRENT, LTD. v. BERTIN, [1922] 1 W. W. R. 374; 65 D. L. R. 232; 15 Sask. L. R. 171.—CAN.

n. — — —.]—FORREST v.

2757. ———.]—GROSVENOR HOTEL CO. v. HAMILTON, No. 2717, *ante*.

2758. ——— Costs of collateral actions—Ejectment against lessee—and mesne profits recovered therein.]—WILLIAMS v. BURRELL, No. 2566, *ante*.

2759. ———.]—MORSE v. TUCKER, No. 2755, *ante*.

2760. ——— Trespass against lessee—and damages recovered therein.]—Deft. demised premises for a term of years to pltf., & covenanted that pltf. should occupy same during the term "without any interruption whatsoever from or by deft., his exors., etc., or any other person or persons lawfully claiming by, from, or under him or them." An action of trespass was afterwards brought by a person claiming under deft. against pltf., who gave notice of it to deft. Deft. paid no attention to the notice, & pltf., acting on his own judgment & without express authority, defended the action. A verdict was eventually found against him, & he was obliged to pay damages & costs. In an action against deft. his landlord, for breach of the covenant for quiet enjoyment contained in the demise:—*Held*: pltf. was entitled to recover from deft. the costs & damages he had paid, & also the expenses he had himself incurred in defending the action of trespass.—ROLF v. CROUCH (1867), L. R. 3 Exch. 44; 37 L. J. Ex. 8; 17 L. T. 249; 16 W. R. 252.

Annotation:—*Refd.* G. W. Ry. v. Fisher, [1905] 1 Ch. 316.

2761. ——— Action against executors of lessee—Insufficiency of personal estate.]—MORSE v. TUCKER, No. 2755, *ante*.

2762. ——— Costs of preparing void lease.]—LOCK v. FURZE, No. 2751, *ante*.

2763. ——— Interest on damages awarded.]—MORSE v. TUCKER, No. 2755, *ante*.

2764. ——— Costs awarded to successful joint defendant—Payable by unsuccessful joint defendant.]—CHILD v. STENNING, No. 2766, *post*.

2765. ——— Nominal damages—Infringement only temporary.]—A. was the sub-lessee of stalls & boxes in Her Majesty's Theatre, Haymarket. The leases under which he held gave him free admission to the stalls & boxes at all performances except balls & masquerades, & reserved to the lessor access for the purpose of painting & repairing. The lessor covenanted with A. for quiet enjoyment. A.'s lessor was himself the lessee of the whole of the theatre for a long term of years, & was under a covenant with the freeholder not to convert the theatre to any but theatrical purposes. The theatre was burnt down & a new one erected in its place, & A.'s lessor then let or agreed to let the whole of the building to persons other than A. for the purposes of holding religious meetings, & these persons took possession of the theatre & boarded over the site of A.'s stalls & took down the partitions between the boxes which had been constructed on the sites of those originally leased to A. Upon motion to restrain A.'s lessor & the persons in possession of the theatre from interfering with A.'s right:—*Held*: there was an infringement of A.'s right by his lessor & the persons in possession of the theatre; but the theatre not being ready to be used as a theatre, & the persons in possession undertaking not to renew

their engagement with A.'s lessor, which was a short one, no injunction was granted, but A. was awarded a shilling damages & the costs of the suit.—LEADER v. MOODY (1875), L. R. 20 Eq. 145; 44 L. J. Ch. 711; 32 L. T. 422; 23 W. R. 606.

Annotation:—*Refd.* Holford v. Acton U. C., [1898] 2 Ch. 240.

2766. ——— No actual eviction.]—In an action for damages for breach of the covenant for quiet enjoyment in a lease, there being disturbance of enjoyment but not eviction, the measure of damages is the actual damages sustained up to the date of the issuing of the writ, & in the absence of evidence of actual damage, such damages will be nominal. A. & B. were lessees of C., & B. under his lease claimed a right of way over A.'s land. C. supported A.'s title, & insisted that B. had no such right of way. A. having brought an action against B. & C., claiming as against B. an injunction, & in the alternative, as against C. damages for the breach of his covenant for quiet enjoyment contained in A.'s lease, judgment was given for B. with costs against A., & £100 damages were awarded to A. in respect of C.'s breach of covenant, but the costs of B. ordered to be paid by A. were not included in such damages. On appeal as to the *quantum* of damages:—*Held*: (1) the damages, in the absence of evidence of actual damage, must be reduced to 40s.; (2) A. was entitled by way of increased damages to the costs of B.—CHILD v. STENNING (1879), 11 Ch. D. 82; 48 L. J. Ch. 392; 40 L. T. 302; 43 J. P. 479; 27 W. R. 462, C. A.; *varying* (1878), 7 Ch. D. 413.

Annotations:—As to (1) *Refd.* Clarke v. Yorke (1882), 47 L. T. 381. As to (2) *Refd.* Roth v. Tayson, Townsend (1896), 1 Com. Cas. 306; Sanderson v. Blythe Theatre Co., [1903] 2 K. B. 533. *Generally, Mentd.* Tritton v. Bankart (1887), 56 L. J. Ch. 629.

2767. ——— Direct lease from head lessor obtained.]—Pltf., in 1876, took an assignment of a lease, granted by deft., for a term expiring Mar. 25, 1887, at a rent of £180, & containing a covenant for quiet enjoyment, which included disturbance by deft.'s superior lessors. In 1883, pltf. was informed by the ground landlord that she should have to quit the premises on Mar. 25, 1886, at which date the head lease expired. An agreement was then negotiated, & completed in 1885, for a new lease direct from the ground landlord to pltf. from Mar. 25, 1886, at a rent of £100. In Oct. 1885, pltf. commenced this action upon the covenant for quiet enjoyment, claiming as damages a year's interest on the sums which she had to pay under the agreement for repairs & as premium for the new lease:—*Held*: the action was maintainable, but pltf. was only entitled to nominal damages.—JONES v. HAWKINS (1886), 3 T. L. R. 59.

2768. ——— All loss consequential on lessor's wrongful acts—Expense of removing business.]—GROSVENOR HOTEL CO. v. HAMILTON, No. 2717, *ante*.

## SECT. 6.—COVENANTS RUNNING WITH THE LAND.

### SUB-SECT. 1.—IN GENERAL.

*See, now, Law of Property Act, 1925 (c. 20), ss. 78-80, 82, 141, 142.*

GREAVES, [1923] 3 D. L. R. 816; 3 W. W. R. 658.—CAN.

o. ——— Nominal damages—Speculative lease.]—Both parties had been speculating as to the probability of the lessee losing the property, & thus perfecting a lease of mutual advantage:—*Held*: having regard to the relations of the parties only

nominal damages would be adjudged.—DAVIDSON v. DES BARRÈS (1892), 7 Nfld. L. R. 672.—NFLD.

p. ——— All loss consequential on lessor's wrongful acts.]—Under a lease containing a covenant for quiet enjoyment, the lessee was prevented from using a portion of the property covered by the lease by reason of the lessors

permitting a tenant at will to remain in possession:—*Held*: the lessee was entitled to damages for breach of the covenant for quiet enjoyment & for anticipated profits such as would have occurred & grown out of the contract itself as a direct & immediate result of its fulfilment.—CHRISTIN v. DEY, [1923] 3 D. L. R. 1116; 52 O. L. R. 308.—CAN.

**Sect. 6.—Covenants running with the land: Sub-sects. 1, 2, 3, 4 & 5.]**

**2769. Burden of covenant runs with the land.]—**

*Semble*: the burden of a covenant, not involving a grant, never runs with the land at law except as between landlord & tenant.—AUSTERBERRY v. OLDHAM CORPN. (1885), 29 Ch. D. 750; 55 L. J. Ch. 633; 53 L. T. 543; 49 J. P. 532; 33 W. R. 807; 1 T. L. R. 473, C. A.

*Annotations*:—*Consd.* L. C. C. v. Allen, [1914] 3 K. B. 642. *Reid*, Hall v. Ewin (1887), 57 L. T. 831; Rogers v. Hosegood, [1900] 2 Ch. 388; Nathan v. Rouse (1904), 2 L. G. R. 1304; Hubbard v. Weldon (1909), 25 T. L. R. 356; Whitmores (Edenbridge) v. Stanford, [1909] 1 Ch. 427; Chelsham & Woldingham Assocn. v. Hayward (1911), 76 J. P. 52. *Mentd.* Mid. Ry. v. Watton (1886), 17 Q. B. D. 30; A.-G. v. Simpson, [1901] 2 Ch. 671; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140; Palliser v. Dover Corpn. & Dover Harbour Board (1914), 58 Sol. Jo. 379; Smith v. Colbourne, [1914] 2 Ch. 533; *Re* Woking Urban District Council (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300.

**2770. Covenant by one with himself & others—Void.]**—Testator directed that his trustees should, if requested to do so, give a lease of a freehold house forming part of his estate to his son C., at a rent to be fixed by arbitration, & that the lease should contain a lessee's covenant to repair & other covenants usual in a London repairing lease. C. was himself one of the trustees; he exercised his option, & a lease was executed between C. & his co-trustees as lessors & C. as lessee, whereby the trustees let the house to C. for twenty-one years, & he covenanted for himself, his exors., administrators & assigns, with the lessors, their heirs & assigns, amongst other things to keep the property in repair, & not to assign without the lessor's consent. C. entered into possession of & carried on business on the premises till he sold the business to a co., & assigned the term to them. They issued debentures secured by a trust deed which included the lease. The lessors brought this action against the trustees of the debenture trust deed for a declaration that the lease was binding on defts., & that they held the premises subject to the lessee's covenants. Defts., who had never been in possession, insisted that by reason of the facts that the covenantor was himself one of the covenantees, & that the covenants were joint & not joint & several, they were void, & created no obligation by which defts. were bound:—*Held*: there was no ground for rectification or for holding that defts. ought to be treated as tenants from year to year; the lease was not void in law, but the covenants were by one person with himself & others jointly & were void; & there was therefore no covenant which could run with the land & impose any personal liability on defts.—NAPIER v. WILLIAMS, [1911] 1 Ch. 361; 80 L. J. Ch. 298; 104 L. T. 380; 55 Sol. Jo. 235.

*See, now*, Law of Property Act, 1925 (c. 20), s. 82.

#### SUB-SECT. 2.—NECESSITY FOR LEASE UNDER SEAT.

*See* Law of Property Act, 1925 (c. 20), s. 52.

**2771. Necessity for deed.]**—In *assumpsit*, brought by the assignee of a reversion against a tenant in occupation under a lease for a term of years granted by the assignor, not under seal, for breach of covenants contained in the lease:—*Held*: on the issue raised by the plea of *non tenuit*, evidence was properly admitted to show, that deft. was in fact tenant of the land, on the terms stated in the declaration. *Qu.*: whether 32 Hen. 8, c. 34, which gives assignees of rever-

sions the right of action against parties "holding" under leases from former reversioners, extends to leases not under seal.—BRYDGES v. LEWIS (1842), 3 Q. B. 603; 2 Gal. & Dav. 763; 11 L. J. Q. B. 280; 114 E. R. 639; *sub nom.* BRIDGES v. LEWIS, 6 Jur. 837.

*Annotations*:—*Reid*, Arden v. Sullivan (1850), 14 Q. B. 832; Smith v. Egginton (1874), 30 L. T. 521.

**2772.**—[32 Hen. 8, c. 34, applies to lease by deed only, & where a lease is not under seal the assignee of the reversion cannot maintain *assumpsit* against the lessee for breach of his contract with the assignor to repair.—STANDEN v. CHRISTMAS (1847), 10 Q. B. 135; 16 L. J. Q. B. 265; 9 L. T. O. S. 169; 11 Jur. 694; 116 E. R. 53.

*Annotations*:—*Consd.* Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608. *Reid*, Hickman v. Machin (1869), 4 H. & N. 716; Elliott v. Johnson (1866), L. R. 2 Q. B. 120; Smith v. Egginton (1874), L. R. 9 C. P. 145; Phillips v. Miller (1875), L. R. 10 C. P. 420; Wedd v. Porter, [1916] 2 K. B. 61. *Mentd.* Turner v. Cameron's Coalbrook Steam Coal Co. (1850), 5 Exch. 932; Churchward v. Ford (1857), 2 H. & N. 446.

**2773.**—[The doctrine of conditions running with the land is confined to covenants annexed to the land by the indenture of demise (LUSH, J.).—ELLIOTT v. JOHNSON (1866), L. R. 2 Q. B. 120; 8 B. & S. 38; 36 L. J. Q. B. 44; 31 J. P. 212; 15 W. R. 253.

**2774.**—[The principle, that the assignee of a reversion is not bound by the terms in a lease not under seal, applies where the demise is of three windows in a factory, with the stipulation that the lessor shall provide steam power.

B. demised, by an instrument not under seal, three windows in a factory to ptfs. & stipulated to supply steam power. B. at the time of the demise was mtgor. in possession. His mtgees. sold to deft., who did not accept rent from ptfs., but continued to supply steam power. Subsequently a dispute arose as to the terms upon which ptfs. should continue tenants of deft., who thereupon cut off the steam power. Ptfs. having sued deft. for cutting off the steam power:—*Held*: no action would lie against deft.—SMITH v. EGGINGTON (1874), L. R. 9 C. P. 145; 43 L. J. C. P. 140; 30 L. T. 521.

*Annotation*:—*Reid*, Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608.

#### SUB-SECT. 3.—COVENANTS RELATING TO THINGS IN ESSE.

**2775. Assignee bound though not named.]**—SPENCER'S CASE, No. 2798, *post*.

**2776.**—[WINDSOR (DEAN & CHAPTER) v. HYDE (1601), 5 Co. Rep. 24 a; 77 E. R. 87; *sub nom.* HIDE v. WINDSOR (DEAN & CANONS), Moore, K. B. 399; *sub nom.* HYDE v. WINDSOR (DEAN & CANONS), Cro. Eliz. 552.

*Annotations*:—*Reid*, Bally v. Wells (1769), Wilm. 341; Adams v. Gibney (1830), 6 Bing. 656; Tremere v. Morison (1834), 1 Bing. N. C. 89; Penfold v. Abbott (1862), 32 L. J. Q. B. 67; Taylor v. Caldwell (1863), 3 B. & S. 826; Bonner v. Tottenham & Edmondton Permanent Investment Bldg. Soc. (1898), 68 L. J. Q. B. 114.

#### SUB-SECT. 4.—COVENANTS RELATING TO THINGS NOT IN ESSE.

**2777. Whether unnamed assignee bound.]**—SPENCER'S CASE, No. 2798, *post*.

**2778.**—[ANON. (1584), Moore, K. B. 159; 72 E. R. 504.

*Annotations*:—*Consd.* Vernon v. Smith (1821), 5 B. & Ald. 1; Minshall v. Oakes (1858), 2 H. & N. 793. *Reid*, Bally v. Wells (1769), Wilm. 341.

**2779.** —.]—Assignee is liable to all covenants which run with the land.—*SMITH v. ARNOLD* (1703), 3 Salk. 4; 91 E. R. 655.

*Annotation:—**Reid. Minshull v. Oakes* (1858), 2 H. & N. 793.

**2780.** —.]—Covenant to build [a house] & repair, does not bind assignee, unless named, being for a new thing.—*ANON.* (1700), 12 Mod. Rep. 384; 88 E. R. 1396.

**2781.** —.]—*GREY v. CUTHBERTSON*, No. 2793, *post*.

**2782.** —.]—By indenture of lease, B., the lessee, for himself, his exors., administrators & assigns, covenanted with the lessor to build four messuages on the land within a specified time from the date of the demise, & to pay rent, etc.; & there was a clause for re-entry on non-performance of this or certain other covenants. By a subsequent indenture, B. demised to pltf., the houses not having been built, & covenanted with pltf. that B., his heirs, exors. or administrators (not adding assigns), would pay the rent reserved by the former indenture, & perform, or effectually indemnify pltf. of, & against, all the covenants therein contained on the lessee's or assignees' part to be performed. B. afterwards assigned to defts. :—*Held*: the covenant to pltf. was not such a covenant as would pass with the reversion of the land & bind assignees not named; & therefore pltf. could not recover against defts. for not building the wall or indemnifying pltf. against eviction for breach of the covenant to build.

Assigns are not named; & the covenant, concerning a thing not *in esse* at the time of the demise, does not pass to assigns unnamed (*PARKE, B.*).—*DOUGHTY v. ROWMAN* (1848), 11 Q. B. 444; 17 L. J. Q. B. 111; 12 Jur. 182; 116 E. R. 543.

*Annotations:—**Consd. Dewar v. Goodman*, [1909] A. C. 72. *Reid. Minshull v. Oakes* (1858), 2 H. & N. 793; *Piggott v. Stratton* (1859), 1 De G. F. & J. 33.

**2783** —.]—*Held*: as the covenant was not a covenant absolutely to do a new thing, but to do something conditionally, viz., if new buildings were erected on the demised premises to repair them; & as when built they would be part of the thing demised, the assignee was bound, though not named.

No doubt the resolution in *Spencer's Case*, No. 2798, *post*, has been repeatedly cited or the same thing said as is said there; but that resolution is the foundation of the opinion; it never seems to have been acted on (*POLLOCK, C.B.*).—*MINSHULL v. OAKES* (1858), 2 H. & N. 793; 27 L. J. Ex. 194; 4 Jur. N. S. 169; 157 E. R. 327.

*Annotations:—**Consd. Dewar v. Goodman*, [1908] 1 K. B. 94. *Reid. Williams v. Earle* (1868), 9 H. & S. 740; *Re Stephenson, Poole v. The Co.*, [1915] 1 Ch. 802.

#### SUB-SECT. 5.—COLLATERAL COVENANTS.

**2784. Assignee not bound.**—*SPENCER'S CASE*, No. 2798, *post*.

**2785.** —.]—Collateral covenant in a lease, not running with the land, binds not assigns.—*UXBRIDGE (LORD) v. STAVELAND* (1747), 1 Ves. Sen. 56; 27 E. R. 888, L. C.

*Annotation:—**Consd. Keppell v. Bailey* (1834), 2 My. & K. 517.

**2786.** — **Payment of sum not amounting to**

**rent.**—*ANON.* (1587), Godb. 120; 78 E. R. 73; *sub nom. PURFREY'S CASE*, Moore, K. B. 243.

*Annotations:—**Reid. Bally v. Wells* (1769), Willm. 341; *Canham v. Rust* (1818), 2 Moore, C. P. 164; *Keppell v. Bailey* (1834), 2 My. & K. 517.

**2787.** —.]—*CHAWORTH v. PHILLIPS* (1610), Moore, K. B. 876; 72 E. R. 968.

*Annotation:—**Reid. Wright v. Burroughes* (1816), 3 C. B. 685.

**2788.** —.]—A declaration in covenant for non-payment of an annuity, must show for what time the sum was in arrear. The assignee of a term is not liable on a mere collateral covenant.—*MAYHO v. BUCKHURST* (1617), Cro. Jac. 438; 79 E. R. 374.

**2789.** —.]—A term for years was limited to A., pltf.'s testator, for securing a sum of money, & deft., in the mtge. deed, covenanted with A., his exors., administrators, & assigns, to pay the money at a certain day; after that day, A. died, having bequeathed to pltf. the sum so secured, & appointed pltf. & another his exors. The co-exor. assented to the bequest. In an action on the covenant, brought by pltf. in his own right :—*Held*: he was not entitled to sue as assignee; because the covenant was merely personal, & because the breach occurred in testator's lifetime.—*CANHAM v. RUST* (1818), 2 Moore, C. P. 164; 8 Taunt. 227; 129 E. R. 370.

*Annotation:—**Reid. Wedd v. Porter*, [1916] 2 K. B. 91.

**2790.** —.]—An agreement that pltf. should be paid £360, on Dec. 31, 1834 for £313 lent by him on Apr. 26, 1834, if four persons named should be alive on Dec. 31, & that pltf. should have the use of two boxes at the V. theatre, in the intermediate time, gratuitously, but if either of the four persons should die, pltf. should pay a reasonable sum for the use of the boxes :—*Held*: not an agreement running with the land, & therefore not binding, as to the use of the boxes, on an assignee of the theatre.—*FLIGHT v. GLOSSOP* (1835), 2 Bing. N. C. 125; 1 Hodg. 263; 2 Scott, 220; 4 L. J. C. P. 268; 132 E. R. 50.

**2791.** —.]—A landlord who had demised certain premises for twenty-one years by deed, at the rent of £230, agreed to enlarge the buildings, the lessees agreeing to pay 10 per cent. additional on the outlay. The buildings were accordingly made, & the lessees subsequently became bkpt., & their assignees took possession of the premises. In an action for use & occupation brought against the assignees :—*Held*: this was a collateral agreement, & not a contract running with the land, upon which the assignees were liable.—*LAMBERT v. NORRIS* (1837), 2 M. & W. 333; *Murp. & H. 29*; 6 L. J. Ex. 109; 1 Jur. 24; 150 E. R. 784.

**2792.** —.]—By an underlease, dated in 1869, A. demised the premises comprised in two original leases dated respectively in 1848 & 1863 (save & except such parts of the premises comprised in the original lease of 1848 as were comprised in an underlease dated in 1867) to B. for the residues of the original terms, except the last day of each, at the rents therein mentioned. The underlease to B. of 1869 contained a covenant by B., for himself, his heirs, exors., administrators, & assigns with the lessor, his exors., administrators & assigns, that he would, during the several terms thereby granted, pay all existing & future taxes, tithes,

#### PART XI. SECT. 6, SUB-SECT. 5.

**2784i. Assignee not bound.**—*HUTCHINSON v. RIPEKA TE PEEHI*, [1919] N. Z. L. R. 373.—N.Z.

**2786 i.** — *Payment of sum not amounting to rent.*—A covenant by the lessee to pay a fine upon the expiration of a term of sixty-one years does not amount to a reservation

obligatory upon the tenant in possession to pay the fine, over & above the rent reserved.—*INCHQUIN (EARL) v. BURNELL* (1795), 3 Ridg. Parl. Rep. 376, 420, 422, 424.—IR.

**Sect. 6.—Covenants running with the land: Sub-sects. 5, 6 & 7.]**

rates, assessments, & outgoing of every description, except the landlord's property tax, payable in respect of the premises thereby demised, & also would, during the term thereby granted, in respect of the premises firstly & secondly thereinbefore described & thereby demised, pay all such sums, not exceeding in any one year the sum of £100, as should for the time being be payable by the lessor, his exors., administrators, or assigns, on account of the like taxes, tithes, rates, assessments, & outgoing in respect of the premises comprised in & demised by the indenture of underlease of 1867. Ultimately the property comprised in the underlease of 1869 was assigned to C. for the residues of the terms granted by the underlease to B. The question was, whether the covenant as to the last mentioned taxes, etc. ran with the land, & whether C. was bound thereby, so as to make him liable to pay them:—*Held*: the case was governed by the rule in *Spencer's Case*, No. 2798, *post*, that the covenant as to those taxes, etc. was a covenant to pay a collateral sum of money, & was not one running with the land; & therefore C. was not liable thereunder.—*GOWER v. POSTMASTER-GENERAL* (1887), 57 L. T. 527; 4 T. L. R. 5.

*Annotation*:—*Consd.* *Dewar v. Goodman*, [1908] 1 K. B. 94.

**2793. — To deliver up fruit trees at valuation.]**—(1) Covenant by lessor against assignee of lessee, on a covenant by the lessee, for himself, his exors. & administrators, to pay to the lessor the amount of fruit trees, etc. to be planted by the lessee according to an appraisement to be made by two persons, one to be chosen by each of the parties. Breach that deft. refused to name a person to make the appraisement:—*Held*: this covenant did not run with the land, & the assignee was not bound.

(2) Plff. is not without remedy; he may bring an action against the original lessor, who always remains liable; but his right of action for a breach of this covenant cannot be extended to an assignee, without his being named in the covenant, as the subject-matter of it does not relate to a thing *in esse* at the time of the demise (*per Cur.*).—*GREY v. CUTHBERTSON* (1785), 4 Doug. K. B. 351; 2 Chit. 482; 99 E. R. 917.

*Annotation*:—*Generally*, *Mentd.* *Canham v. Rust* (1818), 2 Moore, C. P. 164.

**2794. — As to persons employed on premises.]**—(1) In a lease of ground, with liberty to make a watercourse & erect a mill, the lessee covenanted for himself, his exors., etc., & assigns, not to hire persons to work in the mill who were settled in other parishes, without a parish certificate:—*Held*: this covenant did not run with the land, or bind the assignee of the lessee.

(2) This is a covenant in which the assignee is specifically named; & though it were for a thing not *in esse* at the time, yet being specifically named, it would bind him, if it affected the nature, quality or value of the thing demised, independently of collateral circumstances; or if it affected the mode of enjoying it (*LORD ELLENBOROUGH, C.J.*).—*CONGLETON CORPN. v. PATTISON* (1808), 10 East, 180; 103 E. R. 725.

*Annotations*:—*As to* (1) *Apld.* *Doe d. Calvert v. Reid* (1830), 10 B. & C. 849; *Keppell v. Bailey* (1834), *Coop. temp. Brough*, 298. *Refd.* *Walsh v. Fussell* (1829), 6 Bing. 163. *As to* (2) *Refd.* *Easterby v. Sampson* (1830), 6 Bing. 644; *Williams v. Earle* (1868), L. R. 3 Q. B. 739; *Fleetwood v. Hull* (1889), 23 Q. B. D. 35; *Horsey Estate v. Steiger*,

[1899] 2 Q. B. 79; *Rogers v. Hoagood*, [1900] 2 Ch. 388; *Woodall v. Clifton*, [1905] 2 Ch. 257; *Dewar v. Goodman*, [1908] 1 K. B. 94; *Forster v. Elvert Collier Co.*, *Quin v. The Same*, *Seed v. The Same*, *Morgan v. The Same*, [1908] 1 K. B. 629; *Ricketts v. Enfield*, [1909] 1 Ch. 544.

**2795. — Option to purchase adjoining property.]**—A lessor possessed of considerable freehold & leasehold property lying together, covenanted in a lease of parcel, that if he, his heirs or assigns, should, during the term, have any advantageous offer for the disposing of a certain adjoining freehold parcel, he, the lessor, his heirs or assigns, should not dispose of same without previously making an offer of that parcel to the lessee, his exors., administrators, or assigns, at 5 per cent. less than that offer. The lessor sold his entire property, including the demised land & the adjoining parcel, for an entire consideration in one entire contract, without offering the parcel to the covenantee:—*Held*: (1) this was no breach of the covenant; (2) the covenant did not enure to the assignee of the lease, though named.—*COLLISON v. LETTSOM* (1815), 6 Taunt. 224; 2 Marsh. 1; 128 E. R. 1020.

*Annotation*:—*As to* (1) *Refd.* *Keppell v. Bailey* (1834), 10 B. & C. 517.

**2796. — Indemnity against apprentice becoming chargeable to parish.]**—In an indenture of lease, the lessee covenanted with the lessor, his heirs & assigns, to indemnify the overseers for the time being of the parish in which the premises demised were situate from all costs & charges by reason of the lessee's taking an apprentice or servant who should thereby gain a settlement within, or become chargeable to the parish:—*Held*: (1) a valid covenant, although it was objected that it was unreasonable, in restraint of trade, & contrary to the policy of the poor laws; (2) the action was well brought by the exors. of the lessor, as the covenant was with him personally, & did not run with the land.—*WALSH v. FUSSELL* (1829), 6 Bing. 163; 3 Moo. & P. 457; 2 Man. & Ry. M. C. 280; 7 L. J. O. S. C. P. 261; 130 E. R. 1243.

*Annotation*:—*Generally*, *Mentd.* *Bennett v. Batten* (1850), 15 L. T. O. S. 181.

**2797. — Not to increase rent.]**—The owner of certain premises agreed to let them to deft. by written agreement, not under seal, specifying a certain rent, & containing the following clause: "I will agree not to increase your rent, & not to give you notice to quit, so long as you desire to continue my tenant":—*Held*: this constituted a mere personal agreement between the landlord & tenant, so as not to bind a subsequent purchaser of the landlord's interest, with or without notice.—*ROBERTS v. TREGASKIS* (1878), 38 L. T. 176.

**Covenants touching or concerning the thing demised.]**—*See* Sub-sect. 7, *post*.

**SUB-SECT. 6.—IMPLIED COVENANTS.**

*See, now*, Law of Property Act, 1925 (c. 20). ss. 59, 77 (5).

*See* Sect. 4, *ante*.

**SUB-SECT. 7.—COVENANT MUST TOUCH OR CONCERN THE THING DEMISED.**

**2798. General rule.]**—A lessee by indenture covenanted for himself, his exors. & administrators, that he, his exors. or assigns, would build a brick

wall upon part of the land demised, etc.:—*Held*: (1) if the lessee assigned his term, such covenant did not bind his assignee.

(2) Where a covenant extends to a thing *in esse*, parcel of the demise, such covenant shall go with the land, & shall bind the assignee, although he be not bound by express words.

(3) Although the covenant extends to a thing not *in esse* at the time of the demise, yet the assignee shall be bound if named, unless the thing to be done is merely collateral to the land & does not concern the thing demised.

(4) If a man leases sheep or other stock of cattle, or any other personal goods for any time, & the lessee covenants for him & his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them; & the lessee assigns the sheep over, this covenant shall not bind the assignee, for it is but a personal contract, & wants such privity as is between the lessor & lessee & his assigns of the land in respect of the reversion. But in the case of a lease of personal goods there is not any privity, nor any reversion, but merely a thing in action in the personality, which cannot bind any but the covenantor, his exors., or administrators, who represent him (*per CUR.*).

(5) If a man makes a lease for years by the word *concessi* or *demisi*, which implies a covenant, if the assignee of the lessee be evicted, he shall have a writ of covenant (*per CUR.*).—SPENCER'S CASE (1583), 5 Co. Rep. 16 a; 77 E. R. 72.

*Annotations*:—*As to* (1) *Refd.* Baily v. De Crespigny (1869), L. R. 4 Q. B. 180; Cooke v. Chilcott (1876), 3 Ch. D. 694; Andrew v. Aitken (1882), 22 Ch. D. 218. *As to* (2) *Consd.* Bally v. Wells (1769), Wilm. 341. *Apld.* Tatem v. Chaplin (1793), 2 Hy. Bl. 133; Vernon v. Smith (1821), 5 B. & Ald. 1; Doughty v. Bowman (1848), 11 Q. B. 444. *Refd.* Kitchen & Knight v. Bunkley (1663), 1 Keb. 565, 572; Wilkinson v. Rogers (1863), 3 New Rep. 145; Williams v. Earle (1868), L. R. 3 Q. B. 739. *As to* (3) *Consd.* Uxbridge v. Staveland (1747), 1 Ves. Sen. 56; Bally v. Wells (1769), Wilm. 341; Easterby v. Sampson (1830), 6 Bing. 644; Keppell v. Bailey (1834), 2 My. & K. 517. *Apld.* Hemmingway v. Fernandez (1842), 12 L. J. Ch. 130. *Consd.* Thomas v. Hayward (1869), L. R. 4 Exch. 311. *Apld.* Gower v. Postmaster-General (1887), 57 L. T. 527; Dewar v. Goodman (1908), 78 L. J. K. B. 209. *Consd.* Kicketts v. Entfield, [1909] 1 Ch. 544; *Re* Stephenson, Poole & Co., [1915] 1 Ch. 802. *Refd.* Grey v. Cuthbertson (1785), 2 Chit. 482; Flight v. Glossop (1835), 2 Bing. N. C. 125; Martyn v. Clue (1852), 18 Q. B. 661; Martyn v. Williams (1857), 1 H. & N. 817; Minshull v. Oakes (1858), 2 H. & N. 793; Wilson v. Hart (1865), 2 Hem. & M. 551; Stevens v. Copp (1868), L. R. 4 Exch. 20; Williams v. Earle (1868), L. R. 3 Q. B. 739; West v. Dobb (1869), 38 L. J. Q. B. 289; Rogers v. Hosegood, [1900] 2 Ch. 388. *As to* (4) *Consd.* Bally v. Wells (1769), Wilm. 341; Newman v. Anderton (1806), 2 Bos. & P. N. R. 224. *Refd.* Attoe v. Hemmings (1614), 2 Bulst. 281; Canham v. Rust (1818), 2 Moore, C. P. 164; Hooper v. Clark (1867), 8 B. & S. 150; Lybbe v. Hart (1885), 29 Ch. D. 8; Davis v. Town Properties Investment Corp., [1903] 1 Ch. 797. *As to* (5) *Refd.* Pomfret v. Riccroft (1669), 2 Keb. 569; Brewster v. Kitchell (1697), 1 Salk. 198; Williams v. Burrell (1845), 1 C. B. 402. *Generally, Refd.* London City v. Richmond (1701), 2 Vern. 421; Itvall v. Rolfe (1749), 1 Atk. 165; Knipe v. Palmer (1760), 2 Wils. 130; Vyvyan v. Arthur (1823), 2 Dow. & Ry. K. B. 670; Irving v. Cuthbertson (1860), 3 L. T. 335; Morland v. Cook (1868), L. R. 6 Eq. 252; Hayward v. Brunswick Bldg. Soc. (1881), 8 Q. B. D. 403; L. & S. W. Iy. v. Gomm (1882), 20 Ch. D. 562; Formby v. Barker, [1903] 2 Ch. 539; Wilkes v. Spooner, [1911] 2 K. B. 473; Long v. Gray (1913), 58 Sol. Jo. 46; L. C. v. Allen, [1914] 3 K. B. 642. *Mentd.* Lougher v. Williams (1873), 2 Lev. 92; Tovey v. Pitcher (1691), Carth. 177; Wollaston v. Hakewill (1841), 3 Man. & G. 297; Davies v. Lowndes (1843), 6 Man. & G. 471; Cottee v. Richardson (1851), 7 Exch. 143; Cuthbertson v. Irving (1860), 6 H. & N. 135; Hill v. Tupper (1863), 11 W. R. 784; Werderman v. Soc. Générale d'Electricité (1881), 19 Ch. D. 246; Johns v. Pink, [1900] 1 Ch. 296; G. N. Ry. v. I. R. Comrs., [1901] 1 K. B. 416; *Re* Nisbet & Potts' Contract, [1906] 1 Ch. 386; Barker v. Stickney, [1919] 1 K. B. 121; Kelly v. Barrett, [1924] 2 Ch. 379.

**2799.** —[—]—Where covenants relate to land, they run with it, attend upon the reversion, & the heir may bring the action.

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This was a covenant relating to the land, & for the advantage of the reversion; it would have gone to an assignee without his being named in the covenant, which proves it to be a covenant that runs with the land, & attends upon the reversion (*per CUR.*).—SALE v. KITCHINGHAM (1713), 10 Mod. Rep. 158; 88 E. R. 673.

**2800.** —[—]—CONGLETON CORPN. v. PATTISON, No. 2794, *ante*.

**2801.** —[—]—It has long been settled that such covenants only pass to an assignee as touch or concern the thing demised (MARTIN, B.).—MARTYN v. WILLIAMS (1857), 1 H. & N. 817; 26 L. J. Ex. 117; 28 L. T. O. S. 321; 5 W. R. 351; 156 E. R. 1430.

*Annotations*:—*Fold.* Norval v. Pascoe (1864), 4 New Rep. 390; Hastings v. N. E. Ry., [1898] 2 Ch. 674. *Refd.* Hooper v. Clark (1867), L. R. 2 Q. B. 200. *Mentd.* Indermaur v. Dames (1867), 36 L. J. C. P. 181.

**2802.** —[—]—After twenty years' user of demised premises, converted into a shop without licence contrary to the covenants in the lease, an assignee of the reversion cannot take advantage of a condition of re-entry for such user subsequent to the assignment. Whether the benefit of such a condition runs with the land, & can be taken advantage of by the assignees of the reversioner, depends on the nature & character of the covenant, & whether it affects the use & enjoyment of the demised premises, & not whether it has in fact deteriorated the value.—GIBSON v. DOEY (1857), 2 H. & N. 615; 27 L. J. Ex. 37; 30 L. T. O. S. 156; 21 J. P. 808; 6 W. R. 107; 157 E. R. 253.

*Annotations*:—*Apld.* Hepworth v. Pickles, [1900] 1 Ch. 108; *Re* Summerson, Downie v. Summerson, [1900] 1 Ch. 112, n. *Refd.* Gibbon v. Payne (1905), 22 T. L. R. 54. *Mentd.* Clippens Oil Co. v. Edinburgh & District Water Trustees, [1904] A. C. 64; Heath v. Deane, [1905] 2 Ch. 86.

**2803.** —[—]—There is a demise of an incorporeal hereditament & one of the conditions attached to the lease is, that at its expiration the lessee shall leave the land as well stocked with game as it was when he entered. It is a covenant which affects the value of the estate, & is valuable to the owner only on that ground; it affects the enjoyment of the estate; & it relates to a matter to be done on the land & touches & concerns the thing demised; the advantage of the covenant therefore clearly passes to the assignees of the reversion (COCKBURN, C.J.).—HOOPER v. CLARK (1867), L. R. 2 Q. B. 200; 8 B. & S. 150; 36 L. J. Q. B. 79; 31 J. P. 228; 15 W. R. 347; *sub nom.* HOOPER v. LANE, 16 L. T. 152.

**2804.** —[—]—THOMAS v. HAYWARD, No. 2897, *post*.

**2805.** —[—]—The true principle is that no covenant or condition, which affects merely the person, & which does not affect the nature, quality, or value of the thing demised or the mode of using or enjoying the thing demised, runs with the land (LORD RUSSELL, C.J.).—HORSEY ESTATE, LTD. v. STEIGER, [1899] 2 Q. B. 79; 68 L. J. Q. B. 743; 80 L. T. 857; 47 W. R. 644; 15 T. L. R. 367, C. A.

*Annotations*:—*Refd.* Gentle v. Faulkner (1899), 68 L. J. Q. B. 848; Jacob v. Down, [1900] 2 Ch. 156; Pannell v. City of London Brewery Co., [1900] 1 Ch. 496; *Re* Riggs, *Ex p.* Lovell, [1901] 2 K. B. 16; Fryer v. Ewart, [1902] A. C. 187; Woodall v. Clifton, [1905] 2 Ch. 257; Fox v. Jolly, [1916] 1 A. C. 1; Davenport v. Smith (1921), 91 L. J. Ch. 225; Civil Service Co-op. Soc. v. McGrigor's Trustee, [1923] 2 Ch. 347.

**2806.** —[—]—Land was demised to a lessee, who covenanted for himself & his assigns to repair buildings thereon subject to a clause of re-entry for breach. In an underlease, the underlessor covenanted for himself & his assigns with the underlessee to perform the covenants of the

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original lease so far as they related to such parts of the demised premises as were not comprised in the underlease. The underlessee covenanted to repair the premises demised by the underlease. The assignee of the superior lease committed a breach of his covenant to repair, & the successors in title of the superior lessor re-entered the whole of the premises & ejected the underlessee, who claimed damages for breach of covenant committed by the underlessor:—*Held*: the covenant in the underlease, as it did not concern the property demised therein, did not run with the land, & did not therefore bind the assignee of the superior lease, but was merely personal & collateral.—*DEWAR v. GOODMAN*, [1909] A. C. 72; 78 L. J. K. B. 209; 100 L. T. 2; 25 T. L. R. 137; 53 Sol. Jo. 116, II. L. *Annotations*:—*Consd.* *Ricketts v. Enfield*, [1909] 1 Ch. 544. *Refd.* *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

**2807. —**—[A covenant in a lease that the lessor & his assigns will not erect or permit to be erected any buildings in front of the building line on the land adjoining the demised premises is a covenant that "touches or concerns the thing demised" within the second resolution in *Spencer's Case*, No. 2798, *ante*, & therefore runs with the land.

A corp., owners of a building estate, granted a lease of a plot of land to A. for ninety-nine years, & entered into a restrictive covenant as above with A., his exors., administrators, & assigns, in respect of the plot of land adjoining the demised premises. Afterwards they entered into a building agreement with B. in respect of the adjoining plot of land, under which B. was to submit his building plans to them for approval, & on approval was to build forthwith in accordance with the plans, & on completion of his buildings was to have a ninety-nine years' lease of the plot. On B.'s plan, which did not show the building line, being approved, he forthwith erected his buildings, which infringed the building line. On complaint by the assignee of A.'s lease, the corp. served B. with a notice to observe the building line, but took no further steps against him, & subsequently proposed to grant him his lease:—*Held*: (1) covenant in A.'s lease touched or concerned the thing demised & ran with the land so as to entitle his assignee to sue the corp. on the covenant; (2) B. was an "assign" of the corp. & they were liable in damages for his breach of the covenant.

*Semble*: even if B. was not an "assign" the corp. had under the circumstances "permitted" a breach of the covenant.—*RICKETTS v. ENFIELD* (CHURCHWARDENS), [1909] 1 Ch. 544; 78 L. J. Ch. 294; 100 L. T. 362.

**2808. —** *Covenant to pay damages for breach of restrictive covenant.*—*HOWARD DE WALDEN (LORD) v. BARBER* (1903), 19 T. L. R. 183.

**2809. Tending to support & maintenance of thing demised.**—"Inherent" covenants & such as tend to the support & maintenance of the thing demised, where assigns are expressly mentioned, follow the reversion & the lease, let them go where they will (*WILMOT, C.J.*).—*BALLY v. WELLS* (1769), *Wilm.* 341; 3 *Wils.* 25; 97 E. R. 130.

*Annotations*:—*Apld.* *Vernon v. Smith* (1821), 5 B. & Ald. 1; *Sampson v. Easterby* (1829), 9 B. & C. 505. *Refd.* *Congleton Corp. v. Pattison* (1808), 10 East. 130; *Canham v. Rust* (1818), 2 Moore, C. P. 164; *Keppel v. Bailey* (1834), 2 My. & K. 517; *Politt v. Forrest* (1847), 11 Q. B. 949; *Martyn v. Williams* (1857), 1 H. & N. 817; *Minshull v. Oakes* (1858), 2 H. & N. 793; *Norval v. Pascoe* (1864), 4 New Rep. 390; *Williams v. Earle* (1868), L. R. 3 Q. B. 739; *Woodall v. Clifton*, [1905] 2 Ch. 257; *Re Stephenson, Poole v. The Co.*, [1915] 1 Ch. 802.

**2810. —**—(1) Where a lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor, & the owners of the other two thirds, for pulling down an old smelting mill, & building another of larger dimensions, upon a waste near the mines, & the lease contained a covenant to keep such new mill in repair, & so leave it at the expiration of the term, but did not contain a covenant to build it:—*Held*: such a covenant was to be implied, & the lessor of the one third might sue upon it in respect of his interest.

(2) The lease contained a demise of all mines & minerals then opened or discovered, or which might during the term be opened or discovered, in or under certain moors & waste lands: & also all smelting mills then standing upon the lands, with full liberty to sink shafts there, & to build thereon any mills or other buildings requisite for working the mines, *habendum* the demised premises, with the appurtenances for twenty-one years. The lessor afterwards granted his reversion of & in the demised premises, with the appurtenances, to G., who, by will, devised same to plffs.:—*Held*: the covenant to build the new smelting mill tended to the support & maintenance of the thing demised, & the assignee of the reversion might therefore sue upon it.—*EASTERBY v. SAMPSON* (1830), 6 Bing. 644; 1 Cr. & J. 105; 4 Moo. & P. 601; 130 E. R. 1429, Ex. Ch.; *affg.* *S. C. sub nom. SAMPSON v. EASTERBY* (1829), 9 B. & C. 505.

*Annotations*:—*As to* (1) *Consd.* *Stephens v. Junior Army & Navy Stores*, [1914] 2 Ch. 516. *Refd.* *Dewar v. Goodman*, [1909] A. C. 72. *As to* (2) *Consd.* *Ricketts v. Enfield*, [1909] 1 Ch. 544. *Refd.* *Keppel v. Bailey* (1834), 2 My. & K. 517. *Generally, Mentd.* *Asplin v. Austin* (1844), 5 Q. B. 671; *Dunn v. Sayles* (1844), 5 Q. B. 685.

## SUB-SECT. 8.—PARTICULAR COVENANTS.

### A. Agricultural Leases.

Agriculture generally, *see* AGRICULTURE, Vol. II., pp. 5 *et seq.*

**2811. Not to plough.**—Covenant lies against an assignee on a covenant not to plough, although assigns are not named in the deed, for it runs with the land; but not on a collateral act, as to build *de novo*, etc.—*COCKSON v. COCK* (1607), *Cro. Jac.* 125; 79 E. R. 109.

*Annotations*:—*Expld.* *Bally v. Wells* (1769), *Wilm.* 341. *Refd.* *Minshull v. Oakes* (1858), 2 H. & N. 793; *Fleetwood v. Hull* (1889), 23 Q. B. D. 35.

**2812. Not to sell off hay or manure.**—R., being the mtgee. of a farm belonging to B. & the collector of the rents thereof for B., but not in possession of the land, entered into an agreement under seal, expressed to be made between R. "as agent, hereinafter called 'the landlord'" & S., "hereinafter called 'the tenant,'" whereby R. let the farm to S. from year to year. The agreement provided that the tenant should consume on the premises all hay & fodder, spread upon the land all manure & compost produced on the farm, not sell off any hay or fodder, & at the end of the tenancy leave all manure & compost. R. subsequently sold & conveyed the farm to C., who brought an action to restrain S. from acting in contravention of the above mentioned provision:—*Held*: (1) C., as assignee of the reversion, could enforce any covenant in the lease which ran with the reversion; (2) the covenant as to hay & manure did so run.—*CHAPMAN v. SMITH*, [1907] 2 Ch. 97; 76 L. J. Ch. 394; 96 L. T. 662; 51 Sol. Jo. 428.

*Annotation*:—*Generally, Mentd.* *Arladno S.S. Co. v. McKelvie*, [1922] 1 K. B. 518.

*B. Against Assignment.*See Part XXI., *post*.*C. Erection of Buildings.*Building agreements & leases, see Part X., Sect. 2, *ante*.**2813. To build wall.**—SPENCER'S CASE, No. 2798, *ante*.**2814. —**—ANON. (1584), Moore, K. B. 159; 72 E. R. 504.*Annotations*:—**Consd.** Minshull v. Oakes (1858), 2 H. & N. 793. **Refd.** Bally v. Wells (1769), Wilm. 341; Vernon v. Smith (1821), 5 B. & Ald. 1.**2815. To build de novo.**—COCKSON v. COCK, No. 2811, *ante*.**2816. To build outhouse.**—SMITH v. ARNOLD (1703), 3 Salk. 4; 91 E. R. 655.*Annotation*:—**Refd.** Minshull v. Oakes (1858), 2 H. & N. 793.**2817. To build house.**—ANON. (1700), No. 2780, *ante*.**2818. —**—A man made a lease of a piece of ground, & the lessee covenanted to build, & having occasion for money, mortgaged his lease by assignment, & died insolvent, & the lessor preferred his bill against the mtgee., to compel him to build & to execute this agreement in specie; & it was decreed that the mtgee. should build according to the agreement of the mtgor., so that he could not quit the lease, though he would be content to lose his money.—ANON. (1701), Freem. Ch. 253; 22 E. R. 1192.**2819. —**—DOUGHTY v. BOWMAN, No. 2782, *ante*.**2820. —**—MINSHULL v. OAKES, No. 2783, *ante*.*D. Insurance against Fire.*See Part XX., *post*.*E. Mining Leases.*

See MINES.

*F. Quiet Enjoyment.*See Sect. 5, sub-sect. 1, *ante*.*G. Renewal.*See Part IX., Sect. 1, sub-sect. 2, *ante*.*H. Rent.*See Part XV., Sect. 2, *post*.*I. Repairs.*See Part XVIII., Sect. 1, *post*.*J. Restrictions on Use of Premises.*See Part XII., Sect. 3, sub-sect. 2, B., *post*.*K. Sporting Leases.*

See GAME, Vol. XXV., p. 359, Nos. 94, 95.

*L. Tied House Covenants.*See Part X., Sect. 7, sub-sect. 4, B. (a), *ante*.*M. Other Covenants.***2821. To reside upon land demised.**—TATEM v. CHAPLIN, No. 2878, *post*.**2822. To supply water.**—A covenant by a lessor to supply the premises demised, which were two houses, with a sufficient quantity of good water, at a rate therein mentioned for each house, is a covenant that runs with the land, & for the breach of which the assignee of the lessee may maintain an action against the reversioner.—JOURDAIN v. WILSON (1821), 4 B. & Ald. 266; 106 E. R. 935.*Annotation*:—**Refd.** Keppell v. Bailey (1834), 2 My. & K. 517.**2823. To carry coal upon railway to be built on land demised.**—A., an owner of land in the township of S., entered into articles of agreement with B., the lessee of a neighbouring colliery, by which he agreed to grant to B. a lease of part of the land for the purpose of forming a railway for the conveyance of coal to certain wharfs; & B., for himself, his exors., administrators & assigns, agreed with A., his heirs & assigns, to convey, upon the railway, all the coal to be gotten from the colliery or from any other lands or grounds in the township, & to pay to A., his heirs & assigns, twopenny for every ton of coal so conveyed. B. assigned his interest in the colliery & in the lands taken, under the articles of agreement, for forming the railway, together with the use of the railway to C.:—**Held**: the agreement to convey, upon the railway, all the coal, etc., & to pay 2d. per ton in respect of it, ran with the land, & consequently, it was binding on C.—HEMINGWAY v. FERNANDES (1842), 13 Sim. 228; 7 Jur. 888; 60 E. R. 89; *sub nom.* HEMMINGWAY v. FERNANDEZ, 12 L. J. Ch. 130.**2824. To resume possession.**—In Feb. 1863, J. K. made a lease of land to L. The land demised really amounted in quantity to, & was described in the lease as containing five acres, two roods, twenty poles, & the rent was fixed at £100 a year. The lease contained a clause declaring that it should be lawful "for J., upon giving to L., his exors., etc., or leaving at their usual or last known places of abode, three months' previous notice in writing of an intention to resume, for building purposes, the possession of any portion of the premises demised, to enter into such possession." It was agreed that "the portion or quantity of the ground so taken shall be valued at the rate of £20 per statute acre, & that the rent hereby reserved shall be proportionably reduced." J., in Nov. 1864, executed a deed by which he constituted himself & V., his brother, tenants in common of the land. In Oct. 1865, a notice signed by both J. & V. was served on L., declaring, in the words of the lease, their intention to resume, for building purposes, possession of the whole of the premises:—**Held**: they were entitled to do

## PART XI. SECT. 6, SUB-SECT. 8.—C.

**a. General rule.**—Covenants by a lessor to erect new buildings on the demised premises within a time specified, do not run with the reversion, though assigns may be bound if they are named.—RANKIN v. DANBY (1883), 9 V. L. R. 278.—AUS.**r. —**—McCLARY v. JACKSON (1887), 13 O. R. 310.—CAN.**t. —**—OFFICIAL ASSIGNEE OF DUNBAR v. DEAL & MANNING (1888), 7 N. Z. L. R. 9.—N.Z.**s. To erect steading.**—M'GUFFOG v. AGNEW (1822), 1 Sh. (Cl. of Sess.) 342.—SCOT.

## PART XI. SECT. 6, SUB-SECT. 8.—M.

**2824 i. To resume possession.**—MITCHELL v. McCAULEY (1893), 20 A. R. 272.—CAN.**b. To pay for improvements.**—**At expiration of lease.**—A covenant between lessor & lessee that the lessor should have the option of purchasing buildings on the demised premises, at the expiration of the term, at a valuation to be agreed upon between the lessor & the parties then being in lawful possession of the premises, is not a covenant running with the land, at all events, so far as the movable chattels are concerned.—MALMESBURY CONFLUENCE GOLD

MINING CO. v. TUCKER (1877), 3 V. L. R. 213.—AUS.

**c. —**—CHEYNE v. MOSES (1919), 12 Q. S. R. 74.—AUS.**d. —**—B. demised lands to W. by deed of lease, containing an agreement that at the expiration of the lease, he would pay W. one-half of the then value of any permanent improvements W. may have placed upon the lands:—**Held**: the liability to pay for the improvements ran with the land.—BERRIE v. WOODS (1886), 12 O. R. 693.—CAN.**e. Option to purchase.**—A lease from A. to B., contained a covenant

**Sect. 6.—Covenants running with the land: Sub-sect. 8, M. Sect. 7: Sub-sects. 1, 2, 3 & 4. Sects. 8 & 9. Part XII. Sect. 1: Sub-sect. 1.]**

so; the clause respecting the proportionate diminution of the rent did not restrict them to the exact amount of five acres; the deed of 1864 did not destroy the right of entry reserved by the lease; the two brothers were, under 23 & 24 Vict. c. 154, s. 1, "the landlord" entitled to the possession; & the notice signed by J., whether taken as given for himself alone, or as given by him for himself & his brother, was perfectly good.—**LIDDY v. KENNEDY** (1871), L. R. 5 H. L. 134; 20 W. R. 150, H. L.

## SECT. 7.—COVENANTS FOR TITLE.

### SUB-SECT. 1.—EXPRESS COVENANTS.

*See, now, Law of Property Act, 1925 (c. 20), s. 76.*

**2825. Extent of covenant—Qualification by subsequent covenants—For quiet enjoyment.]—**Debt on bond for performance of covenants in an assignment of a lease, in which it was covenanted that it then was a good & indefeasible lease, & that pltf. should quietly enjoy the, etc., during the whole residue of the term without any let or disturbance of debts. A stranger entered, & breach was assigned that at the time of making the assignment the lease was not good & indefeasible. The breach was well assigned, for the first sentence was distinct, & contained a general covenant not restrained by the latter sentence.—**GAINSFORD v. GRIFFITH** (1867), 1 Saund. 58; 2 Keb. 201, 213; 85 E. R. 69; *sub nom.* **GAINSFORD v. GRIFFITH**, 1 Sid. 328.

**Annotations:—***Distd.* **Nind v. Marshall** (1819), 1 Brod. & Bing. 319. *Refd.* **Browning v. Wright** (1799), 2 Bos. & P. 13; **Barton v. Fitzgerald** (1812), 15 East, 530; **Foord v. Wilson** (1818), 2 Moore, C. P. 592; **Linc v. Stephenson** (1838), 4 Bing. N. C. 678. *Mentd.* **Hankin v. Broomhead** (1804), 3 Bos. & P. 607; **Webb v. James** (1841), 11 L. J. Ex. 38; **Branscombe v. Scarborough** (1844), 6 Q. B. 13; **Betta v. Burch** (1859), 28 L. J. Ex. 267; **Oshorne v. Kales** (1862), 2 Moo. P. C. C. N. S. 100; **Preston v. Danie** (1872), 42 L. J. Ex. 33.

**2826. ———.]—**The assignor in a deed of assignment of a lease, after reciting the original lease granted to another for the term of ten years, which by mesne assignments had vested in him, & that pltf. had contracted for the absolute purchase of the premises, bargained, sold, assigned, transferred, & set over the same to pltf., for & during all the rest, etc., of the said term of ten years in as ample manner as the assignor might have held the same, subject to the payment of rent & performance of covenants; & then covenanted that it was a good & subsisting lease, valid in law, in & for the said premises thereby assigned, & not forfeited, etc., or otherwise determined, or become void or voidable:—*Held*: the generality of this covenant for title, which was supported by the recital of the bargain for an absolute term of ten years, was not restrained by other covenants which went only to provide for or against the acts of the assignor himself, or those who claimed under him.—**BARTON v. FITZGERALD** (1812), 15 East, 530; 104 E. R. 944.

**Annotations:—***Refd.* **Foord v. Wilson** (1818), 8 Taunt. 543; **Nind v. Marshall** (1819), 1 Brod. & Bing. 319; **Linc v.**

that if B. should, during the continuance of the lease, be desirous of purchasing the lands demised, A. would, on payment of \$500, convey the fee simple to him. The lease further provided that the covenants & agreements contained in it should be binding upon the respective heirs, exors., administrators, & assigns of the parties. B. assigned the lease to pltf.:—*Held*:

the covenant ran with the land.—**ALBERT BRICK, LIME & CEMENT CO. v. NELSON** (1888), 27 N. B. R. 276.—**CAN.**

*1. To heat rooms in a flat.]—***NANKIN v. STARLAND, LTD.** (1910), 15 W. L. R. 520.—**CAN.**

*2. To allow use of conduit for water.]—*A covenant by a lessor with

**Stephenson** (1838), 4 Bing. N. C. 678. *Mentd.* **S.S. Magnhild v. McIntyre**, (1920) 3 K. B. 321.

**2827. — Acts of lessor & those claiming under him—Lease pur autre vie.]—**L., by an indenture reciting that he was possessed of a term for years provided one C. should so long live, granted & assigned the term to S., & covenanted, that notwithstanding any act, deed, matter or thing, done by him at any time heretofore, the lease was, at the time of the assignment, a good, valid & effectual lease, & that the same, & the term of eleven years therein expressed, was in full force & effect, & in nowise forfeited, surrendered, assigned, determined or otherwise become void or voidable, or prejudicially affected in any manner howsoever, otherwise than by effluxion of time; & also, that for & notwithstanding any such act, he, L., had full power to assign; & also for quiet enjoyment against all acts done by or through him. Before the assignment, C. had died, & L. knew the fact:—*Held*: (1) pltf. could not recover, for L.'s express covenants for title were only against the acts, etc., of himself & those claiming under him & therefore the determination of the term by the death of C. was not a breach of the covenants; (2) no absolute covenant for title could be implied from the words of grant, there being an express qualified title.—**STANNARD v. FORBES** (1837), 6 Ad. & El. 572; 1 Nev. & P. K. B. 633; Will. Woll. & Dav. 321; 6 L. J. K. B. 185; 112 E. R. 210.

**2828. — Lease for lives—Does not imply all lives in existence.]—**By deed of July, 1853, after reciting a lease of Mar. 10, 1847, from E. to deft., for the lives of A., B. & C. & the survivors or survivor of them, deft. conveyed the premises to pltf., to hold for the lives of A., B. & C., & the survivors or survivor of them, & covenanted "that the lease of Mar. 10, 1847, is a good, valid & subsisting lease in the law, for the lives of A., B. & C., & the survivors or survivor of them, & is not forfeited, surrendered or become void or voidable." B. having died before July, 1853, pltf. sued deft. for a breach of the covenant:—*Held*: the mention of the three lives was mere matter of description, & the covenant only amounted to a covenant that the lease was still subsisting, & not to an implied covenant that the three lives were still in existence.—**COATES v. COLLINS** (1871), L. R. 7 Q. B. 144; 41 L. J. Q. B. 90; 26 L. T. 134; 36 J. P. 19; 20 W. R. 187, Ex. Ch.

**2829. Express covenant excludes implied.]—****STANNARD v. FORBES**, No. 2827, *ante*.

### SUB-SECT. 2.—IMPLIED COVENANTS.

**2830. From what words implied—Demise.]—****HOLDER v. TAYLOR**, No. 2746, *ante*.

**2831. ———.]—**(1) *Dimiscrunt* imports a joint covenant as to the interest granted.

(2) The action as to the breach of their not being seised at the time of the demise ought to have been against both lessors, & cannot be maintained against the deft. alone (*per* CUR.)—**COLEMAN v. SHERWIN** (1689), 1 Salk. 137; Carth. 97; 91 E. R. 128.

**Annotation:—***Generally, Mentd.* **Johnston v. Wilson** (1740), 7 Mod. Rep. 345.

a lessee, that it should be lawful for the lessee, during the continuance of the demise, to make use of a conduit, made for carrying off certain waste water, & to take such waste water for his own use:—*Held*: a covenant running with the land.—**ATHOL v. MIDLAND GREAT WESTERN RY. CO.** (1868), 1 R. 3 C. L. 333.—**IR.**

2832. ———.]—FRASER v. SKEY, No. 2846, *post*.  
 2833. ———.]—BURNETT v. LYNCH, No. 2611, *ante*.  
 2834. ———.]—LINE v. STEPHENSON, No. 2582, *ante*.  
 2835. ———.]—BAYNES & Co. v. LLOYD & SONS, No. 2629, *ante*.  
 2836. ——— To hold demised premises.]—MOSTYN v. WEST MOSTYN COAL & IRON CO., No. 2577, *ante*.  
 2837. ——— Let.]—MOSTYN v. WEST MOSTYN COAL & IRON CO., No. 2577, *ante*.  
 2838. ——— "Agree to let."]—BAYNES & Co. v. LLOYD & SONS, No. 2629, *ante*.  
 2839. From what circumstances implied—Parol demise.]—BANDY v. CARTWRIGHT, No. 2598, *ante*.  
 2840. ——— Agreement to let.]—HOARE v. CHAMBERS (1895), 11 T. L. R. 185.  
 2841. ——— Relationship of landlord & tenant.]—BAYNES & Co. v. LLOYD & SONS, No. 2629, *ante*.  
 2842. Extent of covenant—Covenant by under-  
 lessor—Conditions governing tenure of head lease.]—HOARE v. CHAMBERS (1895), 11 T. L. R. 185.

SUB-SECT. 3.—ON AGREEMENT FOR LEASE.  
 See Part II., Sect. 6, *ante*.

- SUB-SECT. 4.—BREACH OF COVENANT.  
 2843. Effect of breach—Lessor without title as to part of premises—Refusal by lessee to take such part.]—MOSTYN v. WEST MOSTYN COAL & IRON CO., No. 2577, *ante*.  
 2844. Action for breach—Covenant joint—Joinder of both covenantors.]—COLEMAN v. SHERWIN, No. 2831, *ante*.  
 2845. ——— What plaintiff must show—Estate *pur autre vie*.]—In an action of covenant, for a breach of a covenant contained in a lease for six years, if R. should so long live, "that the lessor had full power & lawful authority to make the demise," *pltf.* need not show that R. was alive at the time of the commencement of the lease, or at the time of the action brought, & *pltf.* in assigning the breach may aver generally that *deft.* had not full power & lawful authority to demise, etc., without showing what person had right, title, etc., in the lands & tenements demised at the time

of making the lease.—BRADSHAW'S CASE (1612), 9 Co. Rep. 60 b; Jenk. 305; 77 E. R. 823; *sub nom.* SALMAN v. BRADSHAW, Cro. Jac. 304.

*Annotations*:—*Refd.* Gyll v. Glass (1612), Cro. Jac. 312; Muscot v. Ballet (1615), Cro. Jac. 369. *Mentd.* Fry v. Porter (1870), 1 Mod. Rep. 300; Gale v. Reed (1806), 8 East, 80.

2846. ——— Eviction of assignee of plaintiff.]—(1) In breach of covenant on *deft.*'s demise, for not having title to demise for the whole of the term demised, whereby *pltf.*'s assignee of the lease was evicted, & *pltf.* put to costs in an action against him by such assignee, for such eviction; *pltf.* must show who evicted the assignee; & merely stating that a third person was seised in fee of the premises, & that the assignee was evicted generally, is not sufficient.

(2) *Semble*: under the word "demise," the lessee may maintain an action of covenant against the lessor, for not having sufficient power to demise for the whole term, whereby *pltf.* was put to expense in procuring a better title for whole term.—FRASER v. SKEY (1773), 2 Chit. 616.

*Annotation*:—*Refd.* Line v. Stephenson (1838), 1 Arn. 294.

2847. ——— Whether eviction by party claiming under plaintiff.]—A declaration alleging an eviction, as a breach of a covenant for quiet enjoyment, must not leave it matter of doubt, whether the evictor might not have come in under title from *pltf.* himself.—BROOKES v. HUMPHREYS (1838), 5 Bing. N. C. 55; 7 Dowl. 118; 6 Scott, 756; 1 Arn. 379; 8 L. J. C. P. 34; 2 Jur. 945; 132 E. R. 1025.

#### SECT. 8.—EFFECT OF COMPULSORY PURCHASE ON COVENANTS.

See COMPULSORY PURCHASE OF LAND, Vol. XI., p. 279, Nos. 2064–2070.

#### SECT. 9.—RIGHTS AND LIABILITIES OF PERSONAL REPRESENTATIVES.

Enforcement of rights of deceased.]—See EXECUTORS, Vol. XXIII., pp. 290–292, 300, 304, Nos. 3563–3577, 3657, 3687, 3688, 3695.

Liability for obligations of deceased.]—See EXECUTORS, Vol. XXIV., pp. 618–620, 637–644, Nos. 6487–6507, 6631–6707.

## Part XII.—Restrictions on Use of Premises.

### SECT. 1.—IMMORAL OR ILLEGAL PURPOSES.

#### SUB-SECT. 1.—IMMORAL PURPOSES.

Void & illegal contracts generally, see CONTRACT, Vol. XII., pp. 234 *et seq.*

2848. Lessor's right of action—For use & occupation.]—*Assumpsit* for use & occupation will not lie where the premises are let for an illegal purpose, or what is *contra bonos mores*.—GIRARDY v. RICHARDSON (1793), 1 Esp. 13, N. P.

*Annotation*:—*Refd.* Ritchie v. Smith (1848), 6 C. B. 462.

2849. ———.]—If a party lets lodging to

an immodest woman, to enable her to consort with the other sex, he cannot recover in an action for the lodging so supplied; but if the woman merely lodges there, & receives her visitors elsewhere, he may.—APPLETON v. CAMPBELL (1820), 2 C. & P. 347, N. P.

*Annotations*:—*Refd.* Ritchie v. Smith (1848), 6 C. B. 462; Taylor v. Chester (1869), 10 B. & S. 237.

2850. ——— Purpose within knowledge of lessor.]—CRISP v. CHURCHILL (1794), cited in 1 Bos. & P. at p. 340; 126 E. R. 939.

*Annotations*:—*Refd.* Lloyd v. Johnson (1798), 1 Bos. & P. 340; Ritchie v. Smith (1848), 6 C. B. 462.

### PART XI. SECT. 7, SUB-SECT. 4.

*h.* Action for breach—Lessor unable to give possession—Previous tenant holding over.]—By agreement in writing *deft.* agreed to let to *pltf.* certain

property for five years from a date fixed. *Deft.* was prevented from giving possession by reason of his tenant holding over. In an action for damages for breach of covenant:—*Held*: it is no defence that *pltf.*

adopted *deft.*'s tenant as his own, merely allowing his name to be used for the purpose of enforcing possession.—MCDONALD v. ENGLISH (1881), 6 Nfld. L. R. 278.—NFLD.

**Sect. 1.—Immoral or illegal purposes: Sub-sects. 1 & 2. Sects. 2 & 3: Sub-sect. 1.]**

**2851. ——— Rent accrued due after knowledge.]**—In an action for use & occupation of a lodging under a weekly tenancy, where it did not appear that the lodging was originally let for the purposes of prostitution:—*Held*: pltf. could not recover the weekly rent, which accrued after he was fully informed, that deft. occupied the lodgings for the purposes of prostitution.—*JENNINGS v. THROGMORTON* (1825), Ry. & M. 251, N. P.

*Annotations*:—*Consd.* *Smith v. White* (1866), L. R. 1 Eq. 626. *Refd.* *Taylor v. Chester* (1869), 10 B. & S. 237.

**2852. ——— ]**—*CROSSE v. MURRAY* (1850), 15 L. T. O. S. 206.

**2853. ——— Premises let for purposes of immorality.]**—*CROSSE v. MURRAY* (1850), 15 L. T. O. S. 206.

**2854. ——— Lease by agent of lessor.]**—Pltf. by his agent let a flat to deft. for a term of three years. The agent knew that deft. was the mistress of a certain man, & he assumed that the rent would come through her being a kept woman & would come from the man whose mistress she was; & he knew that the man went constantly to the flat to visit her. After the expiration of the term deft. continued as tenant from year to year. In an action to recover the rent:—*Held*: as the flat was let for an immoral purpose pltf. was not entitled to recover.—*UPFILL v. WRIGHT*, [1911] 1 K. B. 506; 80 L. J. K. B. 254; 103 L. T. 834; 27 T. L. R. 160; 55 Sol. Jo. 189, D. C.

**2855. Lessee obtaining possession by false representation—Of intention to carry on lawful trade—Subsequent immoral user.]**—A. procured B. to grant him a lease of premises by means of a false representation that he intended to carry on a certain lawful trade therein. Having obtained possession, A. converted the premises into a common brothel, whereupon B. forcibly expelled him:—*Held*: A. might maintain ejectment—the fraudulent misrepresentation & the subsequent illegal use of the premises not being sufficient, at law, to avoid the lease.—*FERET v. ILL* (1854), 15 C. B. 207; 2 C. L. R. 1366; 23 L. J. C. P. 185; 23 L. T. O. S. 158; 18 Jur. 1014; 2 W. R. 493; 139 E. R. 400.

*Annotations*:—*Expld.* *Canham v. Barry* (1855), 15 C. B. 597; *Gordon v. Metropolitan Police Chief Commr.*, [1910] 2 K. B. 1080. *Refd.* *Taylor v. Chester* (1869), L. R. 4 Q. B. 309. *Mentd.* *Anderson v. Radcliffe & Walker* (1858), 5 Jur. N. S. 704; *R. v. Saddlers' Co.* (1863), 10 H. L. Cas. 404; *Fisher v. Tully* (1878), 3 App. Cas. 627; *Morley v. Renoldson* (1895), 12 R. 158.

**2856. Lessee's right of action—On covenant—Against assignee.]**—A lessee of a house which, to his knowledge, had for many years been used as a brothel, assigned the lease absolutely, knowing that the assignee intended to use the house for the same purpose. The original lease contained covenants to deliver up at the end of the term, in good repair, & not to use the house as a brothel; & the assignment contained a covenant to indemnify the lessee from the covenants in the lease. The lessee having been compelled to pay for dilapidations at the end of the lease, sought to recover the amount from the estate of the assignee which was being administered:—*Held*: the assignment, & everything arising out of it, was so tainted with the immoral purpose, that pltf. could not recover.—*SMITH v. WHITE* (1866), L. R. 1 Eq.

626; 35 L. J. Ch. 454; 14 L. T. 350; 30 J. P. 452; 14 W. R. 510.

*Annotation*:—*Reid*. *Upall v. Wright*, [1911] 1 K. B. 506.

**2857. ——— For quiet enjoyment—Acquiescence of landlord.]**—*HARRIS v. BENTLEY* (1902), cited in 87 L. T. at p. 694; 47 Sol. Jo. at p. 147, C. A.

*Annotations*:—*Consd.* *Malzy v. Eichholz*, [1916] 2 K. B. 308. *Refd.* *Jaeger v. Mansions Consolidated* (1903), 87 L. T. 690; *Rainham Chemical Works v. Belvedere Fish Guano Co.*, [1921] 2 A. C. 465.

Immoral contracts generally, see CONTRACT, Vol. XII., pp. 263 *et seq.*

Contracts with ulterior, illegal, or immoral purpose, see CONTRACT, Vol. XII., pp. 275 *et seq.*

**SUB-SECT. 2.—ILLEGAL PURPOSES.**

Void & illegal contracts generally, see CONTRACT, Vol. XII., pp. 234 *et seq.*

**2858. Lessor's right of action—For use & occupation.]**—*GIRARDY v. RICHARDSON*, No. 2848, *ante*.

**2859. ——— User prohibited by statute.]**—A local Act, for lighting & watching & preventing nuisances in the parish of St. Mary, Islington, enacted that "if any person should put or cause to be put, or cast out of any waggon, etc. in or near any of the roads, etc. within the said parish of St. Mary, Islington, or should put or cast, etc. within the said parish, & in or within a quarter of a mile of any of the said roads, etc. any noisome or offensive matter," such person might be apprehended & carried before a magistrate, etc.:—*Held*: the whole of the above clause applied to such nuisances only when committed within the parish of St. Mary, Islington, & not when committed out of the parish, although within a quarter of a mile of a road within it; & therefore a plea to an action for use & occupation of a night soil shoot, that it was an open space of ground situate in the parish of St. Pancras, & within a quarter of a mile of a road in St. Mary, Islington, & was demised by pltf. to deft., after the passing of the above Act, for the purpose of being used as a place of deposit for night soil & other noisome & offensive matter, was bad, after verdict for deft.—*FLIGHT v. CLARKE* (1844), 13 M. & W. 155; 13 L. J. Ex. 309; 153 E. R. 64.

**2860. ——— On covenant—User prohibited by statute.]**—*Held*: a good plea in covenant on a lease, that the lease was entered into by pltf. & deft., & that the premises were let to deft. for the express purpose of being used by deft. in drawing oil of tar & boiling oil of tar, contrary to 25 Geo. 3, c. 77.—*GAS LIGHT & COKE CO. v. TURNER* (1840), 6 Bing. N. C. 324; 8 Scott, 609; 9 L. J. Ex. 336; 133 E. R. 127, Ex. Ch.

*Annotations*:—*Distd.* *Feret v. ILL* (1854), 15 C. B. 207. *Refd.* *Fisher v. Bridges* (1854), 3 E. & B. 642; *Hobbs v. Henning* (1865), 34 L. J. C. P. 117. *Mentd.* *Abbot v. Rogers* (1855), 16 C. B. 277; *Barton v. Muir* (1874), L. R. 6 P. C. 134.

**2861. ——— For rent—Rent payable immediately—Intended use prohibited subsequently.]**—A building agreement provided that A. should build houses on land within a specified time, & that on their completion B. would grant to A. leases of them. A. agreed to pay a specified rent to B. from the date of the agreement to the expiration of the leases. The houses were not built by the specified time, & before they were built, an Act of Parliament rendered their erection illegal:—*Held*:

**PART XII. SECT. 1, SUB-SECT. 2.**

**k. Lessor's right of action—For rent.]**—V. leased hotel premises to

M. in his lifetime, in which to the knowledge of all parties, liquor was sold contrary to Canada Temperance Act:—*Held*: as the lease was for an

unlawful purpose it was void, & pltf. could not recover rent due.—*VAN-BUSEIRK v. McNAUGHTON* (1896), 34 N. B. R. 125.—*CAN.*

A. was not relieved from his liability to pay the rent under the agreement.—*GIBBONS v. CHAMBERS* (1885), 1 T. L. R. 530; Cab. & El. 577.

*Annotation*:—*Refd.* *Bolesworth v. Davis* (1886), 3 T. L. R. 214.

**2862.** ——— *Evasion of excise law.*—A., B. & C. enter into an agreement by which A. contracts to let & B. to take certain rooms belonging to A., a licensed victualler, & within premises for which A. is licensed. C. guarantees the payment of the rent by B. To an action on the agreement by A. against C. on default of payment by B. C. pleaded that the agreement was made for the express purpose of enabling B. to use the said rooms so as to evade the law of excise:—*Held*: the plea was a sufficient answer to the action, the agreement being void for illegality.—*RITCHIE v. SMITH* (1848), 6 C. B. 462; 3 New Mag. Cas. 56; 18 L. J. C. P. 9; 12 L. T. O. S. 148; 12 J. P. 822; 13 Jur. 63; 136 E. R. 1329.

*Annotations*:—*Distd.* *Feret v. Hill* (1854), 15 C. B. 207. *Refd.* *Ramsden v. Lupton* (1873), 43 L. J. Q. B. 17; *Barton v. Muir* (1874), L. R. 6 P. C. 134. *Mentd.* *Mellor v. Lydiato*, [1914] 3 K. B. 1141.

**2863.** *Agreement unenforceable—Blasphemy.*—Deft. contracted to let rooms to pltf.; afterwards, discovering that they were intended to be used for the delivery of lectures maintaining that the character of Christ is defective & His teaching misleading, & that the Bible is no more inspired than any other book, he refused to allow the use of them, but did not assign this as a reason for his refusal. In an action for breach of contract:—*Held*: (1) the publication of such doctrines was blasphemy, & therefore the purpose for which pltf. intended to use the rooms was illegal, & the contract one which could not be enforced at law; (2) deft. was entitled to justify his refusal on this ground, notwithstanding his having assigned a different reason.—*COWAN v. MILBOURN* (1867), 1 R. 2 Exch. 230; 36 L. J. Ex. 124; 16 L. T. 290; 31 J. P. 423; 15 W. R. 750.

*Annotations*:—*As to* (1) *Consd.* *It. v. Ramsey* (1883), Cab. & El. 126. *Refd.* *Hyams v. Stuart King*, [1908] 2 K. B. 696; *It. v. Boulter* (1908), 72 J. P. 188; *Bowman v. Secular Soc.*, [1917] A. C. 106.

**2864.** *Lease rendered illegal by statute after commencement.*—Deft. let the basement of a store to pltf. "with full & undisturbed right & liberty to store cartridges therein," & covenanted to keep the premises in proper repair & condition, so as to be available for storing cartridges, & covenanted for quiet enjoyment. Other parts of the store were at that time let to other persons for storing gunpowder. Soon afterwards Explosives Act, 1875 (c. 17), passed, making it illegal to store cartridges & gunpowder in the same building. Deft., upon the Act coming into operation, removed pltf.'s cartridges out of the building. A correspondence ensued, & deft. stated to pltf. that the basement was at pltf.'s disposal, but that if pltf. stored cartridges there, deft. must, to protect himself from liability, give notice to the authorities. Pltf. thereupon commenced his action to restrain deft. from obstructing the storing of his cartridges, & to compel deft. to do everything necessary to enable pltf. to store them there, & for damages:—*Held*: judgment must be entered for deft., for (1) there had been no eviction, the removal of pltf.'s cartridges being only a trespass; (2) there had been no breach of covenant by deft., for the covenant to keep the premises in proper condition for storing cartridges only referred to their physical condition; (3) the grant of liberty to store cartridges there did not import a warranty of the legality of so storing them, nor did anything in the lease bind deft. to procure licences to make

the storage legal. *Semble*: an amendment converting a claim on the footing of a subsisting lease into a claim on the footing of eviction ought not to be allowed.—*NEWBY v. SHARPE* (1878), 8 Ch. D. 39; 47 L. J. Ch. 617; 38 L. T. 583; 20 W. R. 685, C. A.

*Annotations*:—*As to* (3) *Refd.* *Milch v. Coburn* (1910), 27 T. L. R. 170. *Generally.* *Mentd.* *Blenkhorn v. Penrose* (1880), 43 L. T. 668; *Laird v. Briggs* (1881), 19 Ch. D. 22.

## SECT. 2.—RESTRICTION OF ALTERATION OF PREMISES.

*Covenants in restraint of building.*—*See* Part XII., Sect. 3, sub-sect. 6, *post*.

**2865.** *Alterations completely changing nature of premises.*—Injunction against proceeding with alterations in a house under an agreement for a lease; upon circumstances, that would probably prevent a specific performance; viz. surprise, the effect of fraudulent misrepresentation & concealment, & the particular nature of the alterations, for the conversion of a private house to the purpose of a coachmaker's business; wholly changing the nature of the subject.

This injunction was proper, notwithstanding the clause providing that the lessees shall not carry on any offensive trade; an admission certainly, that they may carry on some trade (*LORD ELDON, C.*).—*BONNETT v. SADLER* (1808), 14 Ves. 526; 33 E. R. 622, L. C.

**2866.** *Alterations increasing risk of fire.*—Injunction granted to restrain lessee from making structural alterations which would increase the risk of fire.—*BRITISH EMPIRE MUTUAL LIFE INSURANCE CO. v. COOPER* (1888), 4 T. L. R. 362.

*Conversion of building into flats or tenements.*—*See* Nos. 2910, 2911, *post*.

*Conversion of flats into offices.*—*See* No. 2914, *post*.

*Conversion of flats into hotel.*—*See* No. 2915, *post*.

## SECT. 3.—RESTRICTIVE COVENANTS AS TO USER.

### SUB-SECT. 1.—IN GENERAL.

**2867.** *Restrictive covenants defined.*—*ABBEY v. GUTTERES*, No. 3079, *post*.

**2868.** *Necessity for express stipulation—Sales by auction—In retail shop.*—In a retail shop sales by auction are allowable unless prohibited by the agreement between the landlord & tenant.

To hold that under the lease of a shop, a back shop, & a cellar, there is necessarily inherent in the subject a prohibition against the use of it for the sale of goods occasionally by public auction, is a proposition which, I think, cannot be sustained (*LORD WESTBURY*).—*KEITH v. REID* (1870), L. R. 2 Sc. & Div. 39, H. L.

**2869.** *Restriction against user for particular purpose—Erection of building suitable to no other purpose—Injunction.*—A person who has covenanted not to use a building for certain purposes will not be restrained from erecting a building seemingly adapted only for such purposes.—*WORSLEY v. SWANN* (1882), 51 L. J. Ch. 576, C. A.

**2870.** *Covenant not to permit unauthorised acts—Duty of covenantor.*—A lease of a dwelling-house contained covenants by the lessee that he would not without the lessors' licence in writing use the premises or any part thereof or permit the same to be used for any purpose whatsoever

**Sect. 3.—Restrictive covenants as to user: Sub-sects. 1 & 2, A. & B. (a).]**

other than for the purpose of a private dwelling-house & would not without the lessors' licence in writing do or suffer to be done in or on the demised premises anything which might in the judgment of the lessors be or grow to the injury or annoyance of the lessors. Assignees of the lease let the premises to a sub-lessee who covenanted not to do or permit to be done any act or thing upon the premises which might be or grow to the annoyance damage or disturbance of the assignees, & not without the written consent of the assignees to assign, underlet, or part with possession of the premises or any part thereof, & not without such consent as aforesaid to put up any bill for the letting of lodgings but to use the premises as a private dwelling-house only. Without the consent of the assignees the sub-lessee let the premises in separate tenements to a number of weekly tenants. The assignees brought an action for possession against the sub-lessee & got judgment against him; but they did not join the weekly tenants as defendants in the action nor take any steps to eject them, but advised them to apply to the lessors for leave to remain in possession; agreed with them that their rent should be paid into a joint account in the names of one of the tenants & of the assignees' solr.; wrote to the lessors to say that if the weekly tenants were not allowed to remain an application under s. 27 of Housing, Town Planning, etc., Act, 1919 (c. 35), was advised for leave to convert the premises into one or more tenements; & also wrote to the weekly tenants saying that the lessors were threatening proceedings for vacant possession, that in view of Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), & s. 27 of Housing Act, the legal position was uncertain, & that they would be well advised to instruct counsel in any proceedings rendered necessary by the lessors' action, of which action they expressed their disapproval. The lessors brought an action against the assignees upon a forfeiture for breach of covenant in "permitting" the premises to be used otherwise than as a private dwelling-house & for "suffering" to be done therein an act to the annoyance of the plaintiffs. Defendants not having themselves used the premises or done any act therein contrary to the terms of the lease:—*Held*: the covenants not to "permit" the unauthorised user of the premises & not to "suffer" unauthorised acts therein did not bind defendants to do more than to take reasonable steps to secure that the premises should be used according to the terms of the lease & not otherwise, & they had not abstained from taking reasonable steps to secure that result merely by forbearing to take proceedings in ejectment against the under tenants the issue of which was rendered doubtful by the statutes above mentioned; in sympathising with the under tenants & even in advising them on their legal position defendants were not committing a breach of the covenants, & plaintiffs' case failed.—*BERTON v. ALLIANCE ECONOMIC INVESTMENT CO.*, [1922] 1 K. B. 742; 91 L. J. K. B. 748; 127 L. T. 422; 38 T. L. R. 435; 66 Sol. Jo. 487, C. A.; *subsequent proceedings, sub nom. ALLIANCE ECONOMIC INVESTMENT CO. v. BERTON* (1923), 92 L. J. K. B. 750, C. A.

*Annotation*:—*Distd. Atkin v. Rose*, [1923] 1 Ch. 522.

**2871. — Depends on circumstances of each case.**—By a lease dated Mar. 24, 1919, T. demised to deft. R. a shop for fourteen years. The lease contained a covenant by R. that he would

not use or exercise or "permit or suffer" any other person to use or exercise in or upon the demised premises any trade or business other than that of a bag manufacturer. There was also a covenant that the lessee or any permitted assignee or underlessee would not assign, underlet, transfer, or part with the possession of the premises, or any part thereof, or do or suffer any act whereby the same or any part thereof might become assigned or transferred to any other person without the consent of the lessor; & there was a proviso for re-entry on breach of either of those covenants.

In Oct. 1920, R., with T.'s consent, underlet the premises to deft. C. to be used for the business of a tobacconist. The underlease contained the same covenants—*mutatis mutandis*—by C. with R. as those entered into by R. in the lease to him, except that the business of a tobacconist was substituted for that of a bag manufacturer, & that the premises were not to be assigned or underlet by C. without the consent of both the superior & immediate lessors. On Nov. 3, 1920, pltf. agreed to purchase the fee simple in reversion of the demised premises. On Nov. 8, C., without the consent of either of the lessors, let part of the shop to G., who agreed not to use that part for any other business than that of a hairdresser; G. then went into possession & carried on—for several months in the name of C.—the business of a hairdresser, C. in the meantime concealing from both R. & pltf. the fact that he had underlet to G. & that G. was the proprietor of the hair-dressing business. On Dec. 22, 1920, pltf. completed his purchase, & the premises were then conveyed to him expressly subject to the lease of Mar. 24, 1919. On Jan. 19, 1921, pltf.'s solrs., by arrangement with the vendor, received the rent due at Christmas, 1920, subject to its apportionment as between T. & pltf. Neither pltf. nor deft. R. knew that G. was in occupation of part of the shop or that he was the proprietor of the hair-dressing business until Mar. 1921. As both defendants R. & C. refused to remedy the breaches when they came to pltf.'s knowledge, pltf. commenced this action to recover possession of the demised premises:—*Held*: (1) in the absence of facts which rendered it unreasonable for R. to bring an action against C. in respect of the breach, & seeing that C. could have no defence to such an action, R. in breach of the covenant in the lease of Mar. 24, 1919, had permitted & was permitting G. to carry on the prohibited business of a hairdresser; (2) as neither pltf. nor his solrs. knew, at the time of the receipt of the rent, that C. had underlet to G. or that G. was carrying on a hairdresser's business, such receipt did not amount to a general waiver of the covenant; & further, even if pltf. had at that time some general knowledge that a hairdresser's business was being carried on on the premises, yet such receipt, in the circumstances, would amount, at most, to a waiver of the breach up to the date thereof; (3) as to the covenant against underletting; although the conveyance to pltf. was made expressly subject to the lease to R., yet, in the absence of proof of waiver by T. (the vendor) or pltf., both of whom were ignorant of the breach committed by C. in underletting to G., the effect of that conveyance was, by virtue of s. 2 of Conveyancing Act, 1911 (c. 37), to pass to pltf., with the reversionary estate in the land, the right to enforce the condition of re-entry; (4) as deft. C. was guilty of a deliberate breach of the covenant by underletting to G. he was not entitled to the protection afforded to an underlessee by s. 4 of the Conveyancing & Law of Property Act, 1892 (c. 13).

It is not established by the authorities that in no circumstances can a covenantor be said to be permitting or suffering a breach of a continuous nature if in order to stop it he must have recourse to legal proceedings; every case must depend upon its own circumstances.—*ATKIN v. ROSE*, [1923] 1 Ch. 522; 92 L. J. Ch. 209; 128 L. T. 653; 67 Sol. Jo. 350.

## SUB-SECT. 2.—NATURE OF COVENANTS.

## A. Usual Covenants.

**What are usual covenants.]**—See Part XI., Sect. 2, *ante*.

**2872. Restriction against trade—Particular trades.]**—If an agreement for a lease contain no stipulation as to covenants, the party agreeing to take the lease has a right to a lease containing only usual covenants, & a restriction against particular trades, not being a usual covenant, cannot be introduced into the lease.—*PROPERT v. PARKER* (1832), 3 My. & K. 280; 40 E. R. 107. *Annotation*:—*Refd.* *Porter v. Drew* (1880), 5 C. P. D. 143.

**2873.** ———.]—An agreement for granting a lease, stipulating, that it should contain "the usual covenants between landlord & tenant," does not include covenants in restraint of trade.

A., being entitled to a lease, containing covenants against carrying on particular trades, agreed with his tenant to grant him a lease, containing "the usual covenants between landlord & tenant," & that the house should not be converted into a school. The tenant had notice, that A. was a lessee only:—*Held*: the tenant was not bound to accept an underlease, containing the restrictive covenants in the original lease.—*VAN v. CORPE* (1837), 3 My. & K. 269; 6 L. J. Ch. 208; 40 E. R. 102.

*Annotations*:—*Consd.* *Porter v. Drew* (1880), 5 C. P. D. 143. *Mentd.* *Paris v. Hughes* (1836), 1 Keen, 1; *Steed v. Oliver* (1817), 5 Hare, 492.

**2874.** ——— **Other than particular trade—Licensed premises.]**—*BENNETT v. WOMACK*, No. 2498, *ante*.

**2875.** ——— **In trading locality.]**—The purchaser of property has notice of the interests of a tenant in possession, & the purchaser of leaseholds has notice of what it is he purports to buy, & that he must be bound by all the covenants in the lease; but one who contracts for a lease from a party, with knowledge that he holds under a leasehold title, has notice of ordinary but not of unusual covenants in the original lease. Covenants in restraint of trade in a trading locality are not considered usual covenants. *Deft.* agreed with *pltf.* to take a house in the Strand, to be used for the business of printing. Nothing was said as to covenants. *Pltf.* was a lessee under a lease containing covenants against "obnoxious trades," & *deft.* was told that the premises were leasehold. A reference as to title was directed, having regard to the covenants in the lease & the purposes for which the premises were taken.—*WILBRAHAM v. LIVESY* (1854), 18 Beav. 206; 2 W. R. 281; 52 E. R. 81.

*Annotation*:—*Refd.* *Reeve v. Berridge* (1888), 20 Q. B. D. 523.

**2876. Affirmative covenant to carry on particular trade.]**—A. agreed to let, & B. to take a piece of land, with liberty to build thereon such warehouses, glasshouses, kilns, houses for workmen, & other erections necessary for carrying on the business of a glass factory, as he should think fit, for sixty-one years, at a certain rent; & B. agreed to pay the rent, to build in a substantial

manner, & not to use the premises for any other purpose than a glass factory during the term. A lease & counterpart to be executed in conformity with the agreement, in which should be inserted all usual covenants:—*Held*: this agreement did not warrant the insertion in the lease of an affirmative covenant by the lessee, that he would carry on the business of a glass factory on the demised premises during the term.—*DOE d. BUTE (MARQUIS) v. GUEST* (1846), 15 M. & W. 160; 153 E. R. 804.

## B. Covenants Running with the Land.

## (a) In General.

**2877. Whether assignee bound—Assignee not named—Covenant not to plough.]**—*COCKSON v. COCK*, No. 2811, *ante*.

**2878.** ——— **Covenant to reside on demised premises.]**—A covenant in a lease that the lessee, his exors. & administrators, shall constantly reside upon the demised premises during the demise, is binding on the assignee of the lessee, though he be not named.—*TATEM v. CHAPLIN* (1793), 2 Hy. Bl. 133; 126 E. R. 470.

*Annotations*:—*Consd.* *Williams v. Earle* (1868), L. R. 3 Q. B. 739. *Apld.* *White v. Southend Hotel Co.*, [1897] 1 Ch. 767. *Refd.* *Koppell v. Bailey* (1834), 2 My. & K. 517; *Hooper v. Clark* (1867), L. R. 2 Q. B. 200; *Fleetwood v. Hull* (1889), 23 Q. B. D. 35; *Re Stephenson, Poole v. Stephenson*, [1915] 1 Ch. 802.

**2879.** ——— **Covenant to use as private dwelling-house only.]**—A covenant in a lease to use a house as a private dwelling-house only, runs with the land, though the word "assigns" be not used.—*WILKINSON v. ROGERS* (1863), 3 New Rep. 145; 9 L. T. 434; 28 J. P. 103; 10 Jur. N. S. 5; 12 W. R. 119; *on appeal* (1864), 2 De G. J. & Sm. 62, L. J.J.

*Annotation*:—*Mentd.* *Reeves v. Cattell* (1876), 24 W. R. 485.

**2880.** ——— **Covenant against particular trade.]**—Covenant upon a conveyance in fee with the grantors, lessees of waterworks, not to sell or dispose of water from a well to the injury of the proprietors of the said waterworks, their heirs, exors., administrators, & assigns. *Qu.*: whether the covenant runs with the land, so as to bind, & be enforced by, assignees, whether it is contrary to the policy of the law, & as to the effect of a renewal of the lease.—*COLLINS v. PLUMB* (1810), 16 Ves. 454; 33 E. R. 1057, L. C.

*Annotations*:—*Consd.* *Catt v. Tourle* (1869), 4 Ch. App. 654. *Refd.* *Clegg v. Hands* (1889), 41 Ch. D. 506, n. *Mentd.* *Lumley v. Wagner* (1852), 1 De G. M. & G. 604.

**2881.** ——— **Assignee of lessor—Covenant limited to lessor.]**—*KEMP v. BIRD*, No. 2908, *post*.

**2882. Whether lessee bound—Covenant against particular trades.]**—The conveyance of an estate to a purchaser & his heirs to the use that certain specified trades should not be carried on upon the premises:—*Held*: to be a stipulation in the nature of a covenant running with the land; but the owner of the estate could alone be restrained from carrying on the trades, as his tenant was no party to the suit.—*HODSON v. COPPARD* (1860), 29 Beav. 4; 7 Jur. N. S. 11; 9 W. R. 9; 54 E. R. 525; *sub nom.* *HODGSON v. COPPARD*, 30 L. J. Ch. 20.

*Annotation*:—*Apld.* *Williamson v. Sunderland Corpn.* (1892) 9 T. L. R. 143.

**2883.** ——— **Covenant not to cause nuisance or annoyance.]**—*FROST v. KING EDWARD VII. WELSH, ETC. ASSOCN.*, No. 2963, *post*.

**2884.** ———.]—About 1870 a considerable building property called "The B. Estate," belonging to G. D. in fee simple, was in course of development on building agreements entitling the builders to leases, with an option of purchasing the fee

**Sect. 3.—Restrictive covenants as to user: Sub-sect. 2, B. (a), (b) & (c).]**

simple, & in 1876 S. B. held one of the leases & options in respect of land & a workshop called 14, W. Road. G. D. died in 1882, having devised the B. Estate to E. D. & F. F., their heirs & assigns, on trust to pay the rents to E. D. for life, & after her death to stand seised upon trust for such persons as she should by will appoint, & in default of appointment in trust for her right heirs. Soon after G. D.'s death S. B. exercised his option, & E. D. & F. F. conveyed 14, W. Road, to him in fee, subject to restrictive covenants, therein contained, by him with E. D. & F. F., their heirs & assigns, to the intent that the covenants might for ever thereafter run with the hereditaments thereby granted, that S. B. & all persons deriving title under him would not, without the written consent of E. D. & F. F., their heirs or assigns, or the persons deriving title under them or either of them (*inter alia*), (a) carry on or permit to be carried on on the premises conveyed any trade or business except that of a builder or coal merchant; & (b) would not do or permit on the premises any act, matter or thing whatsoever which might be a nuisance, annoyance or disturbance to E. D. & F. F., or the persons deriving title under them or either of them. F. F. died in 1885. E. D. died in 1917, having by her will exercised her power of appointment so as to make R. I. tenant for life of the portion of the B. Estate of which 14, W. Road, was part, & given him one-half of her residuary personalty. R. I. & F. R. E. were appointed her exors. S. B. died in 1883, having by his will vested in the trustees thereof 14, W. Road, which they let for a term of years to X. to be used, & which were used, for a business which was not permitted by covenant (a). X. in the course of this business committed breaches of covenant (b) as regarded annoyance & disturbance. R. I., as tenant for life of adjoining freehold lands also forming part of the B. Estate, sued S. B.'s trustees & X. for an injunction to restrain the breaches of covenant. At the trial F. R. E., the other exor. of E. D., was joined as co-pltf., he & R. I. being the legal personal representatives of the survivor of the original covenantees:—**Held**: (1) there was not enough in the words or contract of the conveyance to S. B. to annex the benefits of the covenants to the whole of the B. Estate then remaining in the hands of the covenantees or to any particular parts thereof; (2) the dispositions of E. D.'s will did not amount to an assignment to her devisees of the benefit of the covenants; but (3) the benefit could pass by operation of law as well as by express assignment, & that the covenants could be enforced by R. I. & F. R. E. as representing together both her real estate & personal estate.—**IVES v. BROWN**, [1919] 2 Ch. 314; 88 L. J. Ch. 373; 122 L. T. 267.

**Annotations**:—As to (3) **Distd. Chambers v. Randall**, [1923] 1 Ch. 149. **Reid. Northbourne v. Johnston**, [1922] 2 Ch. 309.

**2885. Whether lessee entitled to benefit—Owners under mutual covenants.**—Where there are mutual covenants by owners of lands, their heirs & assigns, with the owners of adjoining lands,

their heirs & assigns, to comply with certain stipulations [not to carry on certain trades] the subsequent lessee of one of the owners is entitled to the benefit of the covenants as ar assign, & can sue to restrain a breach.—**TAITE v. GOSLING** (1879), 11 Ch. D. 273; 48 L. J. Ch. 397; 40 L. T. 251; 43 J. P. 508; 27 W. R. 394.

**Annotations**:—**Consd. Holloway v. Hill**, [1902] 2 Ch. 612. **Reid. Bryant v. Hancock**, [1898] 1 Q. B. 716; **Villiers v. Oldcorn** (1903), 20 T. L. R. 11; **Westboughton U. C. v. Wigan Coal & Iron Co.** [1919] 1 Ch. 159.

**2886. Whether underlessee bound—Covenant not to carry on dangerous trade.**—By a lease dated Dec. 20, 1897, D. demised certain premises to G., who covenanted for himself, his exors., administrators, & assigns (*inter alia*) not to use or occupy the same or any part thereof as a dwelling-house or sleeping place, or to use the same so as to cause a nuisance, annoyance, or damage to the owners or occupiers of the offices or rooms in the same house or adjoining houses, & not to carry on any noisy or dangerous trade, & also not to do or suffer to be done upon the said demised premises or any part thereof anything which might render any increased or extra premium payable for the insurance of the premises against fire, or which might make void or voidable any policy for insurance. There was also a covenant not to assign without licence. In Aug. 1903 G. assigned to E. with the lessor's consent & on Oct. 18, 1904, E. sub-demised to D. On Nov. 12, 1904, the lessor consented to the underlease, but no explanation of what was intended to be done was given him, & no copy of the agreement was shown.

The sublessee exhibited & sold an incandescent lamp in which petrol was used. The insurance co. at the expiration of the period for which the premises were insured refused to renew, & although negotiations were entered into for the renewal of the insurance at 12s. 6d. instead of 2s. per cent., they fell through. The lessor now applied for an injunction restraining the sublessee from breaking the covenants:—**Held**: deft. must be restrained by injunction from using the premises in a manner prohibited by the lease of which he had constructive notice.—**TRAPE v. DOUSE** (1905), 92 L. T. 319; 21 T. L. R. 271; 49 Sol. Jo. 283.

**(b) Covenants Restricting Right to Build.**

**2887. Whether lessor bound—Breach by tenant—Mandatory injunction.**—A railway co. having conveyed to A. a piece of land abutting on their viaduct, with a covenant not to build within six feet of the wall of the viaduct, the ct., in an action against A.'s widow, who took by assignment, for building against the wall in breach of the covenant, in which action she had suffered judgment by default, refused to grant an injunction against her commanding her to remove the building; it appearing that it had been erected by her under-tenant, & consequently that she could not obey the writ, if granted.—**LONDON & SOUTH WESTERN RY. Co. v. WEBB** (1863), 15 C. B. N. S. 450; 12 W. R. 51; 143 E. R. 860; *sub nom.* **LONDON & NORTH WESTERN RY. Co. v. WEBB**, 9 L. T. 291. **Annotation**:—**Mentd. Mid. Ry. v. G. W. Ry.** (1873), 42 L. J. Ch. 438.

(1881), 6 App. Cas. 560.—**SCOT.**

**PART XII. SECT. 3, SUB-SECT. 2.—B. (b).**

**1. Whether lessee bound.**—**DOMVILLE v. COLVILLE** (1873), 1 R. 7 C. L. 68.—**IR.**

**m. —.**—**BENNETT v. KIDD**, [1926] N. 50.—**IR.**

**PART XII. SECT. 3, SUB-SECT. 2.—B. (a).**

**2885 i. Whether lessee entitled to benefit—Owners under mutual covenants.**—The fact of several feuars of neighbouring plots of building land in the same street holding from a common superior does not, by itself, entitle one of those feuars to claim the benefit of restrictions contained in the feu contract of another,

unless some mutuality & community of rights & obligations is otherwise established between them, which can only be done by express stipulations in their respective contracts with the superior, or by reasonable implication from reference in both contracts to a common plan or scheme of building, or by mutual agreement between the feuars themselves.—**HISLOP v. LECKIE**

**2888. Whether lessee bound—Right to indemnity by purchaser—Notice.]**—In 1867 plffs. conveyed to a purchaser in fee simple certain hereditaments & appurtenances adjoining their railway, & by the deed of conveyance the purchaser covenanted "for himself, his heirs, exors., administrators, & assigns, that he, the said purchaser, would not erect or build any erections or buildings of any kind whatsoever within ten feet of the roadway or viaduct of plffs. without their permission in writing first had & obtained." In the following year the purchaser conveyed the said hereditaments & appurtenances to a person since dead, testator of deft. Bull, & said testator took & accepted the said conveyances without notice or knowledge of the said covenant other than such constructive notice, if any, as he might be deemed to have had by reason of the said deed of 1867 being a title deed of the premises. In 1869 the said testator rebuilt the said hereditaments & erected on the premises a hotel, part of which stood within ten feet of the roadway or viaduct of plffs., & he demised the said hotel & premises for fifty years upon a certain rent to a woman, who assigned the lease to the second deft. Francis. A covenant was contained in the lease to the effect that the lessee should not make any alteration in the premises without the lessor's consent in writing, but neither the lessee nor defts. had any notice of the covenant in the conveyance of 1867 other than such constructive notice (if any) as before mentioned in the case of the said testator. In 1881 deft. Francis increased the height of that part of the erection which was within ten feet of plff.'s roadway or viaduct, having previously in consideration for the payment of a sum of money obtained the written authority of deft. Bull for doing so. Plffs. had no knowledge of this erection by deft. Bull, or the alteration by deft. Francis, until they were both completed in 1881:—*Held*: plffs. were entitled to an injunction to both defts., requiring them to pull down the said erections, & deft. Francis was not entitled to be indemnified by deft. Bull.—*LONDON, CHATHAM, & DOVER RY. CO. v. BULL* (1882), 47 L. T. 413, D. C.

**2889. — Statutory prohibition—Superfluous land.]**—An Inclosure Act passed in 1806 provided that no buildings should at any time thereafter be erected on a certain strip of land. In 1805 a railway co. under their statutory powers acquired a portion of the strip of land for the purposes of their undertaking. A part of the land thus acquired became superfluous land & the co. in 1868 sold & conveyed the superfluous part to a purchaser who demised it to deft. Deft. in 1885 commenced building on the land:—*Held*: the land acquired by the co. was freed from the prohibition of building only for the purposes of the co.'s undertaking & when part of it was sold as superfluous land the prohibition of building revived in respect of that part. An injunction to restrain deft. from building on the land in contravention of the provisions of the Inclosure Act was granted at the suit of an owner of adjoining land.—*BIRD v. EGGLETON* (1885), 29 Ch. D. 1012; 54 L. J. Ch. 819; 33 W. R. 774; *sub nom.* *BIRD v. PONSFORD*, *BIRD v. EGGLETON*, 53 L. T. 87; 49 J. P. 644; 1 T. L. R. 508.

**2890. — As assign.]**—*RICKETTS v. ENFIELD (CHURCHWARDENS)*, No. 2807, *ante*.

**2891. Whether purchaser bound—Breach by lessee—Breach not continuing breach.]**—The pur-

chaser of part of a freehold building estate covenanted with the vendor for himself & his assigns to erect no other than private residences & to submit plans for approval before commencing to build. The purchaser granted a building lease with covenants similar to those in his conveyance; the lessees, without submitting plans for the vendor's approval, commenced a building which was alleged to be & was held a breach of the covenant. The lessees became bkpt., & their trustees having disclaimed the lease, the purchaser took possession of the land & offending building. The vendor having sold the rest of the estate to plff. with the benefit of the purchaser's covenants, plff. brought an action against the purchaser to compel removal of the building, & for damages:—*Held*: (1) there was no continuing breach, the covenant having been broken once for all when the building was erected contrary to it; (2) the breach was committed not by the purchaser, but by his lessees, & he had not by his conduct rendered himself liable for the violation of the covenant; & neither at law nor in equity was plff. entitled to any relief.—*POWELL v. HEMSLEY*, [1909] 2 Ch. 252; 78 L. J. Ch. 741; 101 L. T. 262; 25 T. L. R. 640, C. A.

(c) *Covenants Restricting Use as Licensed Premises.*

Covenants as to licensed premises generally, see Part X., Sect. 7, *ante*.

**2892. General rule.]**—*ZETLAND (EARL) v. HISLOR*, No. 2942, *post*.

**2893. Whether tenant bound—Notice.]**—The owner of a freehold house had entered into a covenant with plff., who was a previous owner, that the building should not be used as a beer-shop. The house was afterwards let to deft. as tenant from year to year, without express notice of the covenant:—*Held*: although the covenant might not at law run with the land, deft. was bound by it in equity. The rule that a purchaser who does not inquire into his vendor's title is affected with notice of what appears upon it, applies equally to a yearly tenant, as to the purchaser of a greater interest.

A covenant by a purchaser of land, not naming his assigns, that no building erected on land shall be used as a beer-shop, does not run with the land (*TURNER, L.J.*).—*WILSON v. HART* (1866), 1 Ch. App. 463; 35 L. J. Ch. 569; 14 L. T. 499; 30 J. P. 582; 12 Jur. N. S. 460; 14 W. R. 748, L. J.

*Annotations*:—*Consd. Catt v. Tourle* (1869), 4 Ch. App. 654. *Appl. Foulden v. Slater* (1869), L. J. 7 Eg. 523; *Richards v. Revitt* (1877), 7 Ch. D. 224. *Consd. Fleetwood v. Hull* (1889), 23 Q. B. D. 35; *Teape v. Douso* (1905), 92 L. T. 319. *Reid. Luker v. Dennis* (1877), 7 Ch. D. 227; *Haywood v. Brunswick Bldg. Soc.* (1881), 8 Q. B. D. 403; *Patman v. Harland* (1881), 17 Ch. D. 355; *Thornwell v. Johnson* (1881), 50 L. J. Ch. 641; *Clegg v. Hands* (1889), 44 Ch. D. 506, n.; *Mander v. Falccke*, [1891] 2 Ch. 554; *Holloway v. Hill*, [1902] 2 Ch. 612; *Formby v. Barker* (1903), 89 L. T. 249; *Ite Nisbet & Potts' Contract*, [1905] 1 Ch. 391; *L. C. C. v. Allen*, [1914] 3 K. B. 642. *Mentd. Cavander v. Bulteel* (1873), 9 Ch. App. 80, n.; *Gainsborough v. Watcombe Terra Cotta Clay Co.*, *Dunning v. Gainsborough* (1885), 54 L. J. Ch. 991; *Nottingham Patent Brick & Tile Co. v. Butler* (1885), 16 Q. B. D. 261; *Oliver v. Hinton*, [1899] 2 Ch. 264.

**2894. — — —.]**—A lessee is bound to inquire into, & is fixed with notice of, all covenants into which his lessor has entered in respect of the land.

In 1854, a dwelling-house & shop were conveyed by plff. to deft. A. in fee, in consideration of the payment by A. to plff. of a perpetual yearly

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rentcharge; & the conveyance contained a covenant by A., his heirs, exors., & administrators, with ptff., his heirs & assigns, that he & they would not use or occupy, or permit to be used or occupied, the building "as an inn, public-house, or taproom, or for the sale of spirituous liquors, or ale or beer." In 1857 doft. B. became tenant from year to year of the house, using & occupying it for the business of a grocer. In 1862, A. demised the house & shop to B. for twenty-one years at a yearly rent; the only restrictive covenant being a covenant by B. that "no offensive business or occupation or nuisance shall be carried on or committed on the premises, & that same shall be used as a dwelling-house & shop only." In 1866, B., as the agent of a firm of London wine merchants, began, in the course of his business as a grocer, to sell on the premises wine & spirits, but in bottle only. On bill for an injunction against A. & B., it was found, as the result of the evidence, that B. had no knowledge of the covenant in the original deed:—*Held*: (1) notwithstanding, he was put upon inquiry, & was fixed with constructive notice of the covenant; (2) the words, "for the sale of spirituous liquors," did not prevent the sale of wine, but extended to the sale of spirituous liquors in bottle; & injunction granted accordingly. Bill dismissed against A. with costs.—*FEILDEN v. SLATER* (1869), L. R. 7 Eq. 523; 17 W. R. 485; *sub nom.* *FEILDEN v. SLATER*, 38 L. J. Ch. 379; 20 L. T. 112.

*Annotations*:—As to (2) *Distd.* *Jones v. Bone* (1870), L. R. 9 Eq. 674; *Stuart v. Diplock* (1889), 43 Ch. D. 343. *Refd.* L. & N. W. Ry. v. *Garnett* (1869), 39 L. J. Ch. 25; *Thornwell v. Johnson* (1881), 50 L. J. Ch. 641; *Holloway v. Hill*, [1902] 2 Ch. 612. *Generally, Mentd.* *Allen v. Allen & Bell* (1894), 63 L. J. P. 120.

**2895.** ————]—A grantee in fee of a piece of building land entered into a separate agreement with the grantor, that during twelve years & a half no building on the premises should be used for "the sale of ale, beer, spirits, wine, porter, or as an inn, public-house, or beerhouse." His assignee built a house on the land, & let it from year to year to a tenant, who opened it as a public-house. Upon bill for an injunction against the assignee & his tenant:—*Held*: no relief could be had against the tenant, who, if he had asked his lessor, would have been told there was no restriction, & if he had seen the conveyance would have found none.—*CARTER v. WILLIAMS* (1870), L. R. 9 Eq. 678; 39 L. J. Ch. 560; 23 L. T. 183; 34 J. P. 468; 18 W. R. 593.

*Annotations*:—*Expld.* *Patman v. Harland* (1881), 17 Ch. D. 353. *Distd.* *Thornwell v. Johnson* (1881), 50 L. J. Ch. 641.

**2896.** ————]—**Assign of covenantor.**—A sub-tenant is liable to a restrictive covenant entered into by the purchaser of the freehold for himself & his assigns, though neither the sub-tenant nor his lessor has actual notice of it, & in spite of s. 2 of Vendor & Purchaser Act, 1874 (c. 78), preventing the examination of the title to the freehold. In the conveyance in 1875 to F. of part of a building estate purchased by him, F. covenanted for himself, his heirs, exors., administrators, & assigns, with the owner or owners for the time being of the remainder of the property, not to carry on the trade of retailer of wine, spirits, or

beer on the land purchased. F. leased to D., who sub-leased to J., neither D. nor J. having actual notice of the restriction. J. opened a shop for the sale of wine & beer to be consumed off the premises. Upon a motion for an injunction by T., the purchaser of another part of the building estate:—*Held*: J. was liable to the covenant.—*THORNEWELL v. JOHNSON* (1881), 50 L. J. Ch. 641; 44 L. T. 768; 29 W. R. 677.

**2897. Whether assignee of lease entitled to benefit—Covenant by lessor—Against erection of competing building.**—Where in a lease, the lessee having covenanted to use the demised premises as a public-house, the lessor covenants not to build or keep any house for the sale of spirits or beer within half a mile of the demised premises; the lessor's covenant does not run with the land so as to enable the assignee of the lease to sue him upon it.

A covenant runs with the land only when it touches, that is, when its operation directly, & not merely collaterally affects the thing demised (*CHANNELL, B.*).—*THOMAS v. HAYWARD* (1869), L. R. 4 Exch. 311; 38 L. J. Ex. 175; 20 L. T. 814.

*Annotations*:—*Distd.* *Fleetwood v. Hull* (1889), 23 Q. B. D. 35; *Dewar v. Goodman*, [1908] 1 K. B. 94. *Refd.* *Clegg v. Hands* (1890), 59 L. J. Ch. 477; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

**2898.** ————]—Upon the sale, in 1863, to A., for the purposes of a public-house, of part of an estate intended to be laid out for building, the trustees of the estate covenanted with A., his heirs & assigns, that they, their heirs & assigns, would not thereafter sell any portions of the estate without requiring the purchaser to enter into a covenant "not to erect thereon or use or permit to be used any building to be erected thereon as a tavern, public-house, or beer-shop." Further portions of the estate were sold in 1870 by the then trustees to G., who covenanted with the vendors not to use or permit to be used any building erected on the land & premises intended to be thereby assured as a tavern, public-house, or beer-shop. The rest of the estate was sold to other persons. In 1879 H. purchased from G. part of the land comprised in G.'s purchase of 1870, & entered into a covenant with G., in terms similar to those of the covenant in the deed of 1870. I., a yearly tenant under H. of one of the houses, having obtained an "off license" sold under it beer which was not drunk upon the premises:—*Held*: the property was bound by the restrictive covenant entered into by the vendors in 1863, & B., an assign of A., was entitled to an injunction & damages against H. & I., in respect of the breach of covenant in selling beer under an "off license."—*NICOLL v. FENNING* (1881), 19 Ch. D. 258; 51 L. J. Ch. 166; 45 L. T. 738; 30 W. R. 95.

*Annotation*:—*Refd.* *Formby v. Barker* (1903), 89 L. T. 249.

**SUB-SECT. 3.—COVENANTS TO USE PREMISES \* FOR PARTICULAR PURPOSES ONLY.**

**A. In General.**

**2899. Post office—Business ordinarily carried on therewith.**—By a lease in 1852, premises were demised to the Postmaster General for 1,000 years,

**PART XII. SECT. 3, SUB-SECT. 3.—A.**

**o. General rule.**—A tenant who has hired premises for a special purpose is liable to make good to his landlord

damage caused to the premises by unreasonable user thereof.—*FRENKEL & Co. v. RAND MINES PRODUCE SUPPLY Co.*, (1909), T. S. 129.—*S. AF.*

p. "Private dwelling"—" & furnish-

ing store"—*Sale by auction.*—A lease contained a covenant that the lessee was not to use the premises for any purpose but that of a private dwelling & "gents' furnishing store":

at the rent of one shilling, & the Postmaster General covenanted that he & his successors would at all times during the term use the premises as a post office for the district, & would not use the premises for any other purpose. Ejectment having been brought on a proviso for re-entry for the breach of the above covenant, on the ground that the excise duties & licences for dogs, men servants, horses, etc., had been received & granted on the premises by the post office clerks:—*Held*: there had been no breach of the covenant.—*WADHAM v. POSTMASTER GENERAL* (1871), L. R. 6 Q. B. 644; 40 L. J. Q. B. 310; 24 L. T. 545; 36 J. P. 148; 19 W. R. 1082.

*Annotation*.—*Consd. Harman v. Ainslie* (1903), 72 L. J. K. B. 533.

**2900. "Printseller or other like business"—Sale of modern jewellery.**—An agreement to let a shop contained the words "the shop to be used for the purpose of a printseller or other like business":—*Held*: the tenant was precluded from selling modern jewellery.—*M'GREGOR v. UNDERWOOD* (1885), 1 T. L. R. 285.

**2901. "Offices"—"& for storage of wines"—Sale of wine by the glass.**—*RANDELL v. BLOCK* (1893), 38 Sol. Jo. 141.

**2902. Business of outfitter.**—A lease contained a covenant by the lessee not to use the premises for any business except that of an outfitter without the licence in writing of the lessor. It also contained a proviso for re-entry in case the lessee should "make default in the performance of any of the covenants upon his part to be performed." The original lessor gave to the original lessee licence in writing to use the premises for a business other than that of an outfitter. The successor in title of the original lessee used the premises otherwise than for the business of an outfitter. In an action of ejectment by the successor in title of the original lessor:—*Held*: the proviso for re-entry applied only to breaches of positive & not of negative covenants. *Seemle*: there was no breach of covenant.—*HARMAN v. AINSLIE*, [1903] 2 K. B. 241; 72 L. J. K. B. 533; 88 L. T. 770; *reversd.* on other grounds, [1904] 1 K. B. 698, C. A.

**2903. Restaurant—Fried fish shop.**—A lease of premises contained a covenant restricting the lessee from carrying on on the premises the business of a "fishmonger" or any other trade which should be a nuisance or an annoyance to the tenants or occupiers of any messuage in the neighbourhood. The lessee let a part of the premises to a tenant who agreed not to use the premises "otherwise than as a restaurant" & not to do upon the premises any act or thing which should or might be a "nuisance, annoyance, or inconvenience" to the lessee or her tenants or the occupiers of any adjoining houses or the neighbourhood. The tenant set up & carried on on the premises the business of a fried fish shop for the sale of cooked fish for consumption on & off the premises. The occupier of the adjoining house had complained of the annoyance caused by the steam & smell

from the fish shop. In an action by the lessee for an injunction to restrain the tenant from using the premises otherwise than as a restaurant, or so as to be an annoyance or inconvenience to occupiers in the neighbourhood:—*Held*: the carrying on of the business of a fried fish shop was not the carrying on of the business of a "fishmonger" within the meaning of the covenant in the lease; but the use of the premises as a fried fish shop was a use of the same "otherwise than as a restaurant" & was an "annoyance or inconvenience" to the occupiers of adjoining houses & the neighbourhood, & the lessee was entitled to the injunction claimed.—*ERRINGTON v. BIRT* (1911), 105 L. T. 373.

**2904. Business of hosier, hatter & mercer—Sale of overcoats & sports jackets.**—The lessees of a shop covenanted in their lease that the demised premises should not without the consent in writing of the lessors be used in any way except for the purpose of carrying on thereon the business or businesses of a hosier or hatter & mercer, including the sale of fancy waistcoats & mackintoshes. They sold amongst other goods, raincoats & sports jackets. In an action brought by the lessors for an injunction to restrain them from using the premises otherwise than in accordance with the covenant & for damages for breach of covenant:—*Held*: the fact that it was thought necessary to mention fancy waistcoats & mackintoshes in the covenant showed that the parties did not regard the sale of such goods as forming part of the business of a hosier, & upon the true construction of the covenant in question the business of a hosier did not include the sale of overcoats, not being mackintoshes, or sports jackets.—*WARTSKI v. MEAKER* (1914), 110 L. T. 473; 58 Sol. Jo. 330.

**Sale of intoxicating liquors.**—*See* Part X., Sect. 7, sub-sect. 3, B., *ante*.

### B. Private Residence.

*See, generally*, SALE OF LAND.

**2905. What constitutes breach—User as school.**—A lease contained a covenant not to carry on upon the demised premises any public trade or business, & to occupy & use the premises as a private dwelling-house only. The lessee kept a day school, & also had a dancing class on the premises once or twice a week, & placards were published stating that the house was open as a dancing academy on certain evenings:—*Held*: this was a breach of the covenant.—*WICKENDEN v. WEBSTER* (1856), 6 E. & B. 387; 25 L. J. Q. B. 264; 27 L. T. O. S. 122; 2 Jur. N. S. 590; 4 W. R. 562; 119 E. R. 909.

*Annotations*.—*Folld. Hawkins v. Hall* (1856), 28 L. T. O. S. 85; *German v. Chapman* (1877), 7 Ch. D. 271.

**2906. ————**—*HAWKINS v. HALL* (1856), 28 L. T. O. S. 85.

—*See, also*, No. 2959, *post*.

**2907. ————**—**Conduct of auction sale on premises.**—A covenant to use a house as a private house

—*Held*: the carrying on by the lessee of auction sales of his stock, on the premises, was a breach of the covenant restrainable by injunction.—*COCKBURN v. QUINN* (1890), 20 O. R. 519.—*CAN.*

**a. Hotel—Failure to obtain transfer of licence—Premises used as quarters for garrison.**—*GRAND CANAL CO. v. M'NAMEE* (1891), 29 L. R. Ir. 131.—*IR.*

**r. Mill & lands.**—The tenant of a mill & lands cannot, without con-

sent of his landlord, establish thereon a manufactory or machinery foreign to the purposes of his lease.—*FORD v. HILLOCHS* (1808), 14 Fac. Coll. 146.—*SCOT.*

**t. Temporary advertisement of sale—Not a breach.**—*M'KRISON v. FORSYTH*, [1909] S. C. 329; 46 Sc. L. R. 273; 16 S. L. T. 643.—*SCOT.*

**s. "General & machinery merchants"**—*Storing goods of third party.*

—*GILLISON v. THOMAS'S ESTATE* (1920), E. D. L. 146.—*S. AF.*

### PART XII. SECT. 3, SUB-SECT. 3.—B.

**2905 i. What constitutes breach—User as school.**—*COLQUHOUN'S CURATOR BONIS v. GLEN'S TRUSTEE*, [1920] S. C. 737.—*SCOT.*

**b. ————**—*Conversion to public-house.*—*BRAY v. FOGARTY* (1876), 4 I. R. Eq. 544.—*IR.*

**Sect. 3.—Restrictive covenants as to user: Sub-sect. 3, B. & C.; sub-sect. 4, A.]**

only is not broken by an auction sale on the premises of the furniture belonging to the house.—**REEVES v. CATTELL** (1876), 24 W. R. 485.

**Annotation:—***Reid. Re Courcier & Harrold's Contract*, [1923] 1 Ch. 565.

—**]**—*See, also*, No. 3027, *post*.

**2908. —** **Taking in paying guests.**—**PORTER v. GIBBONS & BISSETT** (1904), 48 Sol. Jo. 814, C. A.

**2909. —** **]**—By a sub-lease dated Apr. 14, 1921, a dwelling-house in London was sub-let for a term of seven years from Mar. 25, 1921, at the yearly rent of £180. The sub-lease contained a covenant "that the lessee his exors. administrators & assigns will not at any time during the said term use or permit the said dwelling-house & premises to be used for the purpose of any trade or business whatsoever, . . . or otherwise than as a private dwelling-house or professional residence only." Deft. was an assignee of the original sub-lessee, & having taken the house, although it was beyond her means, she made a practice of taking in friends & others as paying guests in order to meet rent, rates & outgoings. These paying guests were either friends or recommended by friends, & were secured by private notification & never by public announcement. In an action by the sub-lessors for an injunction to restrain deft. from doing this on the ground that it constituted a breach of the covenant:—**Held**: deft. was committing a breach both of the part of the covenant against using the premises for the purpose of any trade or business & of the part of the covenant against using the premises otherwise than as private dwelling-house or professional residence only, & an injunction must be granted to restrain deft. from committing this breach.—**THORN v. MADDEN**, [1925] Ch. 847; 41 T. L. R. 628; 70 Sol. Jo. 75.

**2910. —** **Conversion of building into flats.**—A lessee covenanted not to make any alteration in the arrangement or appearance of the demised premises; not to use the demised premises except as a private dwelling-house; & not to do any act in or upon the premises which would be or could become a nuisance to the lessors, owners, or occupiers of the neighbouring messuages. The lease was one of a number of similar leases granted to the builders of the neighbouring houses on the same estate, & containing similar covenants. Deft., without the consent of the lessor, by certain internal structural alterations, converted the premises, which previously had been used only as a private dwelling-house, into three flats & a maisonnette, & sub-let them to different tenants:—**Held**: those operations constituted breaches of all the covenants.—**DAY v. WALDRON** (1919), 88 L. J. K. B. 937; 120 L. T. 634; 35 T. L. R. 310; 63 Sol. Jo. 497; 17 L. G. R. 305.

**Annotation:—***Reid. Johnston v. Maconochie* (1920), 90 L. J. K. B. 83.

**2911. —** **Power of court to vary lease—Housing & Town Planning Act, 1919 (c. 35), s. 27.**—The above sect. provides that: "Where it is proved to the satisfaction of the county ct. on an application by the local authority or any person interested in a house that, owing to changes in the character of the neighbourhood in which such house is situate, the house cannot readily be let as a single tenement but could readily be let for occupation if converted into two or more tenements & that, by reason of the provisions of the lease or of any restrictive covenant affecting the house or otherwise, such conversion is pro-

hibited or restricted, the ct. . . . may vary the terms of the lease or other instrument imposing the prohibition or restriction so as to enable the house to be so converted. . . .":—**Held**: the sect. is not confined to houses which if converted into tenements could readily be let for occupation by persons of the working class, but is of general application, & applies where the house if converted could be let for occupation by persons of any class.—**JOHNSTON v. MACONOCHE**, [1921] 1 K. B. 239; 90 L. J. K. B. 83; 124 L. T. 323; 85 J. P. 18; 37 T. L. R. 48; 18 L. G. R. 806, C. A.

**2912. —** **]**—**ALLIANCE ECONOMIC INVESTMENT CO. v. BERTON**, No. 3066, *post*.

**2913. —** **Premises let in separate tenements—To weekly tenants.**—**BERTON v. ALLIANCE ECONOMIC INVESTMENT CO.**, No. 2870, *ante*.

**2914. —** **Conversion of flats into offices—Implied covenant by lessor—As to other premises in same building—Express covenants by lessees of other portions.**—Pltf. took a lease of a flat in a building from deft., pltf. covenanting to use the flat for residential purposes only. The other flats in the building were let by deft. with similar covenants by the lessees, but there was no express corresponding covenant by deft. as to the use of the flats. Deft. subsequently let some flats in the building to the Govt. for public offices, & possession was given to them:—**Held**: there had been a breach of an implied covenant by deft. that the flats should be used for residential purposes only; but an injunction was refused on the ground that deft., having given possession, could not comply with the order, & an inquiry was directed as to damages sustained by pltf. The ct., on appeal, varied the order by directing an inquiry as to damages sustained by pltf. by reason of any lettings by deft. in breach of his covenant up to the present time, & granting an injunction restraining any future lettings in breach of the covenant.—**GEDGE v. BARTLETT** (1900), 17 T. L. R. 43, C. A.

**Annotation:—***Reid. Reid v. Bickerstaff*, [1909] 2 Ch. 305.

**2915. —** **Conversion of flats into hotel.**—**Held**: the conversion of flats in a building into an hotel was a departure from the scheme in accordance with which the building was to be managed, namely, as residential flats suitable to the convenience of all persons who should be tenants of the flats.—**ALEXANDER v. MANSIONS PROPRIETARY, LTD.** (1900), 16 T. L. R. 431.

#### C. Religious Purposes.

**2916. Place of public worship—Conversion of loft into coffee house—Injunction.**—**GIRAUD v. NANCE** (1886), 2 T. L. R. 617, C. A.

**2917. Residence & holding for priest—User of premises as shelter for evicted tenants—Injunction.**—The owner of land in Ireland agreed with a Roman Catholic bishop to let a few acres to him & his successors in order to provide a suitable residence & holding for a Roman Catholic officiating clergyman upon the estate, to be held so long as there should be & remain stationed upon the premises such an officiating clergyman appointed by the bishop & his successors:—**Held**: upon the true construction of the agreement which was informally expressed, the erection upon the premises of several wooden huts, not attached to, but resting on the freehold, as a shelter for evicted tenants was an application of the premises to a purpose other than the specified one & therefore a breach of the agreement & the owner was entitled to have it restrained by injunction.—**KEHOE v.**

LANDSOWNE (MARQUESS), [1893] A. C. 451; 62 L. J. P. C. 97; 57 J. P. 708; 9 T. L. R. 628; 1 R. 294, H. L.

**SUB-SECT. 4.—COVENANTS NOT TO CARRY ON OR PERMIT TRADE OR BUSINESS.**

**A. In General.**

*See, generally, SALE OF LAND.*

**2918. What constitutes breach—Business conducted by buying & selling.]**—In a lease of a house, made in 1802, there was a covenant, with a clause of forfeiture, not to use or exercise the trades or businesses of a butcher, baker, slaughterman, melter of tallow, tallow chandler, tobacco pipe maker, tobacco pipe burner, soap maker, sugar baker, fellmonger, dyer, distiller, victualler, vintner, tavernkeeper or coffee house keeper, tanner, common brewer, or any offensive trade, without licence:—*Held*: the lease was not forfeited by carrying on any occupation besides a trade, & it was not a trade to use the house as a private lunatic asylum; the word trade in this covenant being applicable only to a business conducted by buying & selling.—*DOE d. WETHERELL v. BIRD* (1834), 2 Ad. & El. 161; 4 Nev. & M. K. B. 285; 4 L. J. K. B. 52; 111 E. R. 63.

**2919. — Materiality of payment to "business."]**—*ROLLS v. MILLER*, No. 2929, *post*.

**2920. — User of premises as private lunatic asylum.]**—*DOE d. WETHERELL v. BIRD*, No. 2918, *ante*.

**2921. — User of premises as school.]**—A covenant contained the words, "that the lessee should not carry on any trade, business, or calling," on the premises in question:—*Held*: the carrying on of a school for young ladies was a calling, within the terms of the restrictive covenant, & the ct. granted an injunction restraining the same from being carried on.—*KEMP v. SOBER* (1852), 19 L. T. O. S. 308, L. C.

*Annotations:—***Distd.** *Johnstone v. Hall* (1856), 2 K. & J. 414. **Refd.** *German v. Chapman* (1877), 7 Ch. D. 271; *Rolls v. Miller* (1883), 53 L. J. Ch. 99; *Sayers v. Culyer* (1883), 24 Ch. D. 180; *Holloway v. Hill*, [1902] 2 Ch. 612. **Mentd.** *Harrison v. Good* (1871), L. R. 11 Eq. 338; *Manners v. Johnson* (1875), 1 Ch. D. 673; *Doherty v. Allman* (1878), 3 App. Cas. 709; *Christie v. Davey*, [1893] 1 Ch. 316; *Sharp v. Harrison*, [1922] 1 Ch. 502.

**2922. — — — — —.]**—Where a lessee of a house & garden for term of years covenanted with the lessor "not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever, etc., without the licence of the lessor, etc." & afterwards, without the licence of the lessor, assigned the lease to a schoolmaster, who carried on his business in the house & premises:—*Held*: the assignment was a breach of this covenant, & the lessor entitled to re-enter under a proviso for re-entry for non-performance of covenants.—*DOE d. BISH v. KEELING* (1813), 1 M. & S. 95; 105 E. R. 36.

*Annotations:—***Consd.** *Rolls v. Miller* (1884), 27 Ch. D. 71. **Refd.** *Doe d. Gaskell v. Spry* (1818), 1 B. & Ald. 617; *Kemp v. Sober* (1851), 1 Sim. N. S. 517; *Barnard Castle U.C. v. Wilson*, [1901] 2 Ch. 813. **Mentd.** *Harrison v. Good* (1871), L. R. 11 Eq. 338.

**2923. — — — — —.]**—*HAWKINS v. HALL* (1856), 28 L. T. O. S. 85.

**2924. — — — — —.]**—*WICKENDEN v. WEBSTER*, No. 2905, *ante*.

— — — — —.]—*See, also*, No. 2059, *post*.

**2925. — Roman Catholic sisterhood—Supported by donations & private property of inmates.]**

—(1) The lessee covenanted not to use, or suffer to be used, the premises for the business of a schoolmaster or schoolmistress, or for any other trade or business:—*Held*: an establishment of Roman Catholics, consisting of a lady superioress, sisters, boarders, etc., many of them being received because they had been abandoned by their friends for change of faith, & supported by donations & the private property of the ladies, was not a breach of the covenant.

(2) A greengrocer was allowed to keep his horse & cart on the premises; it was taken out in the morning, used for the purposes of his trade, & returned in the evening; the baskets used in the trade were also left in the same way:—*Held*: evidence for the jury of a trading within the covenant. So, where a plumber was allowed to keep his tools & some of his lead in the coachhouse.—*DOE d. MACKENZIE v. BAYLIS* (1851), 17 L. T. O. S. 172, N.P.

**2926. — Licence to tradesmen to keep stock-in-trade on premises.]**—*DOE d. MACKENZIE v. BAYLIS*, No. 2925, *ante*.

**2927. — Hospital—Payment by patients according to their means.]**—A hospital, the patients of which make small payments according to their means, is a "business." Covenant by lessee with lessor not to carry on upon the demised premises "any trade, business, or dealing whatsoever, or anything of the nature thereof, or suffer any act or thing which may be or grow to the annoyance, damage, injury, prejudice, or inconvenience, of the neighbouring premises:—"*Held*: to prohibit the user of the premises as a throat & chest hospital for poor persons, where small payments were made by the patients according to their means.—*BRAMWELL v. LACY* (1879), 10 Ch. D. 691; 48 L. J. Ch. 339; 40 L. T. 361; 43 J. P. 446; 27 W. R. 463.

*Annotations:—***Consd.** *Tod-Heatly v. Benham* (1888), 40 Ch. D. 80. **Refd.** *Cleaver v. Bacon* (1887), 4 T. L. R. 27; *Withington L. B. of Health v. Manchester Corpn.*, [1893] 2 Ch. 19.

**2928. — — — — — For patients able & willing to pay.]**—*PORTMAN v. HOME HOSPITALS ASSOCN.* (1870), 50 L. T. 599, n.

*Annotation:—***Refd.** *Tod-Heatly v. Benham* (1888), 59 L. T. 25.

**2929. — Home for working girls.]**—The lease of a house contained a covenant that the lessee should not use, exercise, or carry on upon the premises any trade or business of any description whatsoever:—*Held*: a charitable institution called a "Home for Working Girls," where the inmates were provided with board & lodging, whether any payment was taken or not, was a business, & came within the restrictions of the covenant.

It is not essential that there should be payment in order to constitute a business; nor does payment necessarily make that a business which without payment would not be a business.—*ROLLS v. MILLER* (1884), 27 Ch. D. 71; 53 L. J. Ch. 682; 50 L. T. 597; 32 W. R. 806, C. A.

*Annotations:—***Refd.** *Tod-Heatly v. Benham* (1888), 59 L. T. 25; *Wiltshire v. Coslett* (1889), 5 T. L. R. 410; *Withington District L. B. of Health v. Manchester Corpn.* (1893), 68 L. T. 330; *Barnard Castle U. C. v. Wilson*, [1901] 2 Ch. 813; *South-West Suburban Water Co. v. St. Marylebone Grdn.*, [1904] 2 K. B. 174; *Tompkins v. Rogers*, [1921] 2 K. R. 94.

**PART XII. SECT. 3, SUB-SECT. 4.—A.**

**c. What constitutes breach—Business affecting insurance.]**—A lessee for

a term of years stipulated that he would not carry on any business that would affect the insurance. He made an underlease omitting any such stipulation, & the underlessee having

commenced the business of rectifying high wines, was restrained.—*ARNOLD v. WHITE* (1856), 5 Gr. 371.—**CAN.**

**d. — User of premises for pawn-broking.]**—A covenant not to us

**Sect. 3.—Restrictive covenants as to user: Sub-sect. 4, A. & B. (a) & (b) i. & ii.]**

**2930. — Letting gable ends to billposters.]—**A lease contained a covenant that the lessee, his exors., administrators, & assigns would not use, exercise, or carry on, or permit to be used, exercised, or carried on upon the demised premises, or any part thereof, any trade or business whatsoever, but would keep the demised house as & for a private dwelling-house. The lessee let the gable ends of the house to a billposting firm as a billposting station, & the billposters displayed large advertisements thereon:—*Held*: the lessee had thereby committed a breach of covenant.—*TUBBS v. ESSER* (1909), 26 T. L. R. 145.

**2931. — Sub-letting for purposes of trade.]—**By Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 5 (1), "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejection of a tenant therefrom, shall be made or given unless (a) any rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy (whether under the contract of tenancy or under this Act) . . . has been broken or not performed."

A dwelling-house to which the Act applied had been let by pltf. in 1915 to Mrs. A. on a yearly tenancy agreement, one of the terms of which was that the tenant should use, occupy & keep it as a private dwelling-house & not permit the same to be used for the carrying on of any trade or business without pltf.'s consent in writing. In 1917 Mrs. A. died & Mr. A. & family continued to occupy the house upon the same terms. In breach of the agreement & without applying to pltf. for her consent, Mr. A. sub-let a portion of the premises to deft., who carried on business as a piano tuner in the portion of the premises sub-let to him. Subsequently Mr. A.'s tenancy was determined by mutual agreement & the sub-tenant remained in possession of his part of the premises & refused to vacate it when requested by pltf. to do so. In an action by pltf. to recover possession of the premises:—*Held*: the word "tenancy" in s. 5 (1) (a), was in such a case as the present not to be limited to the statutory tenancy subsisting between pltf. & deft., but extended also to the original contractual tenancy as well, & the original tenant having broken the terms of his tenancy agreement, the case was therefore one which fell within the words of (a) "or any other obligation of the tenancy . . . has been broken or not performed." Accordingly pltf. was entitled to succeed & to recover possession from deft.—*CHAPMAN v. HUGHES* (1923), 129 L. T. 223; 39 T. L. R. 260; 67 Sol. Jo. 518; 21 L. G. R. 350.

*Annotation*:—*Distd. Ward v. Larkins* (1923), 130 L. T. 184.

**2932. — Taking in paying guests.]—THORN v. MADDEN**, No. 2909, *ante*.

**Who may be liable—Assignee of lessee—For breach by underlessee.]—See No. 2938, ante.**

or occupy the demised premises as a "shop," is not violated by carrying on the business of a pawnbroker thereon.—*CARTER v. FENNEL* (1850), 15 L. T. O. S. 416.—*IR.*

**PART XII. SECT. 3, SUB-SECT. 4.—B. (a).**

**2936 i. Covenant not to engage in specified trade—Sale of prohibited articles incident to tenant's business.]—**The proprietress of several adjoining shops

let one to a firm of boot & shoe sellers, the lease containing an undertaking by the lessor not to let any of the other shops "for the purpose of being occupied for a business of similar nature." She subsequently let one of these shops to a firm of naval outfitters for the purposes of their business, which consisted in the supply of everything connected with officers' outfits including boots & shoes. In an action by the firm of boot & shoe sellers against the proprietress for interdict

**B. Particular Trades.**

**(a) In General.**

**2933. Covenant not to engage in specified trade—Carrying on part of forbidden trade—Trade of butcher—Sale of raw meat.]—**A covenant in a lease, that the lessee shall not exercise the trade of a butcher upon the premises, is broken by there selling raw meat by retail although no beasts were there slaughtered.—*DOE d. GASKELL v. SPRY* (1818), 1 B. & Ald. 617; 106 E. R. 227.

**2934. — Exhibition of cycles—Motor cycles.]—ROYAL AGRICULTURAL HALL CO., LTD. v. CORDINGLEY** (1901), 17 T. L. R. 288.

**2935. — Trade of fishmonger—Sale of fried fish.]—ERRINGTON v. BIRT**, No. 2903, *ante*.

—*See, also*, Nos. 2899, 2904, *ante*; No. 3008, *post*.

**2936. — Sale of prohibited articles incident to tenant's business.]—**It is no breach of covenant not to carry on the business of a wholesale or retail confectioner for a grocer & tea dealer to sell a particular kind of sweetmeat in which a confectioner may happen to deal.—*LUMLEY v. METROPOLITAN RY. CO.* (1876), 34 L. T. 774.

**2937. — Auctioneer.]—**The letting of premises to an auctioneer for the purpose of carrying out a sale therein of furs & fur-lined goods is not a breach of a covenant not to carry on "the business of a draper," or to allow the premises to be used "for the sale of or dealing in drapery goods."—*WILLS v. ADAMS* (1908), 25 T. L. R. 85.

—*See, also*, No. 3002, *post*.

**2938. — Carrying on prohibited trade as accessory to tenants' main business—Sale of refreshments to customers—By grocer.]—**Defts. were bound by a covenant in the lease of their house not to use the same as a coffee-house. Defts. were dealers in tea, coffee & other groceries; but they proposed, as ancillary to their business, & for the convenience of their customers, to sell light refreshments consisting of cups of tea & coffee, bread & butter, pastry, ham sandwiches & pork pies, to be consumed on the premises:—*Held*: the sale of light refreshments was carrying on the business of a coffee-house keeper, & was a violation of the covenant, injunction granted.—*FITZ v. LES*, [1893] 1 Ch. 77; 62 L. J. Ch. 258; 68 L. T. 108; 37 Sol. Jo. 25; 2 R. 132, C. A.

*Annotations*:—*Consd. Ashby v. Wilson*, [1900] 1 Ch. 66; *Holloway v. Hill*, [1902] 2 Ch. 612; *Wartski v. Meaker* (1914), 110 L. T. 473. *Refd. Drew v. Guy* (1894), 7 R. 220; *A.-G. v. Plymouth Corpn.* (1909), 7 L. G. R. 710; *Lovell & Christmas v. Wall* (1911), 104 L. T. 85.

**2939. — Covenant not to carry on business similar to that of hotel & restaurant—Sufficient similarity to compete.]—**Pltfs. granted a lease to the A. B. co. containing a covenant that the tenants would not carry on the business of a restaurant similar to that carried on by R., another tenant of pltfs. R. was an hotel-keeper who had a restaurant on licensed premises connected with his hotel. The A. B. co. carried on a restaurant at which they sold tea, coffee, cocoa, pastry, &

& damages in respect of breach of contract:—*Held*: the business of the naval outfitters was not similar in nature to the business of the pursuers, & accordingly, defender had not committed a breach of her undertaking.—*RANDALL (H. E.), LTD. v. SUMMERS*, [1919] S. C. 396.—*SCOT.*

**e. — Chandler—Selling candles.]—**A. was a lessee for years under a lease containing a covenant against carrying on the trade of a chandler on

cold meat, but not any hot meat except beef pies, & this was not objected to. The A. B. co. having assigned their lease to deft., he proceeded in his restaurant to sell hot meat & other things not sold by the A. B. co. Deft. had not a license for the sale of intoxicants, nor a victualler's license; his establishment was on a much smaller scale than that of R., his premises were of an inferior class to those of R., & his prices were much lower:—*Held*: the test whether deft.'s business was similar to that of R. was whether it was sufficiently like it to compete with it, & judging by this rule, although there were considerable differences between R.'s business & that of deft., deft.'s business was similar to that of R., & an injunction must be granted in the terms of the covenant, with a proviso that it was not to prevent deft. from selling any of the articles in which the A. B. co. had dealt.—*DREW v. GUY*, [1894] 3 Ch. 25; 63 L. J. Ch. 547; 71 L. T. 220; 58 J. P. 803; 7 R. 220, C. A.

**2940. Covenant not to permit specified trade—Letting for sale of prohibited articles—Articles incident to tenant's business.**—*WILLS v. ADAMS*, No. 2937, *ante*.

*See, also*, No. 3002, *post*.

**2941. — What constitutes breach—Failure to sue for breach by undertenant.**—*ATKIN v. ROSE*, No. 2871, *ante*.

#### (b) *Licensed Premises, etc.*

##### i. *In General.*

**2942. Whether valid.]—**A restriction in a *feu* charter, purporting to bind not only the original contracting *feuar* & his heirs, but also his assignee or any tenant or possessor of the houses to be erected on the *feu*, & power to enforce or dispense with it, is given not to the disposer or his heirs but to the superior for the time being: the restriction, unless repugnant to the nature of the estate taken by the *feuar* or to public policy, is a condition of the *feu* & runs with the land against singular successors. In all cases of restrictive conditions in a *feu* charter, the superior must have power to enforce them, or to dispense with them according to his own will or not, whether the charter is so expressed or not, unless the benefit of them & the right to enforce them are communicated to other *feuars*. A restraint against carrying on the trade of a publican is as good in law, & as capable of running with the land, as a restraint against carrying on any other business; & the fact that restrictions are placed by statute upon the freedom of that particular trade constitutes no reason why a private contract to prevent it from being carried on, without the consent of the superior should be held invalid or contrary to law. *Feu* rights of land in G., a town of 5,000 inhabitants, contained restrictions against retailing malt or spirituous liquors or allowing the same to be sold or retailed within the buildings erected on the *feus* without the superior's permission. The superior sought an interdict to prohibit defenders, the *feuars*, from continuing to sell any kind of malt or spirituous liquors, etc., alleging that the whole of the town was built on ground held of him as superior; that he was proprietor of certain houses in the

heart of the town at a rental of £750; that he had still a large extent of ground in & adjacent to the town available for *feuing*, & that his mansion house was within half a mile of the town; & that these properties were damaged by the existence of so many public-houses. Defenders pleaded no interest to sue the action, acquiescence & prescriptive use. On the question of relevancy:—*Held*: (1) the restrictions sought to be imposed were not personal or inconsistent with public policy nor repugnant to pursuer's estate they relating to the use & employment of buildings erected on the land; (2) the interest to sue the action was connected with patrimonial rights, & the superior's case as shown on the record was sufficient to entitle him to the relief which he prayed; (3) it was the plain intention of the contracting parties that the superior should determine whether there are to be public-houses upon any of the *feus*, & if so, their number & position & accordingly the superior in granting his license to certain *feuars* to sell liquor was in no sense departing from or waiving the prohibition. But it was a different question in all or some of the cases, whether pursuer might not be seeking to enforce the restrictions under circumstances, or in a manner, which ought to deprive him of the assistance of the ct. there being facts averred from which, if proved or admitted, it might be legally inferred that successive superiors had so acquiesced in the *feuar's* use of their premises for the sale of liquor that the prohibition must be held to have been unconditionally discharged. But the record leaving it open to the superior to adduce evidence which might give a different colour to these facts, the parties must proceed to proof before the questions of acquiescence & waiver & prescriptive use could be decided.—*ZETLAND (EARL) v. HISLOP* (1882), 7 App. Cas. 427, H. L.

*Annotations*:—As to (2) *Consd.* Lord Strathearn S.S. Co. v. Dominion Coal Co. (1925), 42 T. L. R. 86. *Refd.* L. C. C. v. Allen, [1914] 3 K. B. 642; Dundee Harbour Trustees v. Nicol, [1915] A. C. 550.

##### ii. *What constitutes Breach.*

**2943. Covenant not to carry on trade of victualler or retailer of wine—Carrying on of refreshment house.]—***BARRET v. BLAIGRAVE* (1800), 5 Ves. 555; 31 E. R. 735, L. C.; *on appeal* (1801), 6 Ves. 104, L. C.

*Annotations*:—*Consd.* Lumley v. Wagner (1852), 1 Do. M. & G. 604. *Refd.* Shackle v. Baker (1808), 14 Ves. 468; Dietrichsen v. Cabburn (1846), 1 Coop. temp. Cott. 72; Rochdale Canal Co. v. King (1851), 2 Sim. N. S. 78.

**2944. Covenant not to carry on business of common brewer or retailer of beer—Lessee retailer brewer.]—**Carrying on the business of a retailer brewer:—*Held*: to be no breach of a covenant not to carry on the business of a common brewer, or retailer of beer.—*SIMONS v. FARREN* (1834), 1 Bing. N. C. 126; 4 Moo. & S. 672; 131 E. R. 1065; *subsequent proceedings*, 1 Bing. N. C. 272.

**2945. Covenant not to use premises as public-house—Lessee taking out off license—Off license.]—**A person, by taking out an excise license for the sale of beer not to be drunk on the premises, does not break a covenant not to use his house as a public-house for the sale of beer.—*PEASE v. COATS* (1866), L. R. 2 Eq. 688; 36

the demised premises. Candles were, with other goods, exhibited for sale in a shop which formed part of the premises held by deft., although it did not appear that any candles were manufactured on the premises:—*Held*: there was evidence of a breach of the condition contained in the

underlease to deft. against carrying on the trade of a chandler.—*O'FARRELL v. STEPHENSON* (1879), 4 L. R. Ir. 151, 715.—*IR.*

#### PART XII. SECT. 3, SUB-SECT. 4.— B. (b) ii.

##### 1. *Covenant not to follow trade of*

*publican—Trading as licensed spirit grocer.]—*A covenant by the lessee in a lease not to use or follow the trade or business of a publican is not broken by his trading as a licensed spirit grocer on the premises.—*Re CULLEN & HIAL'S CONTRACT*, [1904] 1 I. R. 206.—*IR.*

**Sect. 3.—Restrictive covenants as to user: Sub-sect. 4, B. (b) ii., & C.]**

L. J. Ch. 57; 14 L. T. 880; 30 J. P. 819; 12 Jur. N. S. 684; 14 W. R. 1021.

**2946. Covenant not to use premises as beer-house—Sale of beer for consumption off premises.]**—A covenant not to use the house as "a beer-house" is not broken by the sale, under a license, of beer by retail to be consumed off the premises.—*LONDON & NORTH WESTERN RY. CO. v. GARNETT* (1869), L. R. 9 Eq. 26; 39 L. J. Ch. 25; 21 L. T. 852; 18 W. R. 246.

*Annotations:—*Consd. *Formby v. Barker* (1903), 89 L. T. 249. *Reid. Holt v. Collyer* (1881), 44 L. T. 214.

**2947. Covenant not to use premises for sale of spirituous liquors—Sale of wine.]**—*FEILDEN v. SLATER*, No. 2894, *ante*.

**2948. — Sale of spirits in bottle.]**—*FEILDEN v. SLATER*, No. 2894, *ante*.

**2949. Covenant against use of "trade of seller by retail of wine or spirits"—Sale of wine or spirits in bottle by grocer.]**—A grantee in fee of a piece of building land covenanted by a separate deed with the grantor that the piece of land should not for the space of twenty years be used "as a site for any hotel, tavern, public-house, or beer-house," nor should "the trade or calling of an hotel or tavern keeper, publican or beer-shop keeper, or seller by retail of wine, beer, spirits, or spirituous liquors," be "used, exercised, or carried on, at or upon" the same:—*Held*: the sale of wine & spirits in bottle by a grocer in the course of his trade was not such a breach of the above covenant as the Ct. of Ch. would interfere with.—*JONES v. BONE* (1870), L. R. 9 Eq. 674; 30 L. J. Ch. 405; 23 L. T. 304; 34 J. P. 468; 18 W. R. 489.

*Annotations:—**Apld. Holt v. Collyer* (1881), 16 Ch. D. 718. *Distd. Buckle v. Fredericks* (1890), 44 Ch. D. 244. *Reid. Formby v. Barker* (1903), 89 L. T. 249. *Mentd. Shoolbrod v. St. Pancras JJ.* (1890), 24 Q. B. D. 346.

**2950. Covenant not to carry on business of vintner—Sale of wine.]**—A "vintner" means any one who sells wine.

It is no defence to an application for an injunction to restrain a breach of covenant to say that the covenantee sustains no damage from the breach, for if the covenantor derives any benefit therefrom the covenantee may reasonably demand a share of it as the price of his consent.—*WELLS v. ATTENBOROUGH* (1871), 24 L. T. 312; 19 W. R. 465.

**2951. Covenant not to use premises as public-house or beerhouse—Sale of beer for consumption off premises—In pursuance of excise licence.]**—A lease contained a covenant by the lessees not to permit any house that might have been erected on the land demised to be used as a beer-shop, or public-house, or any theatre, or public show, or exhibition. The assignee of the lease carried on the business of a grocer & baker at a shop erected on the land demised. He obtained an excise retail beer license for the sale of beer to be consumed off the premises, & sold beer in pursuance thereof in his shop:—*Held*: a breach of the covenant.—*ST. ALBANS (RP.) v. BATTERSEY* (1878), 3 Q. B. D. 359; 47 L. J. Q. B. 571; 38 L. T. 685; 42 J. P. 581; 26 W. R. 679.

*Annotations:—*Consd. *Holt v. Collyer* (1881), 16 Ch. D. 718. *Reid. Thornevell v. Johnson* (1881), 50 L. J. Ch. 641; *Devonshire v. Simmons* (1894), 11 T. L. R. 52.

**2952. — Use of premises as private hotel—Supply of liquor to visitors—Other than beer.]**—Covenant not to use premises as a public-house or beer-shop. The Ct. refused an injunction to restrain the user of the premises as a private

hotel where the liquors were supplied only to visitors & no beer at all was supplied on the premises.—*DEVONSHIRE (DUKE) v. SIMMONS* (1894), 11 T. L. R. 52; 39 Sol. Jo. 60.

*Annotation:—**Mentd. Bristol Grdns. v. Bristol Waterworks Co.* (1911), 105 L. T. 702.

**2953. Covenant not to use premises as public-house, tavern or beerhouse—Sale of beer for consumption off premises.]**—A person who had entered into a covenant not to use a house as a public-house, tavern, or beerhouse, opened a grocer's shop there, at which he carried on the sale of beer to be drunk off the premises as an ancillary business to his grocer's business:—*Held*: this was no infringement of the covenant.—*HOLT & CO. v. COLLYER* (1881), 16 Ch. D. 718; 50 L. J. Ch. 311; 44 L. T. 214; 45 J. P. 456; 29 W. R. 502.

*Annotations:—**Reid. Formby v. Barker* (1903), 89 L. T. 249. *Mentd. Lovell & Christmas v. Wall* (1910), 103 L. T. 588.

**2954. — — —.]**—*NICOLL v. FENNING*, No. 2898, *ante*.

**2955. — — —.]**—A deed contained a covenant by the grantee of a piece of land that no building to be erected on the land should be used as a public-house, tavern, or beer-shop. A lessee of the grantee obtained an off license authorising him to sell at his shop, on the land, beer not to be drunk on the premises, & sold beer there accordingly:—*Held*: this was a breach of the covenant.—*LONDON & SUBURBAN LAND & BUILDING CO. v. FIELD* (1881), 16 Ch. D. 645; 50 L. J. Ch. 549; 44 L. T. 444, C. A.

*Annotations:—*Consd. *Formby v. Barker* (1903), 89 L. T. 249. *Reid. Holt v. Collyer* (1881), 16 Ch. D. 718; *Thornevell v. Johnson* (1881), 50 L. J. Ch. 641.

**2956. — Use of premises as club—Sale of liquor to members—For benefit of club.]**—A club of working men were the lessees of premises the lease of which contained a covenant that they should not be used for the sale of wines, malt or spirituous liquors. The rules provided for the purchase of liquor & its distribution at fixed prices among the members by whom it was consumed upon the premises, the profits being applied to the general purposes of the club:—*Held*: this was not a sale within the meaning of the covenant.—*RANKEN v. HUNT* (1894), 38 Sol. Jo. 290; 10 R. 249, D. C.

**C. Noisome or Offensive Trades.**

**2957. Effect of covenant—Admission of liberty to carry on some trades.]**—*BONNETT v. SADLER*, No. 2865, *ante*.

**2958. What constitutes breach—Licensed victuallers' business.]**—In a lease for years of a messuage & premises in a public street, lessor covenanted, that, lessee, his exors., etc., should not permit or suffer any person or persons to inhabit the same, who should carry on therein certain enumerated trades or businesses, "or any other trade or business, that may be, or grow, or lead to be, offensive, or any annoyance or disturbance to" any of the other tenants of lessor, etc. Lessee granted an underlease of the premises, subject to the like covenant, to A., who opened them in the business of a licensed victualler, which was not one of the businesses enumerated in the covenant:—*Held*: by such acts, the covenant was not broken.—*JONES v. THORNE* (1823), 1 B. & C. 715; 3 Dow. & Ry. K. B. 152; 1 L. J. O. S. K. B. 200; 107 E. R. 263.

*Annotation:—**Reid. Rapley v. Smart* (1893), 10 T. L. R. 174.

**2959. — School.]**—In a case resting simply upon covenant, if the party seeking specific performance be entitled in possession, he has a right

to the enjoyment of the property *modo et forma* according to his covenant; but if he be entitled in remainder only, he must show that he has sustained some material damage by reason of the breach to entitle him to relief of this nature.

Demise of land for 999 years, at a yearly rent of £33 odd, & covenant by lessee not to carry on, or suffer to be carried on, in any building to be erected on the premises, any of several noxious or objectionable trades & employments, "or any other trade, business, or employment whatsoever," but to use the premises solely for private dwelling-houses. Lessor died, having devised the premises to one for life, & to plffs. in remainder. Deft., as sub-lessee, carried on upon the premises a school for girls. A bill for an injunction, living the tenant for life (who was not a plff.), dismissed with costs, upon the ground that, having regard to the circumstance that plffs. were merely entitled in remainder, the relief prayed was too minute, there being no case of waste, but only a possibility of the respectability of the neighbourhood being in some measure affected; & the argument from acquiescence could not apply, plffs. having no right of re-entry:—*Held: obiter*, in a gross case, *c.g.*, a noxious trade, an injunction would have been granted, although plffs. were not entitled in possession.—*JOHNSTONE v. HALL* (1856), 2 K. & J. 414; 25 L. J. Ch. 462; 27 L. T. O. S. 230; 20 J. P. 579; 2 Jur. N. S. 780; 4 W. R. 417; 69 E. R. 844.

*Annotations:—Reid*, German v. Chapman (1877), 7 Ch. D. 271; Holloway v. Hill, [1902] 2 Ch. 612. *Mentid*, Wilson v. Church (1879), 13 Ch. D. 1.

**2960. — Dangerous trade.**—["Dangerous" not included in covenant.]—Using premises for depositing large quantities of lucifer matches, whereby the premises are rendered so dangerous as to be uninsurable against fire, is not a breach of a covenant not to carry on any noisome or offensive trade, the word "dangerous" not being in the covenant.—*HICKMAN v. ISAACS* (1861), 4 L. T. 285.

**2961. — Mock auction.**—*Qu.*: whether a "mock auction" comes within the terms of a covenant against carrying on offensive trades.—*MOSES v. TAYLOR* (1862), 27 J. P. 36; 11 W. R. 81.

**2962. — Tannery—Business to be conducted in no offensive manner.**—Specific performance of an agreement to take a lease of lands for the purpose of a tannery will not be enforced when the proposed lease contained the usual covenant against carrying on noxious trades, although defts. had represented that they were about to conduct their business in a way which could not be open to objection on that score.—*REEVES v. GREENWICH TANNING CO., LTD.* (1864), 2 Hem. & M. 54; 71 E. R. 380.

**2963. — Hospital for surgical tuberculosis.**—By a lease dated Feb. 18, 1887, H., the tenant for life in possession of a settled estate, demised to deft. T., a parcel of land, on which C. House was built, for a term of ninety-nine years, with a covenant by the lessee not to exercise or carry on upon the demised premises any noisy, noisome, or offensive trade or business, or do or suffer to be done anything which might be hazardous, or noisome or injurious, or offensive to the lessor or his property or any of his tenants. Other similar building leases with identical covenants were

granted according to a building scheme applicable to part of the estate. By a deed dated Aug. 2, 1889, H. & his trustees conveyed the site of C. House, subject to the existing lease, to W. in fee, & she covenanted with H. to the intent that the burden of the covenant might run with the premises, that she, her heirs, & assigns, would not at any time thereafter permit the premises to be used for the purpose of any trade or business "or otherwise than as a private dwelling-house." On Apr. 14, 1893, W. conveyed & released the site of C. House to T. subject to the lease of Feb. 18, 1887, but to the intent that the term thereby created might be thenceforth absolutely merged in the reversion, & T. covenanted to indemnify W. against the covenants in the conveyance of 1889. In Jan. 1915, T. offered C. House to deft. association, & it was subsequently opened as a children's hospital for surgical tuberculosis. In an action by H. & others entitled to freehold & leasehold interests in houses in the vicinity, alleging breaches of covenants by reason of sights, noise, smells, & risk of infection to the neighbourhood, & asking for an injunction to restrain defts. from using the house for the purpose of a hospital so as to cause a nuisance, or from using the premises "otherwise than as a private dwelling-house" or in breach of the covenants in the lease of 1887:—*Held*: (1) the carrying on of a properly equipped & well managed establishment, such as the hospital was proved to be, was not *per se* a noisy, noisome, or offensive business; (2) on the evidence, & in particular upon the ground that the medical evidence was unanimous & unshaken to the effect that the hospital was not a source of danger to the neighbourhood & there was no risk of infection, the action failed as to the alleged breaches of the covenant in the lease of 1887, & also as to the alleged nuisance at common law; but (3) the covenant by W. in the conveyance of 1889 could not be construed as becoming effective only when the leasehold building scheme came to an end on the determination of the leases, nor could any qualification be engrafted on the declaration of merger in the deed of 1893, & therefore from that date onwards T. must be held bound by covenant enforceable by H. & his assigns not to use C. House otherwise than as a private dwelling-house. In the result, an injunction would be granted in the terms of the covenant in the conveyance of 1889, but the operation of it would be suspended for six months.—*FROST v. KING EDWARD VII. WELSH, ETC., ASSOC.*, [1918] 2 Ch. 180; 87 L. J. Ch. 561; 119 L. T. 220; 82 J. P. 249; 34 T. L. R. 450; 62 Sol. Jo. 584; *on appeal*, 35 T. L. R. 138, C. A.

**Carrying on hospital—Whether "nuisance" or "annoyance."**—*See* No. 2927, *ante*, No. 2968, *post*.

**2964. Factors to be considered—Character of neighbourhood.**—*GUTTERIDGE v. MUNYARD*, No. 2965, *post*.

**2965. — Trade carried on at time of demise.**—In construing a covenant not to carry on any offensive trade or business on premises demised, much will depend on the situation of the premises; & in construing such a covenant, it is particularly worthy of consideration whether such trade as that complained of was carried on there at the

**PART XII. SECT. 3, SUB-SECT. 4.—C.**

**2964.1. Factors to be considered—Character of neighbourhood.**—*PEMBROKE (EARL) v. WARREN*, [1896] 1 I. R. 76.—*IR.*

*g.*—*Similar business in same building.*—The ct. refused to give damages for the alleged breach of a covenant by a lessee not to carry on any business offensive or annoying to the lessor or his assigns, since the business was not in itself offensive or

annoying another similar business being carried on in the same building as the leased premises without objection, a full disclosure of the nature of the business having been made by the lessee, & no tenants having brought action against the lessor or moved out

**Sect. 3.—Restrictive covenants as to user: Sub-sect. 4, C.; sub-sect. 5, A. & B.; sub-sect. 6, A. & B.]**

time of the demise; & *semble*: a trade carried on there at the time of the demise would not be within the covenant.—*GUTTERIDGE v. MUNYARD* (1834), as reported in 7 C. & P. 129, N. P.

*Annotations*:—*Refd.* Rapley v. Smart (1893), 38 Sol. Jo. 129. *Mentd.* Young v. Mantz (1838), 7 L. J. C. P. 204; Lister v. Lane & Nesham, [1893] 2 Q. B. 212; *Torrens v. Walker*, [1906] 2 Ch. 166; *Lurcott v. Wakely & Wheeler*, [1911] 1 K. B. 905; *Miller v. Burt* (1918), 63 Sol. Jo. 117; *Hewitt v. Rowlands* (1924), 131 L. T. 757.

**2966. Necessity for proof of pecuniary damage—Injunction.]—WILTSHIRE v. COSSLETT** (1889), 5 T. L. R. 410.

**SUB-SECT. 5.—COVENANTS RESTRAINING NUISANCE OR ANNOYANCE.**

**A. Nuisance.**

*See, generally, NUISANCE.*

**2967. What constitutes breach—Nuisance committed on adjoining land.]—**Where there was a covenant by several allottees of land not to commit a nuisance on the allotted land:—*Held*: not to be a fraud on the covenant to commit a nuisance on land immediately adjoining.—*CLEEVE v. MAHANY* (1861), 25 J. P. 819; 9 W. R. 882.

**2968. —Hospital.]—**The lease of a dwelling-house at Old Brompton contained a covenant by the lessee not to use the house for certain specified trades, or any other noisome, obnoxious, or offensive trade or business, & not to do, or suffer to be done, anything upon the premises which should, or might be, or grow to the annoyance, nuisance, grievance, or damage of the lessor, his heirs & assigns, or the inhabitants of the neighbouring or adjoining houses. The lessee established a hospital at the house for treatment of diseases of the throat, nose, ear, skin, eye, fistula, & other diseases of the rectum. The lessor & two of his tenants brought an action against the lessee for an injunction restraining the lessee from using the house as a hospital in breach of the covenant contained in the lease. The Ct. granted the injunction:—*Held*: the question depended on the construction of the latter part of the covenant; the word “annoyance” had a wider meaning than “nuisance,” & this hospital was an annoyance to the lessor & the inhabitants of the neighbouring or adjoining houses within the covenant, & the injunction had been properly granted.

In order to enforce such a covenant it is not necessary to show that actual damage or pecuniary loss has been sustained. It is sufficient without proving actual risk of infection that sensible people feel a reasonable apprehension of risk & interference with the pleasurable enjoyment of their houses for ordinary purposes as distinguished from a more fanciful feeling of distaste entertained by sensitive persons.—*TOD-HEATLY v. BENHAM* (1888), 40 Ch. D. 80; 58 L. J. Ch. 83; 60 L. T. 241; 37 W. R. 38; 5 T. L. R. 9, C. A.

*Annotations*:—*Apld.* Wood v. Cooper, [1894] 3 Ch. 671; *Erlington v. Birt* (1911), 105 L. T. 373; *Adams v. Ursell*, [1913] 1 Ch. 269. *Refd.* *Re Davis & Cayey* (1888), 40 Ch. D. 601; *Tinkler v. Aylesbury Dairy Co.* (1888), 5 T. L. R. 62; *Showell v. Winkup* (1889), 60 L. T. 389; *Wiltshire v. Coslett* (1889), 5 T. L. R. 410; *Our Boys*

of the premises.—*BROWN v. TOOTHILLS* (1914), 29 W. L. R. 729; 7 W. W. R. 318; 20 D. L. R. 584.—*CAN.*

**PART XII. SECT. 3, SUB-SECT. 5.—A.**

**b. What constitutes breach—Con-**

**duct of tenant—Preventing landlord letting adjoining premises.]—**Conduct by tenant which prevents landlord from letting adjoining premises *ejusdem generis* with nuisance or annoyance to adjoining or neighbouring occupiers, & forms a ground which

*Clothing Co. v. Holborn Viaduct Land Co.* (1896), 12 T. L. R. 344; *Howarth v. Armstrong* (1897), 77 L. T. 62; *Wauton v. Coppard*, [1899] 1 Ch. 92.

**2969. —Whether limited to technical nuisance.]—TOD-HEATLY v. BENHAM**, No. 2968, *ante*.

**2970. —Necessity for physical detriment.]—TOD-HEATLY v. BENHAM**, No. 2968, *ante*.

**2971. Necessity for proof of actual damage.]—TOD-HEATLY v. BENHAM**, No. 2968, *ante*.

**2972. Nuisance committed by sub-lessee—How far lessee liable—Covenant not inserted in sub-lease.]—**(1) A lessee of a house covenanted that she would not use or permit the premises or any part thereof to be used for any illegal or immoral purpose, & further, that no act, matter, or thing should at any time be done on the premises which might be or tend to the annoyance of the lessor or superior landlord for the time being or the lessees or occupiers of neighbouring premises. There was a condition of re-entry on breach of any of the covenants:—*Held*: the second part of the covenant in the original lease was not qualified by the word “permit” in the first part, but was an absolute covenant that if the act, matter, or thing specified was done by any one, there was a right of re-entry.

(2) The lessee sub-let the house, & the sub-lessee covenanted that she would not carry on or permit to be carried on any noisome, or dangerous, or offensive trade, or business, or anything that might be or cause an injury, nuisance, or annoyance to the sub-lessor or any of the neighbours. During the occupation of the sub-lessee an act was done on the premises which tended to the annoyance of the superior landlord:—*Held*: the original lessee could not be said to have “permitted” the act complained of simply because she had made a sub-lease without inserting therein covenants as strict as those in the original lease.—*PROTHERO v. BELL* (1906), 22 T. L. R. 370.

**B. Annoyance.**

**2973. What constitutes breach—Interference with reasonable peace of mind.]—BRAMWELL v. LACY**, No. 2927, *ante*.

**2974. —.]—TOD-HEATLY v. BENHAM**, No. 2968, *ante*.

**2975. —Interference with reasonable enjoyment of adjoining premises—Erection of screen.]—**A lessee covenanted not to erect or build on the demised premises, without the written consent of the lessor, “any other building whatsoever” save & except a stable & coach-house; & also not to do on the demised premises any act, matter, or thing which might be an annoyance or nuisance to any tenant of the lessor. The lessee, without the lessor’s consent, erected above his boundary fence an open trellis-work screen of wood about fifty-eight feet long & twelve feet high, which interfered to some extent with the light flowing to the ground floor windows of the adjoining premises, which were held on lease from the same lessor with covenants similar to those above stated. In an action by the lessor against an assignee of the lease:—*Held*: under the circumstances the screen was a “building” within the covenant against building; & it was also an “annoyance” as it interfered with the pleasurable enjoyment of

may be considered satisfactory to a Ct. for making a decree for possession.—*PATTERSON v. CULHANE* (1916), 50 I. L. T. 116.—*IR.*

**2971 i. Necessity for proof of actual damage.]—COLLINS v. HAMILTON** (1837), 15 Sh. (Ct. of Sess.) 895.—*SCOT.*

the adjoining premises by the tenant thereof, & an injunction was granted accordingly.—*WOOD v. COOPER*, [1894] 3 Ch. 671; 63 L. J. Ch. 845; 71 L. T. 222; 43 W. R. 201; 8 R. 517.

*Annotations*:—*Reid*. *Howarth v. Armstrong* (1897), 77 L. T. 62; *Nussey v. Provincial Bill Posting Co. & Eddison*, [1909] 1 Ch. 734. *Mentd*. *Boyce v. Paddington B. C.*, [1903] 1 Ch. 109.

2976. — *Hospital*.—*BRAMWELL v. LACY*, No. 2927, *ante*.

2977. — —.—*TOD-HEATLY v. BENHAM*, No. 2968, *ante*.

2978. — *Dog show*.—*CHURCHILL v. PEMBERTON* (1895), 39 Sol. Jo. 332.

2979. — *Advertisement across front of shop—in business neighbourhood*.—*OUR BOYS CLOTHING CO., LTD. v. HOLBORN VIADUCT LAND CO., LTD.* (1896), 12 T. L. R. 344.

2980. — *Inconvenience—Use of blind for business purposes*.—*GRESHAM LIFE ASSURANCE SOCIETY, LTD. v. RANGER* (1899), 15 T. L. R. 454; 43 Sol. Jo. 624, C. A.

2981. — *Letting wall of house to bill-posting company*.—*HEARD v. STUART*, No. 2993, *post*.

#### SUB-SECT. 6.—COVENANTS IN RESTRAINT OF BUILDING.

##### A. In General.

2982. *Covenant that lessee's elevation shall correspond with adjoining houses—Whether enforceable*.—Equity will execute a covenant that lessee's elevation shall correspond with the adjoining houses.—*FRANKLYN v. TUTON* (1821), 5 Madd. 469; 56 E. R. 975.

*Annotation*:—*Mentd*. *Blakemore v. Glamorganshire Canal Navigation* (1832), 1 My. & K. 154.

2983. *Covenant not to build—What constitutes breach—Erection of greenhouse—Balance of convenience*.—A lease contained a covenant that the lessee should not during the term erect any new building or erection on the premises thereby demised without first obtaining the consent in writing of the lessor, etc. The lessee had erected in the kitchen garden belonging to said premises a greenhouse or conservatory without the consent of the lessor. The lessor brought an action of ejectment for the breach of the covenant. On motion to restrain deft. from proceeding with this action:—*Held*: on a balance of convenience & inconvenience, having regard also to the fact deposed to that the greenhouse or conservatory might be removed in the course of a day, *pltf.* was entitled to an injunction to restrain the action.—*HAIGH v. WATERMAN* (1867), 16 L. T. 375.

2984. — *Erection of wooden hoardings*.—The erection of wooden hoardings for the purposes of advertisement fastened to the demised premises:—*Held*: to be a breach of a covenant not "to erect or make any other building or erection on any part of the demised premises."—*POCOCK v. GILHAM* (1883), 1 Cab. & El. 104.  
*Annotation*:—*Consd*. *Boyce v. Paddington B. C.*, [1903] 1 Ch. 109.

2985. *Covenant must be definite—Covenant against "unseemly" buildings*.—The pursuers, proprietors of a *feu*, raised an action against defenders, the proprietors of an adjoining *feu* held of the same superior, to enforce building restrictions. These restrictions were contained in a bond of servitude, by which defenders bound themselves & their successors not to erect on any part of an adjoining piece of ground "any building

of an unseemly description." Pursuers alleged that defenders were about to allow the erection of unseemly buildings within the meaning of the bond of servitude:—*Held*: a condition against the erection of buildings of "an unseemly description" was too vague & indefinite to be valid as a permanent restraint on the use of property.—*MURRAY v. DUNN*, [1907] A. C. 283; 97 L. T. 112, II. L.

##### B. Alteration of Buildings.

Restriction of alteration of premises, *see* Part XII., Sect. 2, *ante*.

2986. *Alterations completely changing nature of premises*.—*BONNETT v. SADLER*, No. 2865, *ante*.

2987. *External alterations—Construction of covenant*.—Premises consisting of a wharf & dock, dwelling-house, wash-house, & courtyard, were demised under a lease containing a covenant that the lessee, his exors., etc., should not erect or build any edifice or structure whatsoever on the wharf & dock, or place goods thereon above a certain height, etc., "nor do any other matter or thing of any nature or kind which might obstruct the view of the river from the White Hart public-house, or that should grow or be a nuisance or annoyance to the occupier thereof," nor carry on a certain trade thereon, "nor make any external alteration whatsoever in the said premises, nor any internal alterations in the said dwelling-house that may lessen the value thereof, without the consent in writing of the lessor for that purpose;" with a proviso for re-entry for a breach:—*Held*: (1) this covenant absolutely prohibited all external alteration in any part of the demised premises, & the qualification as to lessening "the value thereof" applied only to internal alterations in the dwelling-house; (2) mere standing by & seeing the lessee making alterations which are in breach of his covenant, does not operate as a waiver on the part of the lessor.—*PERRY v. DAVIS* (1858), 3 C. B. N. S. 769; 140 E. R. 945.

2988. — —.—The lease of a shop occupied by a jeweller & watchmaker contained a covenant by the lessee that he would not make or suffer to be made any alteration to the demised premises without the previous written consent of the lessor:—*Held*: some limitation must be placed on the words of the covenant, & the erection of a large clock, affixed without the consent of the lessor to the exterior of the wall of the house by means of bolts driven into it, was not a breach of the covenant, & consequently a mandatory injunction to compel the removal of the clock ought not to be granted.

In my opinion the words "alteration to the said premises" apply only to alterations which would affect the form or structure of the premises (*VAUGHAN WILLIAMS, L.J.*).

I think the exception ought not to be limited to such alterations as are absolutely essential to carrying on the business, by which I mean alterations without which the business could not be carried on, but it ought to extend to all things fixed to the premises & convenient for the carrying on the business in a reasonable, ordinary, & proper way (*STIRLING, L.J.*).—*BICKMORE v. DIMMER*, [1903] 1 Ch. 158; 72 L. J. Ch. 96; 88 L. T. 78; 51 W. R. 180; 19 T. L. R. 96; 47 Sol. Jo. 129, C. A.

*Annotations*:—*Consd*. *Joseph v. L. C. C.* (1914), 111 L. T. 276; *L. C. C. v. Hutter*, [1925] Ch. 626. *Refd*. *Hope v. Cowan*, [1913] 2 Ch. 312.

#### PART XII. SECT. 3, SUB-SECT. 6.—A.

k. *Covenant must be definite*.—*ARMSTRONG v. COURTNEY* (1863), 15 I. Ch. R. 138.—*IR*.

l. *Covenant to build only dwelling-house—Stables included*.—*SMITH v. CROWE* (1864), 17 Ir. Jur. 105.—*IR*.

*Sect. 3.—Restrictive covenants as to user: Sub-sect. 6, B.; sub-sect. 7, A.]*

**2989. Alteration in elevation—What constitutes breach—Alterations effecting great improvement.]**—*DE NICOLS v. ABELS*, [1869] W. N. 14.

**2990. ——— Alteration in fabric.]**—In a lease dated Nov. 12, 1889, the lessee covenanted that he would not make or permit to be made any alterations in the elevation of the buildings or in the architectural decoration thereof. An assignee of the lease for the residue of the term of eighty years erected a structure consisting of a framework of light bars to which letters made of wood & fitted with electric lamps were fixed & used for advertising brands of whisky, ginger ale, & Bovril. The frame was hung from the upper part of the premises by steel bands fastened to the ornamental stonework & supported by struts screwed into the woodwork of the windows, & could be removed in a few hours without injury to the fabric. The lessors said that this was a breach of the covenant:—*Held*: the words of the covenant referred to an alteration in the fabric, & not to an alteration in appearance caused by temporary advertisements & frameworks which could be removed at any time, leaving the structure the same as before, & there had been no breach of covenant.—*JOSEPH v. LONDON COUNTY COUNCIL* (1914), 111 L. T. 276; 30 T. L. R. 508; *sub nom. Re LONDON COUNTY COUNCIL & WEIR'S LEASE, JOSEPH v. LONDON COUNTY COUNCIL*, 58 Sol. Jo. 579.

*Annotation*:—*Distd. L. C. C. v. Hutter*, [1925] Ch. 626.

**2991. ——— Alteration in appearance—Addition of temporary framework.]**—*JOSEPH v. LONDON COUNTY COUNCIL*, No. 2990, *ante*.

**2992. Covenant not to remove windows—Mandatory injunction.]**—*BROCKLESBY v. MUNN*, [1870] W. N. 42.

**2993. Alteration in external appearance—What constitutes breach—Letting wall to bill-posting company—Wall covered with advertisements.]**—Pltfs. granted a lease of a house to deft. for twenty-one years, deft. covenanting (1) to keep the premises in good & substantial repair & condition; (2) not to make any alteration in the external appearance of the buildings; (3) not to do or suffer to be done any act or thing which might be or grow to the annoyance, damage, or disturbance of the lessors or the neighbourhood; (4) not to carry on upon any part of the premises any other business than that of a tailor; (5) not to assign or part with the possession of the premises or any part thereof. Pltfs. held the house under a lease for ninety years from the vicar of the parish, which contained similar covenants. The house adjoined the churchyard, & deft. let the wall of the house which faced the principal entrance to the church to a bill-posting company, who covered the wall with advertisements. The effect of this was to injure the wall, & there was evidence that it was an annoyance to the vicar of the church & members of the congregation. Pltfs. claimed an injunction to restrain deft. from allowing the wall to be used as a bill-posting station:—*Held*: there had been a breach of covenants (1), (2), & (3), & perhaps of covenants (4) & (5), & pltf. was entitled to an injunction.—*HEARD v. STUART* (1907), 24 T. L. R. 104.

**2994. ——— Installation of electric light advertisement—On iron brackets fixed in stonework.]**—Pltfs. were successors in title of the original lessors & deft. was a successor in title of the original lessee under a lease dated Mar. 6, 1886, by which premises were let for a term of

eighty years at the yearly rent of £350. The lease contained a covenant not without the consent of the lessors, their successors & assigns to "cut or maim any of the principal walls or timbers of the building . . . or commit or permit any waste or damage to the said building or to the floors or timbers thereof or make or permit to be made any alteration in the elevation of the building or in the architectural decoration thereof. . . ." Deft. had installed, without pltf.'s consent, on the facade of the building an electric light advertisement set in a large iron framework round the whole frontage of the building. The framework was bolted to & supported by twelve T irons & eleven iron brackets, all of which were cemented into holes cut in the stonework of the wall of the building. Twenty-three holes had been cut for this purpose, each hole being about 2½ inches square & 6 inches deep. The advertisement was let for advertising a make of gin, & deft. received payments for its display. The advertisement had no connection with any business carried on by deft. or his undertenants on the premises:—*Held* the fixing of the T irons & iron brackets in the stonework in this manner was a breach of the covenant in the lease & pltfs. were entitled to a mandatory order for their removal.—*LONDON COUNTY COUNCIL v. HUTTER*, [1925] Ch. 626.

**2995. Alteration with consent—Consent not to be unreasonably withheld—Building in gardens in square.]**—A lessee covenanted with his lessor not to sublet without the lessor's previous consent in writing, such consent not to be unreasonably withheld, & not "without the like consent" to make any alteration to the demised premises, which consisted of the gardens in the centre of a London square. The lessee subsequently proposed to erect a building in the said square, to which the lessor refused his consent:—*Held*: the lessor was precluded from withholding his consent unreasonably to any proposed alteration by the lessee, but in the circumstances his consent to the proposed alteration was reasonably withheld.—*CARTWRIGHT v. RUSSELL* (1912), 56 Sol. Jo. 467.

#### SUB-SECT. 7.—COVENANTS RESTRICTING LESSORS USE OF OTHER PROPERTY.

##### A. Express Covenants.

**2996. Not to build on remainder of site.]**—Injunction granted to restrain the Comrs. of Woods from building on part of the site of Carlton Palace, in violation of one of the terms of an agreement entered into by them with pltfs. for a building lease of an adjoining part of the site.—*RANKIN v. HUSKISSON* (1830), 4 Sim. 13; 58 E. R. 6.

*Annotations*:—*Reid, Jacob v. Knight* (1863), 2 New Rep. 49; *Allport v. Securities Corp.* (1895), 64 L. J. Ch. 491. *Mentd. Squire v. Campbell* (1830), 1 My. & Cr. 459; *Dietrichsen v. Cabburn* (1846), 1 Coop. temp. Cott. 72.

**2997. Not to let for particular trade.]**—S. purchased from comrs. by several conveyances the fee simple of several houses forming one block of buildings upon a site laid out in accordance with a building scheme, each conveyance containing a covenant by S. not to carry on or permit to be carried on upon the premises conveyed any trade or business, but to keep the house as a private dwelling-house only, & not to do or suffer to be done upon the premises conveyed anything which might grow to the annoyance of any person who might be or become the owner, tenant, or occupier of any part of the premises then or late belonging

to the comrs. S. afterwards granted to resp. a lease of one of the houses containing a restrictive covenant of the same nature & a block plan of the houses. During the negotiations for the lease statements were made by S.'s solrs. to resp. whereby he became aware that similar restrictive covenants were contained in all the leases granted by S. of houses in that block & also became aware of the terms of the conveyances of resp.'s house from the comrs. to S.:—*Held*: although the statements made to resp. did not amount to a collateral contract with him as to the future management of the estate, resp. was from the nature of the transaction entitled to an injunction restraining S. from authorising any of the other houses in the block to be used for the purpose of trade.—*SPICER v. MARTIN* (1888), 14 App. Cas. 12; 58 L. J. Ch. 309; 60 L. T. 546; 53 J. P. 516; 37 W. R. 689, H. L.

*Annotations*:—*Consd. Maackenzie v. Childers* (1889), 43 Ch. D. 265. *Appld. Hudson v. Cripps*, [1896] 1 Ch. 265. *Consd. Osborne v. Bradley*, [1903] 2 Ch. 446. *Appld. Elliston v. Reacher*, [1908] 2 Ch. 374. *Distd. Reid v. Blockstaff*, [1909] 2 Ch. 305. *Consd. Kelly v. Barrett*, [1924] 2 Ch. 379. *Reid, Re Birmingham & District Land Co. & Allday*, [1893] 1 Ch. 342; *Davis v. Leicester Corp.*, [1894] 2 Ch. 208; *Knight v. Simmonds* (1896), 65 L. J. Ch. 583; *Rogers v. Hoesgood*, [1900] 2 Ch. 388; *Jaeger v. Mansions Consolidated* (1902), 87 L. T. 690; *Formby v. Barker* (1903), 89 L. T. 249; *Willé v. St. John*, [1910] 1 Ch. 84; *Browne v. Flower*, [1911] 1 Ch. 219; *Wilkes v. Spooner*, [1911] 2 K. B. 473; *Sobey v. Sainsbury*, [1913] 2 Ch. 513; *Swan v. Sinclair*, [1925] A. C. 227.

**2998. — What amounts to breach—Breach by lessee of neighbouring premises—Let under covenant not to trade without lessor's licence.**—B. demised an eating house for a term of twenty-one years, & covenanted that he would not during the term let any house in the same street for the purpose of carrying on the business of an eating house, provided always that the covenant should be binding only on B., & not on his heirs, exors., administrators, or assigns. Subsequently B. let the adjoining house for twenty-one years to another person, who covenanted with him not to carry on there any trade or business without B.'s licence. The first lease was subsequently assigned to pltf., & the second to G. Pltf. then brought an action against B. & G. to restrain G. from carrying on the trade of an eating house on the premises comprised in the second lease, & to restrain B. from permitting him to do so:—*Held*: B.'s covenant was not broken by G.'s carrying on the business of an eating house, & pltf. had no equity to restrain G. from doing so.—*KEMP v. BRID* (1877), 5 Ch. D. 974; 46 L. J. Ch. 828; 37 L. T. 53; 42 J. P. 36; 25 W. R. 838, C. A.

*Annotations*:—*Folld. Ashby v. Wilson*, [1900] 1 Ch. 66. *Expld. Holloway v. Hill* (1902), 71 L. J. Ch. 818. *Distd. Briggs v. Thornton*, [1904] 1 Ch. 386. *Reid. Nicoll v. Fenning* (1881), 19 Ch. D. 258; *Palliser v. Dover Corp.* & *Dover Harbour Board* (1914), 58 Sol. Jo. 379.

**2999. — With notice of restrictive covenant.**—*STUART v. DIPLOCK*, No. 3002, *post*.

**3000. — Let for purposes of another specified trade.**—Deft. W., the owner of a row of houses, let No. 3 to H. as a shop for carrying on a specified business. The lessee covenanted to use the premises for that business only, & the lessor covenanted not to let any of the other houses for the purpose of the same business. Pltf. was the assignee of H.'s lease, continuing the business. Afterwards W. let No. 1 to deft. B., taking a covenant from B. to use the premises only for the purposes of another specified business. Deft. B. sold various articles which, as the ct. found, were comprised in pltf.'s business:—*Held*: W. had broken no covenant of his own, & was not bound to sue B. for the breach of his covenant with W.

at the request of pltf., who was neither covenantee nor assignee of B.'s covenant; & pltf., therefore, could sue neither W. nor B.—*ASHBY v. WILSON*, [1900] 1 Ch. 66; 69 L. J. Ch. 47; 81 L. T. 480; 48 W. R. 105; 44 Sol. Jo. 43.

*Annotations*:—*Consd. Holloway v. Hill*, [1902] 2 Ch. 612. *Reid. Palliser v. Dover Corp.* & *Dover Harbour Board* (1914), 58 Sol. Jo. 379.

**3001. — — — — —.**—Pltfs. agreed to take from defts. certain shops in an exhibition, it being a term of the agreement that no shops adjoining those taken by pltfs. should be let for the sale of souvenirs. Defts. let one of the adjoining shops to tobacconists for the sale of tobacconists' & general fancy goods, & others to a tailor, to a perfumer, & to an embroiderer for the sale of neckties & handkerchiefs. In an action for breach of the covenant in the agreement pltfs. complained that articles properly described as souvenirs were being sold in these adjoining shops:—*Held*: as the adjoining shops were let for a purpose which would not ordinarily include the sale of souvenirs the action failed.—*L. S. G., LTD. v. LAWRENCE (T. B.), LTD.* (1925), 42 T. L. R. 85; 70 Sol. Jo. 161, C. A.

**3002. — Sale of prohibited articles incident to tenant's business.**—By a lease of a house, No. 10, the lessors covenanted not to permit or suffer to be carried on at 11 or 12 the business of ladies' outfitting, nor give their consent to its being carried on at No. 9. Afterwards the assigns of the lessors demised No. 9 to defts., who covenanted not to carry on there the business of ladies' underclothing, except vests & stockings. Defts. when they took their lease had notice of the covenant in the lease of No. 10. The lessee of No. 10 sued for an injunction to restrain defts. from carrying on at No. 9 the business of ladies' outfitting. All that was proved was, that defts., who were hosiers, sold four classes of articles, the sale of which was an essential part of the business of ladies' outfitters, but which were also commonly sold by hosiers:—*Held*: assuming the lessees of No. 9 to be under an obligation which pltf. could enforce against them by action, not to carry on the business of ladies' outfitters, the action must be dismissed, on the ground that they were not shown to have done so, for that the *bona fide* sale by hosiers, along with numerous other articles, of certain articles of hosiery, the sale of which was an essential & important part, but not nearly the whole, of ladies' outfitting, was no breach of the obligation, there being no covenant that the lessees of No. 9 would not carry on any part of the business of ladies' outfitters:—*Qu.*: whether the lessees of No. 9 were under any obligation not to carry on the business of ladies' outfitters on which the lessee of No. 10 could sue them.—*STUART v. DIPLOCK* (1889), 43 Ch. D. 343; 59 L. J. Ch. 142; 62 L. T. 333; 38 W. R. 223; 6 T. L. R. 104, C. A.

*Annotations*:—*Distd. Fitz v. Iles*, [1893] 1 Ch. 77; *Bailey v. Skinner & Fleming*, *Reid* (1898), 42 Sol. Jo. 780. *Reid. Wartski v. Meaker* (1914), 110 L. T. 473.

**3003. — — — — —.**—*BAILEY v. SKINNER & FLEMING, REID & Co.* (1898), 42 Sol. Jo. 780.

**3004. — Carrying on part of forbidden trade.**—A covenant not to let premises as a "motor garage & office" is not infringed by letting them as a shed or house where motor cars may be taken for temporary storage, & for no other purpose.—*DERBY MOTOR CAR CO. v. CROMPTON & EVANS' UNION BANK, LTD. & GUEST* (1915), 31 T. L. R. 185.

**3005. — Adjoining premises—Meaning of adjoining.**—*BUCKELL v. KING & KORAL* (1895), 40 Sol. Jo. 50.

**Sect. 3.—Restrictive covenants as to user: Sub-sect. 7, A. & B.; sub-sect. 8.]**

**3006.** ————.]—In a covenant by the lessor not to allow a certain trade to be carried on in the "adjoining premises" the word "adjoining" was confined to the two houses on either side of the demised premises, although the lessor was at the time of the lease the owner of a block of buildings, of which these formed part only.—**VALE & SONS v. MOORGATE STREET & BROAD STREET BUILDINGS, LTD. & BAKER (ALBERT) & CO., LTD.** (1899), 80 L. T. 487.

**Annotations:—Distd.** *Ind Coope v. Hamblin* (1900), 81 L. T. 779; *Cave v. Horsell*, [1912] 3 K. B. 533. **Refd.** *Derby Motor Cab Co. v. Crompton & Evans Union Bank* (1913), 29 T. L. R. 673.

**3007.** ————.]—Deft., being the owner of certain house property, which included five shops, numbered 2 to 6, L. Parade, let to pltf. the shop No. 4, L. Parade for twenty-one years, the lessor covenanting that he would not at any time during the continuance of the lease let "any of the adjoining shops belonging to me on the L. Estate" for the purpose of the businesses of upholsterers, cabinet makers, furniture dealers, or french polishers. Subsequently, during the continuance of the lease, deft. let to a tenant the shop No. 6, L. Parade for a term of twenty-one years for the purpose of carrying on the business (*inter alia*) of a cabinet maker:—**Held:** the word "adjoining" was not confined to the two shops physically in contact with the demised shop, but that it extended to No. 6, & there had therefore been a breach of deft.'s covenant in respect of which pltf. were entitled to recover damages.—**CAVE v. HORSELL**, [1912] 3 K. B. 533; 81 L. J. K. B. 981; 107 L. T. 186; 28 T. L. R. 543, C. A.

**Annotation:—Distd.** *Derby Motor Cab Co. v. Crompton & Evans Union Bank* (1913), 29 T. L. R. 673.

**3008.** ————.]—Defts. in a lease of premises to pltf. covenanted not to let the "adjoining" premises as a motor garage & office without giving pltf. the first refusal. Defts. having let premises which were near to, but not next door or physically adjoining, those let to pltf. as a lock up show room for motor cars without giving pltf. the first refusal, pltf. claimed an injunction:—**Held:** (1) on the evidence, the premises were not being used as a motor garage; (2) the premises were not "adjoining" those let to pltf., & therefore on both grounds pltf. were not entitled to an injunction.—**DERBY MOTOR CAB CO. v. CROMPTON & EVANS UNION BANK** (1913), 29 T. L. R. 673; 57 Sol. Jo. 701.

**3009.** ————.]—**Remedy for breach—Injunction.**—Where defts., owners of a public building, have contracted with pltf., that he, renting a stall from them, shall have the exclusive right to exhibit & sell certain specified classes of goods, an injunction will lie against defts. for permitting the exhibition & sale by other renters of stalls within the building of goods so specified.—**ALTMAN v. ROYAL AQUARIUM SOCIETY** (1876), 3 Ch. D. 228.

**3010.** ————.]—T., the landlord of an arcade containing shops, agreed in writing, binding himself & his "assigns," to grant to B., a "fine art dealer," a lease of one of the shops for a term of twenty-one years, determinable on notice at the end of the seventh or fourteenth year; the lease to contain a covenant by the lessee not to carry on upon the premises any other trade or business than such as was therein specified, including that of an "artistic & heraldic stationer"; & also a covenant by the landlord "not to let any other portion of the arcade for the trade or business hereinbefore mentioned to

be carried on by the tenant." B. thereupon entered into possession of the shop & carried on his specified trade or business there. Subsequently T. let a stall forming part of another shop in the arcade to G., a "bookseller & stationer," on a tenancy determinable on three months' notice, & it was agreed that the tenant should not carry on any business other than that of a librarian, newsagent, bookseller, or stationer. G. then proceeded to sell at his stall certain articles commonly included in a business such as that described in his agreement, but which were also included in a business such as that described in B.'s agreement. G. had notice of B.'s agreement. In an action by B. against T. & G. for an injunction to restrain T. from "letting" & G. from "using" the stall or any other portion of the arcade for any of the purposes of the business described in B.'s agreement:—**Held:** (1) T. had committed a breach of his covenant with B. "not to let" for which he was liable in damages, & although, in the circumstances, an immediate injunction against T. was not necessary, B. might apply for an injunction in the event of any future breach; but (2) as the covenant restrained "letting" only & not "using," B. had no remedy against G. either by injunction or damages.

A restrictive covenant as to the letting or user of property will be construed strictly, & not so as to create a wider obligation than is imported by the actual words.—**BRIGG v. THORNTON**, [1904] 1 Ch. 386; 73 L. J. Ch. 301; 90 L. T. 327; 52 W. R. 276, C. A.

**Annotation:—Generally.** *Refd.* *Palliser v. Dover Corpn. & Dover Harbour Board* (1914), 58 Sol. Jo. 379.

*See, also*, No. 2997, *ante*; No. 3015, *post*.

**3011.** ————.]—**Damages.**—**BRIGG v. THORNTON**, No. 3010, *ante*.

**3012.** ————.]—**On whom binding—Lessee of neighbouring premises—Covenant restraining "assigns."**—The lessee of a person bound by a restrictive covenant can be sued, whether "assigns" are mentioned in the covenant or not.

In a lease by H. to pltf. co., the lessor covenanted that he, his heirs, exors., administrators, & assigns, would not carry on, or permit to be carried on by others, in certain named shops the business of a tailor; H. subsequently demised one of the shops to B. for a tailoring business. In an action by pltf. co. against H. & B. for an injunction to restrain H. from permitting, & B. from carrying on, this business:—**Held:** on the construction of the covenant, the mention of assigns, without mentioning lessees, afforded no ground, standing alone, for holding that the covenant was not binding upon B.; though "lessees" were not mentioned *eo nomine*, the words of the covenant were sufficient to bind B. not to carry on the particular business referred to, & an injunction ought to be granted.—**HOLLOWAY BROTHERS, LTD. v. HILL**, [1902] 2 Ch. 612; 71 L. J. Ch. 818; 87 L. T. 201; 18 T. L. R. 745; 46 Sol. Jo. 665.

**3013.** ————.]—**BRIGG v. THORNTON**, No. 3010, *ante*.

**3014.** Not to "permit or suffer" specified building—What amounts to breach—Breach by lessee of neighbouring premises—Without sanction of lessor.]—The D. Harbour board were the owners of some property adjoining a house of which they were also the lessors. X. was the assignee of the lease of the house. The lease contained a covenant on the part of the lessors that they "shall not nor will at any time or times during the continuance of the term hereby granted, demise, or lease all or any part of the ground between C. Crescent, aforesaid, & the sea for the erection of

any building or buildings whatsoever other than public baths with or without reading rooms or libraries, nor permit or suffer any such buildings or any part of such buildings to be thereon erected which shall be of a greater height than 15 ft. 7 in. above the ground floor of the centre houses in C. Crescent aforesaid." Some years after the date of the lease the board let the adjoining property to the D. corp'n. The agreement between the board & the corp'n. contained a provision that the corp'n. should keep in repair a bandstand on the property. This bandstand was subsequently removed by the corp'n., & a new bandstand exceeding 15 ft. 7 in. in height was erected by them in its place. Pltf. brought this action against the corp'n. & the board for an injunction for the removal of the bandstand & for damages:—*Held*: the operation of the covenant only extended to buildings for the erection of which the board was entitled to demise or let the land, & there was no covenant by the board not to permit any building whatever to be erected in excess of the specified height; no evidence was adduced of any arrangement between the board & the corp'n.; the board could not have authorised the corp'n. to erect a bandstand, though they could have erected one themselves; & pltf. had not succeeded in proving that there had been a breach of the covenant by the board. —*PALISER v. DOVER CORPN.* (1914), 110 L. T. 619; 58 Sol. Jo. 379; 78 J. P. Jo. 123.

**3015. Who may sue—Original lessor—Having parted with whole interest.**—S., an owner in fee simple of land, demised it for ninety-nine years to a lessee, who assigned it with the lessor's consent, the assignee covenanting with the lessor, "his heirs & assigns as owner for the time being of land forming part of" the E. estate that he the assignee, his exors., administrators, & assigns, would not "for the space of ten years from the date thereof use or allow to be used the said premises for any trade or business other than that of a poulterer & cheesemonger." The assignee's extrix. & universal legatee agreed to let the premises for three years to a tenant who agreed to use them as a cheesemonger's & poulterer's shop only. The tenant assigned his interest to B., who signed a memorandum indorsed on the agreement, agreeing to perform the covenants contained therein. He subsequently used the premises as a grocer's shop, & for the sale of wines & spirits under an off-license. The shop in question formed one of a row of shops which had belonged to S., & each of which was limited by covenant to a particular trade, & S. on selling some of the other shops had covenanted with the purchasers that the shop now occupied by B. should not be used for the purpose for which B. was now using it. S. had subsequently disposed of all his interest in the E. estate. He now brought an action against B. for an injunction to restrain him from using the shop except as a cheesemonger's & poulterer's. Deft. contended that S. having parted with all his interest in the estate could not enforce the covenant:—*Held*: though pltf. had parted with his interest in the estate he had still an interest in enforcing the covenant previously entered into with him as owner, inasmuch as he had, by his subsequent covenants to the same effect, made himself liable to be sued by the purchasers of the other shops

in case the covenant should be infringed, & deft. having taken the premises with notice of the title of which the restrictive covenant formed part, pltf. was accordingly entitled to the injunction he asked for.—*SPENCER v. BAILEY* (1893), 69 L. T. 179; 9 T. L. R. 364.

#### B. Implied Covenants.

**3016. Exhibition of plan of property at time of demise—Whether engagement that property shall continue as then shown.**—(1) A treaty was entered into with the Comrs. of Woods & Forests for the lease of a piece of ground in the line of an intended new street, & which the Comrs. were empowered by Act of Parliament to demise. Upon the treaty, a Parliamentary plan was shown to the lessee, on which the new street was distinguished by a line, & the space between the piece of ground demised & the opposite houses, being 100 feet in width, was left open. A lease was executed, & in it the ground demised was described as being on the north side of a new street then forming; but no mention was made of the Parliamentary plan. The Comrs. of Woods & Forests, & the Comrs. of Paving for the parish, consented to the erection of a pedestal & statue in this open space, leaving, however, between such erection & the ground demised, a space of equal width with the rest of the new street:—*Held*: the lessee was not entitled to an injunction to restrain the proposed erection.

(2) The mere exhibition by a lessor of a plan of his property, at the time of demising part of it, does not amount to an engagement that the rest of the property so exhibited shall continue in the same state as then represented.—*SQUIRE v. CAMPBELL* (1836), 1 My. & Cr. 459; 6 L. J. Ch. 41; 40 E. R. 451, L. C.

*Annotations*:—As to (2) *Reid. Fewster v. Turner* (1841), 11 L. J. Ch. 161; *Eastwood v. Lever* (1863), 4 De G. J. & Sm. 114. *Generally*, *Mentd. Williams v. Jersey* (1841), Cr. & Ph. 91; *Dietrichsen v. Cabburn* (1846), 1 Coop. temp. Cott. 72; *N. B. Rty. v. Tod* (1846), 12 Cl. & Fin. 722; *Soltan v. De Held* (1851), 2 Sm. N. S. 133; *Allen v. Maddock* (1858), 11 Moo. P. C. C. 427; *Lett v. Randall* (1883), 49 L. T. 71.

**3017. Common scheme—Building scheme.**—*BROWN v. ROSE* (1895), 39 Sol. Jo. 504.

**3018. — Residential flats—Implied obligation not to use for other purposes—Club.**—*HUDSON v. CRIPPS*, No. 2701, *ante*.

**3019. — — — Hotel.**—*ALEXANDER v. MANSIONS PROPRIETARY, LTD.*, No. 2915, *ante*.

#### SUB-SECT. 8.—OTHER COVENANTS.

**3020. Not to turn out tenants—Forfeiture.**—*THOMAS & WARD'S CASE* (1590), 1 Leon. 245; 74 E. R. 224.

**3021. Not to molest any copyholder—Effect of entry vi et armis to beat him.**—A condition, that the lessee shall not molest, vex, etc. any copyholder, is not broken by an entry on the premises vi et armis to beat him, if he do not oust him from his copyhold.—*PENN v. GLOVER* (1595), Cro. Eliz. 421; 78 E. R. 662; *sub nom. PEN v. GLOVER*, Moore, K. B. 402.

**3022. — Ouster of copyholder.**—*PENN v. GLOVER*, No. 3021, *ante*.

**3023. "Not to part land from house"—Letting house & part of land.**—*MARCH v. CURTIS* (1597),

#### PART XII. SECT. 3, SUB-SECT. 7.—B.

*m. Landlord competing with tenant's business.*—*CRAIG v. MILLER* (1888), 15 R. (Ct. of Sess.) 1005; 25 Sc. L. R.

#### 715.—SCOT.

#### PART XII. SECT. 3, SUB-SECT. 8.

*n. Not to allow occupation by coloured persons.*—*WITWATERSRAND TOWNSHIP*

*ESTATE & FINANCE CORPN., LTD. v. RITCH* (1913), App. D. 423.—S. AF.

*o. — — —*—*SIMMER & JACK PROPRIETARY MINES, LTD. v. O'MEARA* (1916), W. L. D. 57.—S. AF.

**Sect. 3.—Restrictive covenants as to user: Sub-sects. 8 & 9, A.]**

Noy, 7; 2 And. 90; 74 E. R. 979; *sub nom.* MARSH v. CURTEYS, Cro. Eliz. 528; 2 And. 42; 1 Brownl. 78; Moore, K. B. 425.

*Annotation*.—*Mentd.* Tovey v. Pitcher (1690), Carth. 177.

**3024. Not to dig gravel out of part of premises—Breach by undertenant.]—BURMAN v. ASTON** (1664), 1 Lev. 144; 83 E. R. 340.

**3025. — Variations in indorsement on lease—Construction.]—**Covenant in a lease that the lessee would not dig gravel out of any part of the demised premises without consent of the lessor, or paying to him 10s. per load, except what should be dug out of two acres, part of the premises demised, & part of a garden late in the possession of A. By indorsement made on the lease before execution, it was agreed that it should be lawful for the lessor to let any part of the within demised premises for the purpose of making bricks or tiles, he paying the lessee £3 for every acre which he should so let; & further, that it should be lawful for the lessee to break up & dig for gravel any part of the within demised premises, he covenanting to pay to the lessor £20 for every acre he should break up & dig at or before the expiration of the time, & to make good the same:—*Held*: the lessee was not entitled to dig for gravel in the two acres of garden ground mentioned in the lease, without making them good.—*FLINT v. BRANDON* (1804), 1 Bos. & P. N. R. 73; 127 E. R. 336; *previous proceedings*, (1803), 8 Ves. 159.

**3026. Not to hang signs outside demised premises—"Wooden spectacles."]**—In a lease the lessee covenanted not to fix or hang any sign or signs whatsoever by iron or other fastenings to, out of, or from the said premises thereby demised:—*Held*: (1) wooden spectacles were "signs" within the meaning of the covenant; (2) *semble*: also, in such a case receipt of rent after breach of the covenant would amount to such an inducement to the lessee to believe that the condition would not be enforced, as that no ejectment would lie till after notice to the lessee.—*ELAND v. SUFFEL* (1868), 18 L. T. 371, N. P.

**3027. Not to permit sale by auction on premises—Sale by grantor of bill of sale.]—**Pltf. demised a house by lease, creating a forfeiture upon breach of lessee's covenants, one of which was not to permit a sale by auction on the premises; another was to pay rent within a certain time. The lessee executed a bill of sale of his goods, by which he agreed that in case of default the mtgees. of the goods might sell & dispose of the goods on or at the house or premises, or remove the goods & sell the same whenever & wheresoever they should think proper, by private contract or public auction. The lessee then underlet the premises by way of mtge. to deft. The lessee then assigned all his estate & effects to trustees under Bkpcy. Act, 1861 (c. 134). Afterwards the grantee of the bill of sale sold the goods assigned to him by public auction on the premises, without the lessee's knowledge, & without the assent of deft., who was mtgee. Pltf. claimed possession, by the particulars ordered in this ejectment, on the grounds of forfeiture by breach of covenant not to permit a sale by auction:—*Held*: these facts constituted a forfeiture of the lease by breach of the covenant not to permit a sale by auction on the premises.—*TOLEMAN v. PORTBURY* (1872), L. R. 7 Q. B. 344; 41 L. J. Q. B. 98; 26 L. T. 292; 20 W. R. 441, Ex. Ch.

*Annotations*.—*Consd.* Berton v. Alliance Economic Investment Co., [1922] 1 K. B. 742. *Refd.* Wilson v. Twamley,

[1904] 2 K. B. 99. *Mentd.* Evans v. Davis (1878), 1 Ch. D. 747; Evans v. Wyatt (1880), 43 L. T. 176; F. Morrish, *Ex p.* Hart Dyke (1882), 32 Ch. D. 410; Serjeant v. Nash, Field, [1903] 2 K. B. 304; Evans v. Eneve [1920] 2 K. B. 315; Atkin v. Rose, [1923] 1 Ch. 522.

**3028. Not to do any dangerous act—Keepin steam engine on premises—Refusal by insurance company to re-insure.]—**Pltf. desired to restrain deft. from using & keeping on pltf.'s premises now occupied by deft., a steam engine. Deft. had covenanted not to do any act dangerous to his co-tenants, or to the landlord. On account of the engine, the fire office, where pltf. was insured, refused to continue the insurance, & pltf. was under a covenant with his superior landlord to insure. In deft.'s covenant to repair & keep safe, there is an exception of accidental fire. This action was commenced in the hope that the engine would be removed at once, for since it worked night & day it was a nuisance to the co-tenants, as well as an actual damage to pltf. On an *ex p.* application in an action of ejectment for an injunction against the use of a steam engine on the premises until the trial of the action, an injunction was granted, pltf. undertaking to abide by whatever order the ct. might make as to any damages suffered by deft.—*TOZER v. WALFORD* (1875), Bitt. Prac. Cas. 68; 1 Char. Cham. Cas. 16.

**3029. Not to affix outward mark of business—Inscribed blinds—& brass plate.]—**Pltf., having agreed for a lease of premises for a term of years, agreed to lease a part of such premises to deft. D., such lease to D. to contain the same covenants as should be contained in pltf.'s own lease, when granted. Pltf.'s lease, when granted, contained a covenant "not to affix or permit any outward mark or show of business to be affixed to the premises." Deft. D. sub-leased to deft. B. & the latter, with D.'s licence, so far as he was able to give the same, carried on a tailor's business on the premises, & erected a brass plate on the outside railing of the premises, & also put up blinds inside the window, having her trade name thereon:—*Held*: a breach of the covenant had been committed, & an injunction must be granted against deft. D. as well as against deft. B. to restrain the continuance of the breach.—*EVANS v. DAVIS* (1878), 10 Ch. D. 747; 48 L. J. Ch. 223; 39 L. T. 391; 27 W. R. 285.

*Annotations*.—*Refd.* Sayers v. Collyer (1883), 52 L. J. Ch. 770. *Mentd.* Harman v. Ainslie, [1904] 1 K. B. 698; Moore v. Ulicoats Mining Co., [1908] 1 Ch. 575; Wheeler v. Hitchings (1919), 121 L. T. 636.

**3030. — Illuminated sign—Lease of premises comprising theatre.]—**A lease of a building contained a covenant by the lessee not to paint or write any inscription, figure, or letter, nor affix, attach, or exhibit any signboard or other notice of trade or business to the exterior walls without the lessor's consent. Part of the building consisted of a theatre, to the front wall of which was attached by iron brackets a metal frame, without the consent of the lessor, on which were the words, "His Majesty's Theatre," surmounted by a crown, these words being picked out at night in electric light:—*Held*: this was a breach of the covenant.—*A.-G. v. PLAYHOUSE, LTD.* (1903), 19 T. L. R. 580.

**3031. Not to expose goods for sale outside premises.]—**Pltf. & defts. held under the same superior lease. One of the covenants of the lease was that nothing should be hung, placed or exposed for sale or otherwise outside the premises. Pltf. brought an action for damages & injunction for breach thereof, complaining that defts. greatly interfered with the comfort of the people coming

to his shop. The jury found that defts. had been guilty of a breach of the covenant in question, & also that there was such an unreasonable use of the highway as to amount to a public nuisance, & pltf. had in consequence sustained damage, but to what amount they were unable to say. During the eighteen years for which the nuisance had existed, pltf. had only once complained to defts. about it. Pltf. upon the findings of the jury asked for an injunction:—*Held*: there was such acquiescence on the part of pltf. in the nuisance that an injunction could not be granted. —*ROGERS v. GREAT NORTHERN RY. CO.* (1889), 53 J. P. 484; 5 T. L. R. 264, N. P.

**3032. Not to use premises for illegal purpose—Contemplated breach.**—*LILLEY v. BENNETT* (1888), 5 T. L. R. 156.

**3033. — Gaming.**—The tenant of certain premises agreed not to permit "games of baccarat, hazard, or roulette" to be played thereon, & so to carry on the club for the purpose for which the premises were let "as not to contravene any laws of the land for the time being in force":—*Held*: both "baccarat chemin de fer," & "baccarat banque" were absolutely prohibited by the agreement.—*FAIRLOUGH v. WHITMORE* (1895), 64 L. J. Ch. 386; 72 L. T. 354; 43 W. R. 421; 11 T. L. R. 288; 13 R. 402; *sub nom.* *FAIRLOUGH v. BROADBENT*, 39 Sol. Jo. 332.

**3034. Not to do act to impose heavier insurance burden on premises—Selling lamps ignited by dangerous explosives.**—*TEAPE v. DOUSE*, No. 2886, *ante*.

**3035. — Storing highly inflammable material.**—On Sept. 14, 1905, C. let premises to M., who covenanted not to underlet without C.'s consent in writing, & also not to carry on or permit upon the said premises any trade or occupation or do or suffer any other thing which might render any increased or extra premium payable for the insurance of the premises against fire, or which might make void or voidable any policy for such insurance. The premises were insured with the B.C.A. co. They were burnt down & rebuilt. On July 13, 1910, that office declined to renew the insurance. The N. Assurance inspected the premises, & found they were occupied by linen waterproofers, who manipulated highly inflammable materials & stored fifty gallons of acetone, fifty gallons of alcohol, & 1 cwt. of celluloid 35 ft. from the main building. Goods were dipped in liquid celluloid, & there was a laboratory for mixing the waterproof solution, & they refused to insure the premises. C. asked for an injunction restraining M. from permitting or suffering the waterproofing co. to carry on upon the demised premises any trade or occupation, or doing or suffering any other thing, which might render any increased or extra premium payable for the insurance of the premises against fire, or which might make void or voidable any policy for such insurance:—*Held*: an injunction must be granted as asked, & the immediate removal of the inflammable substance must be directed.—*CHAPMAN v. MASON & LINILINE CO.* (1910), 103 L. T. 390.

**3036. Not to subdivide lands—Advertisement for sale in plots.**—Where land was leased exclusively for agricultural purposes, with liberty to the lessee to erect the necessary buildings for residence,

but not to sub-divide in order to sell or lease stands for building purposes:—*Held*: the lessor was entitled to treat the lease as null & void & eject the assignees thereon on its being shown that they had advertised the land for sale in acre plots, & had issued plans showing a proposed sub-division into acre plots. The breach of condition was complete without actual transfer of the plots to purchasers.—*SHORT v. TURF-FONTEIN ESTATES, LTD.*, [1905] A. C. 584; 74 L. J. P. C. 148; 93 L. T. 57, P. C.

**3037. Not to use premises for revolutionary propaganda—Lessor's right of re-entry.**—Pltf., who described himself as the Plenipotentiary minister of the Russian people's Govt. in London, became the tenant of deft. under an agreement containing a covenant that pltf. would not do anything which might become a nuisance to the adjoining tenants & would not use the premises for propagandist purposes. The agreement gave deft. a right of re-entry only for non-payment of rent. Pltf. committed a breach of his covenant & also sent to British trade unions a circular inciting to revolution. Deft. thereupon re-entered & locked pltf. out. In an action for an injunction to restrain deft. from interfering with pltf.'s occupation of the premises:—*Held*: in the circumstances pltf. was not entitled to equitable relief, & the action must be dismissed.—*LITVINOFF v. KENT* (1918), 34 T. L. R. 298.

**3038. To maintain prices of admission—Lease of theatre—Whether increase of prices prohibited.**

—Under a covenant by the lessee of a theatre that he would at all times during the term "maintain" the prices of admission "as now charged" at the theatre, & would not reduce the same without the consent in writing of the lessor first obtained:—*Held*: the covenant only restricted a decrease & did not restrain an increase in the prices of admission.—*RE DOTT'S LEASE*, *MILLER v. DOTT*, [1920] 1 Ch. 281; 89 L. J. Ch. 15; 122 L. T. 93; 36 T. L. R. 52; 64 Sol. Jo. 68.

**3039. Not to underlet—Breach of another covenant by under lessee—Right of under lessee to protection on forfeiture of head lease—Conveyancing & Law of Property Act, 1892 (c. 13), s. 4.**—*ATKIN v. ROSE*, No. 2871, *ante*.

#### SUB-SECT. 9.—WAIVER.

##### A. Express Waiver Licence.

**3040. Partial waiver—Permission to carry on one trade—Effect of.**—*MACHER v. FOUNDLING HOSPITAL*, No. 3064, *post*.

**3041. Licence not acted upon—Subsequent restrictive covenant.**—A corp., by agreement under their common seal, dated July 24, 1811, covenanted with E. to grant him a building lease of certain ground, for ninety-nine years, as soon as certain houses were finished thereon. E. proceeded to build the houses, & on Jan. 21, 1812, obtained a licence from the corp. to build a particular house as a baker's shop, which he proceeded with accordingly, but put in no shop front, the space left for it being boarded up. On Dec. 30, 1812, the corp., according to their agreement, granted a lease to E., containing a covenant by him, not to cut, maim, or injure any of the principal timbers

#### PART XII. SECT. 3, SUB-SECT. 9.—A.

**p. Licence by agent.**—Def., with the consent of the agent of the owner, became assignee of the lease of an apartment, the lease of which contained a

covenant that the apartment should not be used to give instruction in music & singing. At the time of the execution of the assignment deft. made it known to pltf.'s agent that she was a teacher of the pianoforte, & intended to give lessons on that instru-

ment. The agent agreed that deft. should have permission to give lessons up to a reasonable hour:—*Held*: the forfeiture clause of the lease was waived.—*YEATES v. GILLEN* (1921), 84 N. S. R. 322; 57 D. L. R. 461.—**CAN.**

**Sect. 3.—Restrictive covenants as to user: Sub-sect. 9, A. & B.; sub-sect. 10.]**

or walls of the demised premises, nor to convert, use, or occupy them into or for any shop, etc., without the previous consent in writing of the lessors, their successors, etc.; & also a proviso for re-entry on any breach of covenant. In 1814, the house, which had been left unfinished, was completed by E. as a private house, the space intended for the shop front being filled up with a brick wall, in which two windows were left. The house was occupied as a private dwelling till Oct. 1822, when E. took out the last-mentioned brick wall, & placing a shop window in its place commenced the business of a baker there:—*Held*: a breach of covenant, by which a forfeiture was incurred; & the original licence to build the house as a baker's shop had no operation as such, after the lease executed containing the above covenants.—*DOE d. FOUNDLING HOSPITAL v. EVANS* (1825), 4 L. J. O. S. K. B. 231.

**3042. Licence after breach—Necessity for deed.]**—If, to debt on bond which contained a condition that debt. should not open a shop within a certain distance of premises demised in a lease, debt. plead that he opened a shop by the licence of ptff.:—*Held*: such plea was bad, on general demurrer, on the ground that a licence, after breach, was not good, unless by deed.—*SKILLES v. BICKFORD* (1817), 8 Taunt. 31; 1 Moore, C. P. 460; 129 E. R. 293.

*Annotation*:—*Refd.* *Cordwint v. Hunt* (1818), 2 Moore, C. P. 660.

**3043. If adjoining houses were "converted into shops"—Meaning of "converted."]**—A lessee of a private house covenanted not to use it as a shop; but it was provided that if the adjoining houses were converted into shops, he might convert his to a similar use:—*Held*: the term "converted" did not necessarily mean a structural conversion, but if the adjoining houses were used as shops, although there was no structural conversion, the lessee might use his house also as a shop.—*WILKINSON v. ROGERS* (1864), 2 De G. J. & Sm. 62; 3 New Rep. 347; 9 L. T. 696; 28 J. P. 103; 10 Jur. N. S. 162; 12 W. R. 284; 46 E. R. 208, L. J.T.

*Annotation*:—*Refd.* *Reeves v. Cattell* (1876), 24 W. R. 485.

**B. Implied Waiver—Acquiescence.**

**3044. What amounts to—Acceptance of rent.]**—*MARCH v. CURTIS* (1597), Noy, 7; 2 And. 90; 74 E. R. 979; *sub nom.* *MARSH v. CURTEYS*, Cro. Eliz. 528; 2 And. 42; 1 Brownl. 78; Moore, K. B. 425.

*Annotation*:—*Refd.* *Tovey v. Pitcher* (1690), Carth. 177.

**3045. ———.]**—*DOE d. SHEPPARD v. ALLEN*, No. 3058, *post*.

**3046. ———.]**—In ejectment for a forfeiture incurred by using rooms in a house in a manner prohibited by the lease:—*Held*: such user was a continuing breach, & the landlord was not, by receiving rent, precluded from taking advantage of the forfeiture, provided the user continued after such receipt of rent.

But this covenant is, that the rooms shall not be used for certain purposes. There was, therefore, a new breach of covenant every day during the time that they were so used, of which the landlord might take advantage; & the verdict which proceeded on the particular words of this

covenant was right (*per cur.*).—*DOE d. AMBLER v. WOODBRIDGE* (1829), 9 B. & C. 376; 4 Man. & Ry. K. B. 302; 7 L. J. O. S. K. B. 263; 109 E. R. 140.

*Annotations*:—*Expld.* *Walrond v. Hawkins* (1875), L. R. 10 C. P. 342. *Refd.* *Powell v. Hemsley*, [1909] 2 Ch. 252.

**3047. ———.]**—In a Crown lease, the lessee covenanted not to convert the premises into a shop or place of sale of any kind, without consent of the Comrs. of Woods & Forests. The trade of an engraver had been carried on in it, without consent or objection, but rent had afterwards been received:—*Held*: the forfeiture had been waived, & the title was good.—*BRIDGES v. LONGMAN* (1857), 24 Beav. 27; 53 E. R. 267.

*Annotations*:—*Refd.* *A.-G. of Victoria v. Eitershank* (1875), L. R. 6 P. C. 354. *Mentd.* *Re Chawner's Trusts* (1869), 38 L. J. Ch. 726.

**3048. ——— No ejectment till after notice.]**—*ELAND v. SUFFEL*, No. 3026, *ante*.

**3049. ——— Knowledge of breach.]**—The lease of a public-house contained a covenant on the part of the lessee not to carry on upon the demised premises any business other than that of a licensed victualler without the written consent of the lessors, & there was the usual clause for re-entry upon breach of any of the covenants. The lessee, without the written consent of the lessors, underlet the premises to persons who carried on other trades, & the lessors subsequently received the rent with knowledge of the breach of covenant. The particulars & conditions of sale set forth the fact of the premises being under-leased, & provided that the production of the last receipt for rent should be conclusive evidence of the performance of the covenants or of waiver of any breaches of the same up to the completion of the purchase:—*Held*: the purchaser was bound to complete, notwithstanding the continuing breaches of covenant.—*LAWRIE v. LEES* (1881), 7 App. Cas. 19; 51 L. J. Ch. 209; 46 L. T. 210; 30 W. R. 185, H. L.

*Annotations*:—*Mentd.* *Re Swire, Mellor v. Swire* (1885), 53 L. T. 205; *Re Highbett & Bird's Contract*, [1902] 2 Ch. 214; *Re Gist* (1904), 90 L. T. 35.

**3050. ——— Up to date of receipt.]**—*ATKIN v. ROSE*, No. 2871, *ante*.

**3051. ——— Lying by.]**—*PERRY v. DAVIS*, No. 2987, *ante*.

**3052. ——— Six years.]**—*DOE d. SHEPPARD v. ALLEN*, No. 3058, *post*.

**3053. ——— For few months—Breach gradual & not conspicuous.]**—(1) The ct. will grant an injunction to restrain breach of a covenant, although the covenantee has allowed the breach to go on for a few months, if such breach has been of a gradual & not conspicuous character. (2) Where a lessee, who has entered into a restrictive covenant as to user of the demised premises, underlets to a person who, with his sanction, commits a breach of the covenant, he may properly be made a party to a suit for an injunction, & is liable for the costs.—*MITCHELL v. STEWARD* (1866), L. R. 1 Eq. 541; 35 L. J. Ch. 393; 14 L. T. 134; 30 J. P. 358; 14 W. R. 453.

*Annotation*:—*As to* (2) *Refd.* *Knight v. Simmonds*, [1896] 2 Ch. 294.

**3054. ——— Eighteen years.]**—*ROGERS v. GREAT NORTHERN RY. CO.*, No. 3031, *ante*.

**3055. ——— Necessity for lessor's knowledge of breach—What constitutes such knowledge.]**—

**PART XII. SECT. 3, SUB-SECT. 9.—B.**

**3049 i. What amounts to—Acceptance of rent—Knowledge of breach.]**—The right of forfeiture for breach of a

covenant not to make alterations is waived by the receipt of rent with knowledge of the alterations.—*M'GOWN v. SMITH* (1886), 13 V. L. R. 244.—*AUS.*

*q.* ——— *Lying by—Seven years.]*—*MACDONALD (LORD) v. CAMPBELL* (1889), 16 R. (Ct. of Sess.) 540; 26 Sc. L. R. 397.—*SCOT.*

ASHCOMBE v. MITCHELL (1895), 12 T. L. R. 17, C. A.

**3056.** ——— **Thirty years.**—*Re* SUMMERSON, DOWNIE v. SUMMERSON (1899), [1900] 1 Ch. 112, n.; 69 L. J. Ch. 57, n.; 81 L. T. 819, n.

*Annotations*:—*Fold*. Hepworth v. Pickles, [1900] 1 Ch. 108. *Reid*. Greenhalgh v. Brindley, [1901] 2 Ch. 324.

**3057.** ——— **Twenty-four years.**—By a conveyance dated in 1874, a certain plot of land was conveyed subject to a covenant that no dwelling-house, shop, or other building to be erected on the land should at any time thereafter be used as an inn, tavern, or beerhouse. Shortly after the date of the conveyance beer & spirits were sold in one of the houses erected on the land, & continued to be openly sold for upwards of twenty-four years:—*Held*: in an action by a purchaser to rescind a contract for sale of that house on the ground of the existence of this restrictive covenant; it must be presumed from the uninterrupted user of the premises as a beerhouse for twenty-four years, that there had been a waiver or release of the covenant.—HEPWORTH v. PICKLES, [1900] 1 Ch. 108; 69 L. J. Ch. 55; 81 L. T. 818; 48 W. R. 184; 44 Sol. Jo. 44.

*Annotation*:—*Reid*. Greenhalgh v. Brindley, [1901] 2 Ch. 324.

— *See, also*, No. 3064, *post*.

**3058.** ——— **Permitting expenditure by tenant.**—If a lessee exercise a trade on the demised premises, by which his lease is forfeited, the landlord does not, by merely lying by, & witnessing the act for six years, waive the forfeiture. Some positive act of waiver, as receipt of rent, is necessary. But if he permits the tenant to expend money in improvements, *semble*: that is evidence to be left to a jury of his consent to the alteration of the premises.—DOE d. SHEPARD v. ALLEN (1810), 3 Taunt. 78; 128 E. R. 32.

*Annotations*:—*Consd*. Johnstone v. Hall (1856), 2 K. & J. 414. *Expld*. Parry v. Davis (1858), 3 C. B. N. S. 769. *Reid*. Doe d. Parry v. Hughes (1847), 11 Jur. 698; Ward v. Day (1864), 5 B. & S. 359; Griffin v. Tomkins (1880), 42 L. T. 359; Samuel v. Dunas, [1924] A. C. 431.

*See, also*, No. 3064, *post*.

**3059.** ——— **Knowledge of breach—No immediate application for relief.**—(1) Injunction to restrain the breach of a covenant, that buildings shall be erected upon a general plan refused: the covenantee having acquiesced in a partial deviation from the plan & not having made immediate application to the ct. (2) A landlord who relaxes in favour of some of his tenants a covenant entered into for the benefit of all is not entitled to an injunction to restrain the other tenants from infringing that covenant.—ROPER v. WILLIAMS (1822), Turn. & R. 18; 37 E. R. 999, L. C.

*Annotations*:—*As to* (1) *Consd*. Patching v. Dubbins (1853), Kay, 1; Kilbey v. Haviland (1871), 24 L. T. 353; German v. Chapinan (1877), 7 Ch. D. 271; Knight v. Simmonds, [1896] 2 Ch. 294. *Reid*. Scarisbrick v. Tunbridge (1854), 3 Eq. Rep. 240; Mitchell v. Steward (1866), L. R. 1 Eq. 541; Sobey v. Sainsbury, [1913] 2 Ch. 513. *As to* (2) *Consd*. Child v. Douglas (1854), Kay, 560; Peek v. Matthews (1867), L. R. 3 Eq. 515. *Reid*. Johnstone v. Hall (1856), 4 W. R. 417; Sidney v. Clarkson (1856), 14 W. R. 157; Plymouth Corp. v. Martin (1884), 1 T. L. R. 5; Meredith v. Wilson (1893), 69 L. T. 336; Tubbs v. Esser (1909), 26 T. L. R. 145; Kelly v. Barrett, [1924] 2 Ch. 379.

**3060.** ——— **Waiver in favour of other tenants—Covenant entered into for benefit of all.**—ROPER v. WILLIAMS, No. 3059, *ante*.

**3061.** ——— **Premises held under like covenants.**—ZETLAND (EARL) v. HISLOP, No. 2042, *ante*.

**3062.** ——— **Approval of underlessee's plan of building—By underlessee.**—A landlord held to have waived his right to enforce performance of building covenants in the original lease, by having

approved of a plan, according to which, an underlessee had agreed to build on taking the underlease.—JENKINS v. PORTMAN (1836), 1 Keen, 435; 5 L. J. Ch. 313; 48 E. R. 374.

*Annotations*:—*Mentd*. Moores v. Choat (1839), 8 Sim. 508; Nokes v. Gibbon (1856), 3 Drew. 681.

**3063.** ——— **Acquiescence in breaches of some covenants—Whether bar to relief for other breaches of covenant.**—Acquiescence by a person in the breach of certain of the covenants does not operate as a bar to relief in respect of breaches of other & independent covenants. In order to obtain relief for breach of covenant not to build, it is not necessary to prove "substantial injury."

—WESTERN v. MACDERMOTT (1866), 2 Ch. App. 72; 36 L. J. Ch. 70; 15 L. T. 641; 31 J. P. 73; 15 W. R. 265, L. C.

*Annotations*:—*Consd*. Keates v. Lyon (1869), 4 Ch. App. 218; Nottingham Patent Brick & Tile Co. v. Butler (1886), 54 L. T. 444; Meredith v. Wilson (1893), 69 L. T. 336; Hooper v. Bromet (1903), 89 L. T. 37. *Reid*. Leech v. Schweder (1874), 9 Ch. App. 465, n.; Manners v. Johnson (1875), 1 Ch. D. 673; Master v. Hansard (1876), 46 L. J. Ch. 505; Chitty v. Bray (1883), 48 L. T. 860; Brown v. Inskip (1884), Cab. & El. 231; Sheppard v. Gilmore (1887), 57 L. J. Ch. 6. *Mentd*. *Re* Drew, *Ex p.* Mason (1866), 35 Beav. 443; Poulett v. Hood (1866), 35 Beav. 234; Tulk v. Metropolitan Board of Works (1868), L. R. 3 Q. B. 682; Fairclough v. Marshall (1878), 4 Ex. D. 37; Renals v. Cowlishaw (1879), 11 Ch. D. 866; Austerberry v. Oldham Corp. (1885), 29 Ch. D. 750; Martin v. Spicer (1886), 55 L. T. 821; Rogers v. Hosegood, [1900] 2 Ch. 388; Formby v. Barker, [1903] 2 Ch. 539.

**3064.** **On whom binding—Corporation—Acquiescence by some members.**—Covenant against using premises as a shop, or warehouse for any trade, without licence in writing, or permitting anything, which may grow to the annoyance or damage of the lessors, or any of their other tenants. Breach, though not a nuisance in law, public or private, being an annoyance, not protected by injunction: there being no licence; & permission of one trade not to be construed a general licence for any trade: nor will the ct. enter into a comparison, which are more or less offensive. *Qu.*: whether a corp., consisting of numerous governors, would be bound by the acquiescence of some, standing by, permitting expenditure, etc.—MACHES v. FOUNDLING HOSPITAL (1813), 1 Ves. & B. 188; 35 E. R. 74.

*Annotations*:—*Reid*. Willmot v. Coventry Corp. (1835), 1 Y. & C. Ex. 518; Hogg v. Scott (1874), L. R. 18 Eq. 444. *Mentd*. Diggle v. Blackwall Ry. (1850), 14 Jur. 937.

#### SUB-SECT. 10.—POWER OF COURT TO VARY.

*See* Housing Act, 1925 (c. 14), s. 102; Law of Property Act, 1925 (c. 20), s. 84.

**3065.** **Conversion of house into tenements—Housing & Town Planning, etc. Act, 1919 (c. 35), s. 27.**—JOHNSTON v. MACONOCHE, No. 2911, *ante*.

**3066.** ——— *On an application to a county ct. under the above sect. for an order varying a restrictive covenant in the lease of a house on the ground that, owing to changes in the character of the neighbourhood in which the house is situate, the house cannot readily be let as a single tenement, but could readily be let for occupation if converted into two or more tenements, the ct. must have regard to the following questions*:—(1) whether the house is not readily lettable as a single tenement. If not, (2) whether it will be readily lettable, if converted into two or more tenements. If so, (3) whether the result is due to changes in the character of the neighbourhood, finding in the last-mentioned case exactly what is the neighbourhood taken into consideration, &

**Sect. 3.—Restrictive covenants as to user: Sub-sects. 10 & 11, A. (a) & (b), & B.]**

what are the changes in its character.—**ALLIANCE ECONOMIC INVESTMENT Co. v. BERTON** (1923), 92 L. J. K. B. 750; 129 L. T. 76; 87 J. P. 85; 39 T. L. R. 393; 67 Sol. Jo. 498; 21 L. G. R. 403, C. A.

**3067. Carrying on of school.]—FEILDEN v. BYRNE**, [1926] W. N. 118.

**SUB-SECT. 11.—REMEDIES FOR BREACH.**

**A. Injunction.**

**(a) Who may sue.**

**3068. Lessee of adjoining premises—Covenant enuring to such lessee's benefit—Privacy.]—A.**, lessee of a house, agreed with the landlord of another house which adjoined, that if the lease of the latter were renewed certain windows should be closed up. The lease was not renewed, but a new lease was granted to another lessee, previously to which A. & the landlord agreed that the windows, instead of being closed, should be treated in a particular manner, & in the lease such lessee covenanted so to treat them:—**Held**: upon a bill filed by A. against the subsequent lessee; the latter must be restrained from violating this covenant. The interference with the privacy of a lessee in the enjoyment of his tenement is not of a trivial nature, & the ct. will interpose its authority to protect the enjoyment.—**ANDOVER (LADY) v. ROBERTSON** (1855), 26 L. T. O. S. 23.

**3069. ———.]—The owner of an estate granted a lease of a plot of ground to A., who covenanted that he, his exors., administrators, or assigns, would not during the term do on the premises anything which should be an annoyance to the neighbourhood or to the lessor or his tenants, or diminish the value of the adjoining property, nor build, nor allow to be built, on the ground any building or erection without first submitting the plans to the lessor & obtaining his approval. The landlord some years afterwards granted a lease of an adjoining plot to B. who entered into a similar restrictive covenant. Within twenty years A. commenced, with the approval of the lessor, to build upon his ground so as to darken the windows of B.'s house. On bill by B. to restrain A. from erecting & the lessor from approving the building objected to:—**Held**: B. was not entitled to relief either on the principle that the lessor could not derogate from his grant, or on the ground that the restrictive covenants in A.'s lease enured for B.'s benefit.—**MASTER v. HANSARD** (1876), 4 Ch. D. 718; 40 L. J. Ch. 505; 38 L. T. 535; 41 J. P. 373; 25 W. R. 570, C. A.**

**Annotations:—Consd.** Birmingham Joint Stock Co. v. Lea (1877), 36 L. T. 843. **Apld.** Renals v. Cowlishaw (1879), 48 L. J. Ch. 830. **Refs.** Kemp v. Bird (1877), 5 Ch. D. 974; Nottingham Patent Brick Co. v. Butler (1886), 55 L. J. Q. B. 280; Foster v. Fraser (1893), 69 L. T. 136; Reid v. Bickerstaff, [1909] 2 Ch. 305; Chambers v. Randall, [1923] 1 Ch. 149.

**3070. ———.]—SPICER v. MARTIN**, No. 2997, ante.

**3071. Remainderman — Relief too minute —**

**PART XII. SECT. 3; SUB-SECT. 11.—A. (a).**  
**r. Person having equitable interest.]—BESINNETT v. WHITE**, [1926] 1 D. L. R. 95; **affd.**, [1925] 3 D. L. R. 560; 57 O. L. R. 171.—**CAN.**

**t. Parties to the agreement.]—CRAWFORD v. RYLAND** (1899), 18 N. Z. L. R. 543.—**N.Z.**

**PART XII. SECT. 3, SUB-SECT. 11.—A. (b).**  
**a. Parties to the agreement.]—**

**Covenant against noxious trade—School.]—JOHNSTONE v. HALL**, No. 2959, ante.

**(b) Who may be sued.**

**3072. Lessee—Breach by undertenant—With sanction of lessee.]—MITCHELL v. STEWARD**, No. 3053, ante.

**3073. ——— By inadvertence.]—A** lease of a house was granted to B., which contained a covenant against "any art, trade or business" being carried on upon the premises. B. sub-leased the house to C., & by an inadvertence on the part of B., the sub-lease contained a clause permitting C. to carry on his business of a music teacher on the premises:—**Held**: B. was properly made a party to an action to restrain the breach of the covenant.—**TRITTON v. BANKART** (1887), 56 L. J. Ch. 629; 56 L. T. 306; 35 W. R. 474; 3 T. L. R. 420.

**3074. ——— Liability for not preventing breach.]—Pltf.** demised a house for a term of years to T., with a covenant that the lessee, his exors., administrators, & assigns, would not use the premises, or permit or suffer them to be used by any person for any noisome or offensive business. T. granted an underlease of the house, & the underlease was assigned to deft. E. E. underlet the house to M., who opened a wild beast exhibition in it. Pltf. brought an action against E. & his undertenant, asking for an injunction to restrain the use of the house in that manner. There was no evidence that E. had consented to the use of the house, & it appeared that after complaints had been made he had requested M. to discontinue the exhibition:—**Held**: as against E. the action could not be maintained, he not being liable either at law or in equity for not taking active proceedings against his undertenant to prevent him from opening the exhibition.—**HALL v. EWIN** (1887), 37 Ch. D. 74; 57 L. J. Ch. 95; 57 L. T. 831; 36 W. R. 84; 4 T. L. R. 46, C. A.

**Annotations:—Consd.** Jaeger v. Mansions Consolidated (1902), 87 L. T. 690; Wilson v. Twanley (1903), 88 L. T. 803. **Apld.** Powell v. Hemsley, [1909] 2 Ch. 252. **Consd.** Berton v. Alliance Economic Investment Co., [1922] 1 K. B. 742. **Distd.** Atkin v. Rose, [1923] 1 Ch. 522. **Refs.** Clegg v. Hands (1890), 59 L. J. Ch. 477; John, Abergarw Brewery Co. v. Holmes, [1900] 1 Ch. 188; Teape v. Douse (1905), 92 L. T. 319; Re Nisbet & Potts' Contract, [1906] 1 Ch. 386.

**3075. ———.]—BERTON v. ALLIANCE ECONOMIC INVESTMENT Co.**, No. 2870, ante.

**3076. ——— With notice from previous lessee—Landlord without notice.]—Deft.** I. S. was the lessee of premises No. 137, High Street, East Ham, where he carried on the business of a pork butcher. The lease contained a covenant by him that he would not carry on in those premises any noisy or offensive trade other than that of a pork butcher. He was also the lessee of premises No. 170, High Street, East Ham, where he carried on the business of a general butcher. By a deed of assignment I. S. sold to pltf. his leasehold interest in No. 170, & the goodwill of the business carried on there, & covenanted to use his best endeavours to promote the business & to secure to pltf. his exors., administrators, & assigns, the full advantage of his, the vendor's, connection & custom in the business, & also that he, his exors., administrators, or assigns, would not carry on

**HAYNES v. CROAKER** (1917), 19 W. A. L. R. 37.—**AUS.**

**b. Underlessee.]—MAUNSELL v. HORT** (1877), 1 L. R. Ir. 88.—**IR.**

or be concerned or interested in or assist any other person to carry on or be concerned or obtain any interest in the trade or business of a butcher within three miles of No. 170, High Street, East Ham, & also that he, his exors., administrators, or assigns, would not deal in fresh meat other than pork at No. 137, High Street. Subsequently I. S. determined to give up the business which he was carrying on at No. 137 & his son, deft. G. S., who was also a butcher, & who was aware of the last mentioned restrictive covenant contained in the deed of assignment, was minded to carry it on. I. S. surrendered his lease of No. 137 to the landlord, who granted a new lease to G. S., by the terms of which G. S. was entitled, so far as the landlord was concerned, to carry on in those premises the business of a general butcher. G. S. accordingly commenced to carry on at No. 137 the business of a general butcher. Pltf. claimed damages against I. S. for breach of the covenants in the deed of assignment, & an injunction against G. S. to restrain him from dealing in fresh meat other than pork at No. 137. The ct. held that pltf. was entitled to damages against I. S. for breach of covenant & to an injunction against G. S. as claimed. On an appeal by G. S.:—*Held*: the injunction must be set aside, on the ground that the landlord had no actual notice of the restrictive covenant, & there was nothing to justify the inference that he had constructive notice, & G. S. being therefore in the position of a purchaser with notice from a previous purchaser without notice, was entitled to use the premises free from any restraint by reason of the restrictive covenant.—*WILKES v. SPOONER*, [1911] 2 K. B. 473; 80 L. J. K. B. 1107; 104 L. T. 911; 27 T. L. R. 426; 55 Sol. Jo. 479, C. A.

**3077. Underlessee.—After purchase of immediate reversion.**—A., being possessed of a piece of land for a term of ninety-nine years, laid it out in plots, & underleased one plot to deft. for the residue of the term, less three days, deft. covenanting not to build more than 20 ft. in height on that side of his plot which adjoined a narrow passage. A. underleased another plot, which abutted on the other side of the passage, to plffs. On A.'s death, the estate was sold under conditions which provided that the purchaser of the largest lot in value should take an assignment of the whole, & grant fresh underleases to the various underlessees, for the residue of the term of ninety-nine years, less two days. Deft. purchased his own plot, & plffs. purchased their plot, which was the largest in value. Plffs. took an assignment of the whole, & granted a fresh underlease to deft. of his lot for the residue of the term less two days, at an apportioned ground rent:—*Held*: though deft.'s original underlease was merged at law, he was

still bound in equity to observe his building covenant; & plffs. could obtain an injunction to restrain him from infringing it.—*BIRMINGHAM JOINT STOCK CO. v. LEA* (1877), 36 L. T. 843.

**3078. Occupier.—With notice of covenant.**—The owners of the freehold reversion in a house sued A. & his son B. to restrain them from using the house in such a way as to break a restrictive covenant contained in a lease of it granted by plffs.' predecessor in title. The house was vested in B. for a term under an underlease which had been assigned to him. It was not shown that A. had any estate legal or equitable in the house, but there was evidence to show that he was in substance managing the business carried on there in which B. took part. The judge came to the conclusion that B. was a trustee of the underlease for A., & granted an injunction against both of them. A. appealed, alleging that he had no estate or interest in the house, & that an injunction could not be granted against him:—*Held*: the evidence showed A. to be in joint or sole occupation of the house & to be managing the business in it with notice of the covenants, & even if he was nothing more than a mere occupier he was liable to an injunction to restrain him from using the house in a way forbidden by the restrictive covenants.—*MANDER v. FALCKE*, [1891] 2 Ch. 554; 65 L. T. 203, C. A.

*Annotations*:—*Reid. Re Nisbet & Potts' Contract*, [1905] 1 Ch. 391; *Berton v. Alliance Economic Investment Co.* (1921), 38 T. L. R. 187.

**3079.** ————]—A builder, L., who had entered into an agreement with a landlord by which a lease of certain property was to be granted him on the completion of certain buildings thereon, covenanted with B., the owner of adjoining land, that the windows in the said buildings facing B.'s land should be obscured & fixed. A block of flats was erected, & a lease granted to L., by whom it was subsequently mortgaged & the equity of redemption released. Deft. became tenant of one of the flats & opened one of the fixed windows:—*Held*: the covenant was a restrictive covenant, binding on the leasehold interest, of which deft. had constructive notice, & could be enforced by injunction.

A restrictive covenant is one that restricts the enjoyment of land. When a person in possession of land binds himself to maintain a building, or part thereof, in a certain condition he enters into an obligation restrictive of his full enjoyment of the land. It is not necessary that there should be an express negative covenant; a negative may be implied (*WARRINGTON, J.*).—*ABBEEY v. GUTTERES* (1911), 55 Sol. Jo. 364.

#### *B. Forfeiture.*

See Part XXIV., Sect. 1, sub-sect. 2, A. (c), *post*.

## Part XIII.—Fitness of Premises.

### SECT. 1.—IN GENERAL.

**3080. Duty of landlord as to disclosure.]**—There is no implied duty in the owner of a house which is in a ruinous & unsafe condition, to inform a proposed tenant that it is unfit for habitation; & no action will lie against him for an omission to do so, in the absence of express warranty, or active deceit.—*KEATES v. CADOGAN (EARL)* (1851), 10 C. B. 591; 20 L. J. C. P. 76; 16 L. T. O. S. 307; 15 Jur. 428; 138 E. R. 234.

*Annotations:*—*Reid*, *Peck v. Gurney* (1873), L. R. 6 H. L. 377. *Mentd.* *Davies v. London & Provincial Marine Insce.* (1878), 38 L. T. 478.

**3081. Warranty & representation distinguished.]**—Pltf. & deft. negotiated for the lease of a house by the latter to the former. The terms were arranged, but pltf. refused to hand over the counterpart that he had signed unless he received an assurance that the drains were in order. Deft. verbally represented that they were in good order, & the counterpart was thereupon handed to him. The lease contained no reference to drains. The drains were not in good order, & an action was brought to recover damages for breach of warranty:—*Held*: the representation made by deft. as to the drains being in good order was a warranty which was collateral to the lease, & for breach of which an action was maintainable.

What constitutes a warranty in law, or a mere representation? To create a warranty no special form of words is necessary. It must be a collateral undertaking forming part of the contract by agreement of the parties express or implied & must be given during the course of the dealing which leads to the bargain & should then enter into the bargain as part of it. . . . "An affirmation at the time of sale is a warranty provided it appear on evidence to have been so intended." In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, & on which the buyer may be expected also to have an opinion & to exercise his judgment. In the former case it is a warranty, in the latter not. . . . That the above constitutes a warranty upon the sale of a chattel cannot be doubted, & why not . . . upon the granting & taking of a lease if it be collateral? I know of no authority which shows, nor do I see any principle upon which it should be held that, the like conditions existing, such an affirmation does not constitute a warranty upon, as in this case, the granting of a lease (*A. L. SMITH, M.R.*).—*DE LASSALLE v. GUILDFORD*, [1901] 2 K. B. 215; 70 L. J. K. B. 533; 84 L. T. 549; 49 W. R. 467; 17 T. L. R. 384, C. A.

*Annotations:*—*Consd.* *Lloyd v. Sturgeon Falls Pulp Co.* (1901), 85 L. T. 162. *Obtd.* *Heilbut, Symons v. Buckleton*, [1913] A. C. 30. *Reid*, *Milch v. Coburn* (1910), 27 T. L. R. 170; *Collins v. Hopkins*, [1923] 2 K. B. 617.

### PART XIII. SECT. 1.

**3080 1. Duty of landlord as to disclosure.]**—*KADHA KRISHNA v. O'FLAHERTY* (1869), 3 B. L. R. A. C. 277; 12 W. R. 145.—*IND.*

**a. Tenant of part of buildings—No remedy against landlord for defects in other parts.]**—A tenant taking part of a building in other parts of which are defects likely to result in damage to him, should examine the premises & contract for the removal of such

defects as are apparent, otherwise he will have no remedy afterwards against the landlord for damages caused by such defects.—*ROGERS v. SORELL* (1903), 23 C. L. T. 247; 14 Man. L. R. 450.—*CAN.*

**d. Premises not up to requirements of bye-law.]**—Premises leased for use as a hotel did not fulfil the requirements of a bye-law in regard to the number of bedrooms, & of this both the lessor & the lessee were aware at the time the lease was entered into:—

### SECT. 2.—MISREPRESENTATIONS INDUCING CONTRACT.

*See, generally, MISREPRESENTATION & FRAUD.* Contracts for sale of land, *see* SALE OF LAND.

**3082. Whether actionable—If misrepresentation innocent.]**—Pltf. sued deft. for damages for falsely representing that the sanitary arrangements of a house let by him to pltf. were perfect. Shortly after pltf. took possession of the house his wife was taken ill of blood poisoning from sewer gas & died. At the trial pltf. proved a loss of £850 a year which his wife was entitled to, & he recovered £2,228 damages. The Div. Ct. set aside this verdict, & entered judgment for deft. on the ground that there was no evidence that the drainage was defective when the representations were made, & at any rate, no evidence that if the drainage were defective deft. knew of it or made the representations recklessly; & further, that no damages could be recovered for the death of the wife:—*Held*: without expressing any opinion as to the question of damages arising from the death of the wife, there was no evidence of false or reckless statements, & the appeal must be dismissed.—*SAUNDERS v. PAWLEY* (1886), 2 T. L. R. 590, C. A.

**3083. ———.]**—Where a landlord lets an unfurnished house there is no implied contract by him that it is fit for habitation.

The house in question being unfurnished there was no implied contract by the landlord that it was fit for habitation, & deft. therefore could only recover on his counterclaim by showing that he was induced to take the house by representations of the landlord, which were either false to his knowledge at the time or made recklessly without any care whether they were true or false (*GRANTHAM, J.*).—*BARTRAM v. ALDOUS* (1886), 2 T. L. R. 237.

**3084. ———.]**—*BUTLER v. GOUNDRY* (1888), 4 T. L. R. 711, C. A.

**3085. ———.]**—Deft. had let a house to pltf. for a term of seven years. Pltf. alleged that previous to the execution of the lease deft. said he would make the drainage & water-closet perfect in every way, & subsequently after certain alterations had been made, deft. said that the water-closet was as sound as could be & in perfect order. The lease, which was executed after these representations, was silent as to the state of the drainage & water-closet, but pltf. said he was induced by these representations to take the lease. In an action to recover damages in respect of an illness alleged to have been caused by the defective state of the water-closet:—*Held*: pltf. was not entitled to recover, as, assuming the representations to have been made they did not amount to an agreement, but were at most a misrepresentation for which in the absence of fraud no action would lie.

*Held*: the lease was void *ab initio*.—*HICKEY v. SCIUTTO* (1903), 10 B. C. R. 187.—*CAN.*

**e. Premises not suitable for purposes for which required.]**—*TARRABAIN v. FERRING*, [1918] 2 W. W. R. 170.—*CAN.*

### PART XIII. SECT. 2.

**3082 1. Whether actionable—If misrepresentation innocent.]**—*BOO\* v. BEECHY* (1906), 7 Terr. L. R. 35; 5 W. L. R. 71.—*CAN.*

To my mind pltf. fails completely because he only proves a representation & an honest representation by deft. (CHARLES, J.).—BURTSAL v. BIANCHI (1891), 65 L. T. 678.

3086. ———.]—LONGMAN v. BLOUNT (1896), 12 T. L. R. 520.

Annotation:—*Refd.* De Lassalle v. Guildford, [1901] 2 K. B. 215.

3087. ———.]—GREEN v. SYMONS (1897), 13 T. L. R. 301, C. A.

Annotation:—*Consd.* De Lassalle v. Guildford, [1901] 2 K. B. 215.

3088. ——— Misrepresentation by agent—Knowledge of landlord.]—*Assumpsit* for the non-performance of an agreement to take a ready furnished house. Plea, that pltf. caused & procured deft. to enter into the agreement by means of fraud, covin, & misrepresentation of pltf., & others in collusion with him; on which issue was joined. It appeared at the trial, that pltf. had employed one C. to let the house in question, & that deft. being in treaty with C. for taking it, asked him "if there was any objection to the house," to which he answered that there was not; & deft. entered into & signed the agreement, but afterwards discovered that the adjoining house was a brothel, & on that ground declined to fulfil the contract. It appeared that pltf. knew of the existence of the brothel before, but C. the agent did not:—*Held*: it was not sufficient to support the plea, that the representation turned out to be untrue, but for that purpose it ought to have been proved to have been fraudulently made; as the representation was not embodied in the contract, the contract should not be affected by it, unless it were a fraudulent representation; & the knowledge of pltf. of the existence of the nuisance, & the representation of the agent that it did not exist, were not enough to constitute fraud, so as to support the plea.—CORNFOT v. FOWKE (1840), 6 M. & W. 358; 9 L. J. Ex. 297; 4 Jur. 919; 151 E. R. 450.

Annotations:—*Consd.* Wilson v. Fuller (1843), 3 Q. B. 68. *Expld.* National Exchange Co. v. Drew (1855), 25 L. T. O. S. 223. *Consd.* Ludgate v. Love (1881), 44 L. T. 694. *Refd.* Hart v. Windsor (1844), 13 L. J. Ex. 129; Elkin v. Janson (1845), 14 L. J. Ex. 201; Atkinson v. Pocock (1848), 1 Exch. 796; Murray v. Mann (1848), 2 Exch. 538; Wilde v. Gibson (1848), 1 H. L. Cas. 605; Feret v. Hill (1854), 15 C. B. 207; Bartlett v. Salmon (1855), 6 De G. M. & G. 33; Brady v. Todd (1861), 9 C. B. N. S. 592; Rogers v. Hadley (1861), 7 Jur. N. S. 733; Udell v. Atherton (1861), 7 H. & N. 172; Barwick v. English Joint Stock Bank (1867), L. R. 2 Exch. 259; Bolingbroke v. Swindon New Town L. B. of Health (1874), 43 L. J. C. P. 287; Mackay v. Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394; *Re* Shackleton, *Ex p.* Whittaker (1875), 10 Ch. App. 447, n.; Jolliffe v. Baker (1883), 11 Q. B. D. 255; Baldry v. Bates (1885), 1 T. L. R. 311; Pearson v. Dublin Corp., [1907] A. C. 351; Lloyd v. Grace, Smith, [1912] A. C. 716. *Mentd.* Gould v. Oliver (1840), 2 Man. & G. 208; Wheelton v. Hardisty (1857), 8 E. & B. 232; R. v. Butt (1884), 51 L. T. 607.

*See, generally*, AGENCY, Vol. I., pp. 587 *et seq.*

3089. ——— False or reckless misstatement.]—SAUNDERS v. PAWLEY, No. 3082, *ante*.

3090. ———.]—BARTRAM v. ALDOUS, No. 3083, *ante*.

*See, also*, No. 3093, *post*.

3091. As ground for rescission.]—Supposing that in consequence of a misrepresentation as to the drainage of a house, I am induced to take a lease of the house & to occupy it, the misrepresentation is innocent, but I have a right to have the contract set aside (BOWEN, L.J.).—NEWBIGGING v. ADAM (1886), 34 Ch. D. 582; 56 L. J. Ch.

275; 55 L. T. 794; 35 W. R. 597; 3 T. L. R. 259, C. A.; *on appeal*, *sub nom.* ADAM v. NEWBIGGING (1888), 13 App. Cas. 308, H. L.

Annotations:—*Consd.* Whittington v. Seale-Hayne (1900), 82 L. T. 49. *Mentd.* Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392; Armstrong v. Jackson, [1917] 2 K. B. 822; Hulton v. Hulton, [1917] 1 K. B. 813.

3092. As ground for damages—Whether proper consequence of rescission.]—Pltfs., who were the lessees of certain premises which they used for the purpose of breeding prize poultry, alleged that they had been induced to take the lease on the representations of deft.'s agents that the premises were in a sanitary condition & that the state of repair of the premises was good. Dft. denied that any such representations were made. The premises proved to be in an insanitary condition & in a bad state of repair:—*Held*: assuming innocent misrepresentations were made which entitled pltfs. to rescission of their contract, they could not claim to be indemnified by way of compensation for injuries sustained by the insanitary condition of the premises & occasioned by their entering into the contract. Such compensation is in reality damages pure & simple, & is not the proper consequence of rescinding the contract.—WHITTINGTON v. SEALE-HAYNE (1900), 82 L. T. 49; 16 T. L. R. 181; 44 Sol. Jo. 229.

Annotation:—*Consd.* Milch v. Coburn (1910), 27 T. L. R. 170.

3093. Intention to induce contract—Whether presumed.]—JOHNSON v. BARNES, [1883] W. N. 32.

### SECT. 3.—WARRANTY.

#### SUB-SECT. 1.—EXPRESS WARRANTY.

##### A. What Amounts to.

3094. Representation forming basis of contract.]—BUNN v. HARRISON (1886), 3 T. L. R. 140, C. A. Annotation:—*Refd.* Collins v. Hopkins, [1923] 2 K. B. 617.

3095. ——— & intended to constitute warranty.]—DE LASSALLE v. GUILDFORD, No. 3081, *ante*.

3096. Whether representation intended as warranty—Question of fact.]—A. lets to B. a furnished house, at a certain rent payable in advance, from a certain future day, & agrees that it shall be furnished suitably for a school. Whether a verbal representation that the house will be suitably furnished, forms part of the contract or not, is a question for the jury.—MECHELEN v. WALLACE (1836), 7 Ad. & El. 55, n.; 6 Nev. & M. K. B. 316; 112 E. R. 391.

3097. ———.]—An action is not maintainable on an agreement, outside a lease & not forming part of it, that in consideration of the lessee accepting the lease the lessor promised that the house leased was well built.

An assurance that a certain state of things existed might or might not have been intended & accepted as a promise or warranty, or as a single assurance. The statement that a house was well built was one of a very general character, & was in its nature more like the expression of an opinion than an allegation of fact. . . . There was no indication, upon the evidence, that this assurance was looked upon by either party as a warranty (WILLS, J.).—KENNARD v. ASHMAN (1894), 10 T. L. R. 213; *affd.*, 10 T. L. R. 447, C. A.

Annotation:—*Consd.* De Lassalle v. Guildford, [1901] 2 K. B. 215.

### PART XIII. SECT. 3, SUB-SECT. 1.—A.

3096 i. Whether representation intended as warranty—Question of fact.]—

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Where there is no express warranty of fitness of premises for purposes desired, the representations of fitness should be clear & direct, & evidence must be

sufficient to leave to the jury, of deft.'s liability on such representation.—TAYLOR v. REED (1878), 2 P. & B. 58.—CAN.

**Sect. 3.—Warranty: Sub-sect. 1, A. & B. (a) & (b); sub-sect. 2, A., B., C. & D. (a).]**

**3098.** ———.]—**BEST v. EDWARDS** (1895), 60 J. P. 9.

**Annotation:—***Consd. De Lassalle v. Guildford*, [1901] 2 K. B. 215.

**3099.** ———.]—**DE LASSALLE v. GUILDFORD**, No. 3081, *ante*.

**3100. Particular instances—Statement as to sanitary condition of house.**]—**BUNN v. HARRISON** (1886), 3 T. L. R. 146, C. A.

**Annotation:—***Refd. Collins v. Hopkins*, [1923] 2 K. B. 617.

**3101.** ———.]—**BURTSAL v. BIANCHI**, No. 3085, *ante*.

**3102.** ———.]—**BEST v. EDWARDS** (1895), 60 J. P. 9.

**Annotation:—***Consd. De Lassalle v. Guildford*, [1901] 2 K. B. 215.

**3103.** ———.]—**GREEN v. SYMONS** (1897), 13 T. L. R. 301, C. A.

**Annotation:—***Consd. De Lassalle v. Guildford*, [1901] 2 K. B. 215.

**3104.** ———.]—**Statement that house well built.**]—**KENNARD v. ASHMAN**, No. 3097, *ante*.

**B. Breach.**

**(a) What Amounts to.**

**3105. Breach as to part only of premises—Servants' quarters.**]—**CAMPBELL v. WENLOCK** (LORD), No. 3127, *post*.

**3106. Presence of vermin—Serious & substantial nuisance.**]—**CAMPBELL v. WENLOCK** (LORD), No. 3127, *post*.

**(b) Remedy for.**

**3107. Rescission of contract—Liability of tenant for rent—& use & occupation.**]—**CAMPBELL v. WENLOCK** (LORD), No. 3127, *post*.

**3108.** ———.]—**BUNN v. HARRISON** (1886), 3 T. L. R. 146, C. A.

**Annotation:—***Refd. Collins v. Hopkins*, [1923] 2 K. B. 617.

**3109. Damages.**]—**BUNN v. HARRISON** (1886), 3 T. L. R. 146, C. A.

**Annotation:—***Refd. Collins v. Hopkins*, [1923] 2 K. B. 617.

**3110.** ———.]—**DE LASSALLE v. GUILDFORD**, No. 3081, *ante*.

**SUB-SECT. 2.—IMPLIED WARRANTY.**

**A. In General.**

**3111. No implied warranty—Land.**]—On a demise of land or the vesture of land, as the catage of a field, for a specific term at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it is taken.—**SUTTON v. TEMPLE** (1843), 12 M. & W. 52; 13 L. J. Ex. 17; 2 L. T. O. S. 150; 7 Jur. 1065; 152 E. R. 1108.

**Annotations:—***Consd. Hart v. Windsor* (1844), 12 M. & W. 68. *Apld. Manchester Bonded Warehouse Co. v. Carr* (1880), 5 C. P. D. 507. *Refd. Wilson v. Finch Hatton* (1877), 2 Ex. D. 336; *Chenter v. Cater*, [1918] 1 K. B. 247. *Mentd. Readhead v. Mid. Ry.* (1867), L. R. 2 Q. B. 412; *Fowler v. Lock* (1872), L. R. 7 C. P. 272.

**PART XIII. SECT. 3, SUB-SECT. 1.—B. (a).**

**1. Presence of vermin.**]—**KIPPEN v. OPPENHEIM** (1847), 10 Dunl. (Ct. of Sess.) 242; 20 Sc. Jur. 74.—**SCOT.**  
**g. Defective drains.**]—**SCOTTISH HERITABLE SECURITY CO., LTD. v. GRANGER** (1881), 8 R. (Ct. of Sess.) 459; 18 Sc. L. R. 280.—**SCOT.**

**PART XIII. SECT. 3, SUB-SECT. 1.—B. (b).**

**3109 1. Damages.**]—**BRYMER v. THOMPSON** (1915), 34 O. L. R. 543; 9 O. W. N. 114; 25 D. L. R. 831.—**CAN.**

**PART XIII. SECT. 3, SUB-SECT. 2.—A.**

**3112 1. No implied warranty.**]—**TELFER BROTHERS v. FISHER** (1910), 15 W. L. R. 400.—**CAN.**

**3112 II.** ———.]—**FERRING v. TARRABAIN** (1918), 59 S. C. R. 670; 52 D. L. R. 687.—**CAN.**

**PART XIII. SECT. 3, SUB-SECT. 2.—C.**

**3113 1. Whether warranty of fitness implied.**]—On the demise of an unfurnished house there is no implied contract that the premises are in a tenantable condition.—**GILLIS v. MORRISON** (1882), 22 N. B. R. 207.—**CAN.**

**3112.** ———.]—**HART v. WINDSOR**, No. 2613, *ante*.

**B. Agricultural Land.**

*See AGRICULTURE*, Vol. II., p. 11, Nos. 35, 36.

**C. Unfurnished Houses.**

**3113. Whether warranty of fitness implied.**]—The lessee of a house underlet the same at Lady Day to A., as tenant from year to year, & before the end of the half year, put workmen into the house with A.'s consent, for the purpose of repairing a party wall, but the inconvenience occasioned thereby was so great that A.'s lodgers quitted the house, & he was obliged to take lodgings for his own family elsewhere, & after paying the rent up to Midsummer Day, he remained in possession carrying on his trade till July 5, & then quitted, without notice to his landlord:—**Held**: the latter could not maintain an action for use & occupation for the second half year which had thus commenced, the jury finding that there had been no beneficial occupation.—**EDWARDS v. HETHERINGTON** (OR ETHERINGTON) (1825), 7 Dow. & Ry. K. B. 117; Ry. & M. 268.

**Annotations:—***Distd. Izon v. Gorton* (1839), 7 Scott, 537. *Apld. Smith v. Marrable* (1843), 11 M. & W. 5. *Dtd. Hart v. Windsor* (1844), 12 M. & W. 68. *Distd. Surplice v. Farnsworth* (1844), 7 Man. & G. 576.

**3114.** ———.]—Where the agreement under which a party holds a house states, that he "agrees to become tenant by occupying," it will be an answer to a claim of rent, in an action for use & occupation, if he shows that the house was not in such a reasonable & decent state of repair, as to be fit for comfortable occupation.—**SALISBURY v. MARSHAL** (1829), 4 C. & P. 65, N. P.

**Annotations:—***Distd. Izon v. Gorton* (1839), 7 Scott, 537; *Surplice v. Farnsworth* (1844), 7 Man. & G. 576. *Dtd. Hart v. Windsor* (1844), 12 M. & W. 68.

**3115.** ———.]—A tenant of a house, who is bound by agreement to keep it in tenantable repair, may quit without notice in the course of his term, if the premises become unwholesome for want of sufficient drainage, if they cannot be kept dry without extravagant & unreasonable labour & expense on his part.—**COLLINS v. BARROW** (1831), 1 Mood. & R. 112, N. P.

**Annotations:—***Distd. Izon v. Gorton* (1839), 7 Scott, 537; *Arden v. Pullen* (1842), 10 M. & W. 321. *Apld. Smith v. Marrable* (1843), 11 M. & W. 5. *Dtd. Hart v. Windsor* (1844), 12 M. & W. 68.

**3116.** ———.]—I take it to be now settled law that a tenant is not excused from payment of rent by the unwholesomeness of the drainage, & it is no answer to the action (ERLE, J.).—**HEARD v. CAMPLIN** (1850), 15 L. T. O. S. 437.

**Annotation:—***Distd. Wilson v. Finch Hatton* (1877), 2 Ex. D. 336.

**3117.** ———.]—In the absence of any agreement on the subject, a person who agrees to take a house must take it as it stands, & cannot call on the lessor to put it into a condition which makes it fit for his living in.—**CHAPPELL v. GREGORY**

**3113 II.** ———.]—**BEARDMORE v. BRILLVUE LAND CO.** (1905), Q. R. 15 K. B. 43.—**CAN.**

**3113 III.** ———.]—**HARROD v. WATT** (1905), 1 W. L. R. 216.—**CAN.**

**3113 IV.** ———.]—**EVANS v. TEMPLIN** (1910), 13 W. L. R. 714.—**CAN.**

**3113 V.** ———.]—**ST. GEORGE MAN- SIONS, LTD. v. HETHERINGTON** (1918), 42 O. L. R. 10; 13 O. W. N. 367; 41 D. L. R. 614.—**CAN.**

**3113 VI.** ———.]—**BROWN v. DELMAS** (1919), 27 B. C. R. 471.—**CAN.**

**3113 VII.** ———.]—**IANNONE v. GRASSBY** (1922), 32 Man. L. R. 184; 68 D. L. R. 100; [1922] 2 W. W. R. 1139.—**CAN.**

(1863), 34 Beav. 250; 55 E. R. 631; *on appeal* (1864), 2 De G. J. & Sm. 111, L. J.J.

3118. —.]—MANCHESTER BONDED WAREHOUSE CO. v. CARR, No. 3157, *post*.

3119. —.]—BARTEAM v. ALDOUS, No. 3083, *ante*.

3120. —.]—There is no implied obligation upon the landlord of an unfurnished house towards his tenant not to let the house in a defective or dangerous condition. Consequently, the landlord is not liable in an action for negligence brought against him by the tenant for injuries sustained by reason of such defective condition; *a fortiori* the landlord is not liable in such an action brought against him by a workman employed by the tenant.—LANE v. COX, [1897] 1 Q. B. 415; 66 L. J. Q. B. 193; 76 L. T. 135; 45 W. R. 261; 13 T. L. R. 142; 41 Sol. Jo. 142, C. A.

*Annotation*.—Consd. Cavalier v. Pope, [1906] A. C. 428.

**Liability of landlord to invitees.**—See Part XVIII., Sect. 5, *post*.

**Whether landlord bound to disclose unfitness.**—See No. 3080, *ante*.

#### D. Furnished Houses.

##### (a) In General.

3121. **General rule—Warranty of fitness implied.**—CAMPBELL v. WENLOCK (LORD), No. 3127, *post*.

3122. —.]—Every person who lets a house must be taken to let it on an implied condition that it is habitable, & unincumbered with any serious nuisance.

Where a tenant entered on the occupation of a furnished house, under an agreement to pay a weekly rental of eight guineas, for five weeks, & at the expiration of one week left the house on account of its being infested with bugs. In an action for use & occupation to recover the balance of five weeks' rental:—*Held*: the nuisance was a defence to the action, & evidence of it admissible under the general issue.—SMITH v. MARRABLE (1843), 11 M. & W. 5; Car. M. 479; 12 L. J. Ex. 223; 7 Jur. 70; 152 E. R. 693.

*Annotations*.—Distd. Sutton v. Temple (1843), 12 M. & W. 52. I regard that case as standing upon very different principles; as being the case of a mixed contract, for the letting of goods & chattels involved with the letting of a house, & in which the goods & chattels so supplied are intended for a specific purpose (LORD ABINGER, C.B.); Hart v. Windsor (1844), 12 M. & W. 68. *Distd.* Heard v. Camplin (1850), 15 L. T. O. S. 437. *Apld.* Wilson v. Finch Hatton (1877), 2 Ex. D. 336. I am prepared to hold that the law as laid down in that case is good & sound law (KELLY, C.B.). *Distd.* Manchester Bonded Warehouse Co. v. Carr (1880), 5 C. P. D. 507. *Apld.* Bird v. Greville (1884), Cab. & El. 317. *Distd.* Maclean v. Currie (1884), Cab. & El. 361; Sarson v. Roberts, [1895] 2 Q. B. 395. *Consd.* Humphreys v. Miller, [1917] 2 K. B. 122. No doubt when persons let rooms a warranty is implied that the premises are fit for immediate occupation; that is the result of the decisions in *Smith v. Marrable & Wilson v. Finch Hatton*, No. 3124, *post* (SWINFEN EADY, L.J.); *Collins v. Hopkins*, [1923] 2 K. B. 617. *Refd.* Surplice v. Farnsworth (1844), 7 Man. & G. 576; Campbell v. Wenlock (1866), 4 F. & F. 716; Bunn v. Harrison (1886), 3 T. L. R. 146; Stanton v. Southwick, [1920] 2 K. B. 642. *Mentd.* Fowler v. Lock (1872), L. R. 7 C. P. 272; Robertson v. Amazon Tug & Lighterage Co. (1881), 7 Q. B. D. 598.

3123. —.]—HART v. WINDSOR, No. 2613, *ante*.

3124. —.]—In an agreement to let a furnished house there is an implied condition that the house shall be fit for occupation at the time at which the tenancy is to begin, & if the condition is not fulfilled the lessee is entitled thereupon to rescind the contract.

Deft. agreed to rent plffs.' furnished house for three months from May 7, but having at the beginning of the intended tenancy discovered that the house was, owing to defective drainage, unfit for habitation, refused to occupy. Plffs. repaired the drains, & on May 26, tendered the house in a wholesome condition to deft., who refused to occupy or to pay any rent. Plffs. having sued for the rent & for use & occupation:—*Held*: the state of the house at the beginning of the intended tenancy entitled deft. to rescind the contract, & he was not liable for the rent or for use & occupation.—WILSON v. FINCH HATTON (1877), 2 Ex. D. 336; 46 L. J. Q. B. 489; 36 L. T. 473; 41 J. P. 583; 25 W. R. 537.

*Annotations*.—Consd. Manchester Bonded Warehouse Co. v. Carr (1880), 5 C. P. D. 507. *Apld.* Bird v. Greville (1884), Cab. & El. 317. *Distd.* Maclean v. Currie (1884), Cab. & El. 361; Sarson v. Roberts, [1895] 2 Q. B. 395. To extend such a warranty to the whole term would be most unreasonable (SMITH, L.J.); Humphreys v. Miller, [1917] 2 K. B. 122. *Consd.* Collins v. Hopkins, [1923] 2 K. B. 617. *Refd.* Dawson v. Clementson (1885), 1 T. L. R. 295; Bunn v. Harrison (1886), 3 T. L. R. 146. *Mentd.* Robertson v. Amazon Tug & Lighterage Co. (1881), 7 Q. B. D. 598.

3125. —.]—Upon the letting of a furnished house there is an implied warranty in the nature of a condition that the demised premises shall be reasonably fit for habitation at the date fixed for the commencement of the tenancy. A house in which a person has recently been suffering from pulmonary tuberculosis does not comply with such warranty, & the tenant is therefore entitled to repudiate the contract of tenancy on the ground that the premises are not reasonably safe for human occupation.—COLLINS v. HOPKINS, [1923] 2 K. B. 617; 92 L. J. K. B. 820; 130 L. T. 21; 39 T. L. R. 616; 21 L. G. R. 773.

3126. **Application of rule—Partly furnished house let on five years' agreement.**—An agreement was entered into between C. & P. for the lease of a partly furnished house, together with a garden & a few acres of ground, for a term of five years. P. alleged that a false representation had been made by C. as to the sufficiency of the water supply, & on the water supply failing, P. alleged that the house was uninhabitable, & refused to be bound by the agreement. There was evidence that the pipes had become stopped up when the house was in the occupation of P.:—*Held*: upon the evidence, there had been no misrepresentation by C.; & in a letting of this description, the doctrine that there was an implied condition in the letting of a house that it should be reasonably fit for habitation, was inapplicable.

It may, however, be taken to be the law of the land that, if you find a house which is unfit to live in on account of its being infested with bugs, or that the drains are so bad that you cannot safely live in it, or that scarlet fever has been raging in it, in such cases as those, it would be unlawful to insist upon a man performing his contract to take such a house (BACON, V.-C.).—CHESTER v. POWELL, POWELL v. CHESTER (1885), 52 L. T. 722; 1 T. L. R. 360; *subsequent proceedings*, 1 T. L. R. 390, C. A.

3127. —.]—Covers every part of premises—**Servants' quarters.**—Upon the letting of a furnished house for present occupation, with an express condition, that it is fit for occupation; if it is not so, & is at once given up on that account, the landlord cannot recover either the rent, or for use & occupation. On such a contract, whether express or implied, it is a breach of the

#### PART XIII. SECT. 3, SUB-SECT. 2.— D. (a).

##### 3121 i. General rule—Warranty of fit-

ness implied.]—Upon the letting of a furnished house there is an implied undertaking that the house is reason-

ably fit for habitation.—GORDON v. GOODWIN (1910), 15 O. W. R. 215; 20 O. L. R. 327.—CAN.

**Sect. 3.—Warranty: Sub-sect. 2, D. (a) & (b) i. & ii., E., F. & G. Part XIV. Sect. 1.]**

condition if the house is so infested & overrun with bugs as to render it unfit for occupation; & as the condition applies to the whole house, it is a breach if any of the rooms are in that state. But it must appear that the nuisance existed to a serious & substantial extent, & was such as the tenant could not reasonably be expected either to endure or to extirpate. No distinction can be drawn between the occupation of servants & of other inmates, for servants are as much entitled as any others to proper rest & comfort.

It does not matter whether there is an actual express contract that the house shall be put into a fit state or not, for upon principles of law, there is an implied contract that a furnished house, let for present occupation, shall be fit for such occupation; & if a house is so infested by these insects, that it can not be inhabited by the inmates with proper rest & comfort, it is not in a clean & fit state for habitation (COCKBURN, C.J.).—CAMPBELL v. WENLOCK (LORD) (1866), 4 F. & F. 710, N. P.

**Annotations:—**Consd. Wilson v. Finch Hatton (1877), 2 Ex. D. 336. Rejd. Stanton v. Southwick, [1920] 2 K. B. 642.

**3128. — At beginning of tenancy only.]—**WILSON v. FINCH HATTON, No. 3124, *ante*.

**3129. — —.]—**MACLEAN v. CURRIE, No. 3145, *post*.

**3130. — —.]—**DAWSON v. CLEMENTSON (1885), 1 T. L. R. 295.

**3131. — —.]—**In a contract for the letting of a furnished house or rooms there is no implied condition that the house shall continue fit for habitation during the term. There is no duty in the case of a man who has let part of his house as furnished lodgings to give information to the lodgers upon a member of his family living in the house becoming ill with an infectious disease.—SARSON v. ROBERTS, [1895] 2 Q. B. 395; 65 L. J. Q. B. 37; 73 L. T. 174; 59 J. P. 643; 43 W. R. 690; 11 T. L. R. 515; 14 R. 616, C. A.

**Annotations:—**Consd. Collins v. Hopkins, [1923] 2 K. B. 617. **Mentd.** Kensington & Knightsbridge Electric Lighting Co. v. Notting Hill Electric Lighting Co. (1918), 87 L. J. K. B. 566.

**3132. Effect of subsequent putting into fit condition.]—**WILSON v. FINCH HATTON, No. 3124, *ante*.

**(b) Breach.**

**i. What Amounts to.**

**3133. Presence of vermin.]—**SMITH v. MARRABLE, No. 3122, *ante*.

**3134. —.]—**CAMPBELL v. WENLOCK (LORD), No. 3127, *ante*.

**3135. —.]—**CHESTER v. POWELL, POWELL v. CHESTER, No. 3126, *ante*.

**3136. —.]—**HARRISON v. MALET (1886), 3 T. L. R. 58.

**3137. Presence of infectious disease.]—**One who has agreed to take a furnished house is not bound to fulfil his contract if the house be infected with measles at the date fixed for the commencement of the tenancy. If in such a case the lessor sue for rent, he must show, to entitle him to succeed, that the house was in fact in a state fit for human occupation at the date fixed for the commencement of the term, notwithstanding a previous intima-

tion by the tenant of his intention to repudiate the contract.—BIRD v. GREVILLE (LORD) (1884), Cab. & El. 317.

**Annotations:—**Consd. Collins v. Hopkins, [1923] 2 K. B. 617. Rejd. Humphreys v. Miller, [1917] 2 K. B. 122.

**3138. —.]—**CHESTER v. POWELL, POWELL v. CHESTER, No. 3126, *ante*.

**3139. — If actual & appreciable risk to tenants.]—**COLLINS v. HOPKINS, No. 3125, *ante*.

**— After commencement of tenancy—House let in lodgings—Duty of landlord to notify.]—**See No. 3131, *ante*.

**3140. Defective drainage.]—**WILSON v. FINCH HATTON, No. 3124, *ante*.

**3141. —.]—**CHESTER v. POWELL, POWELL v. CHESTER, No. 3126, *ante*.

**3142. —.]—**HARRISON v. MALET (1886), 3 T. L. R. 58.

**3143. — Honest belief of landlord in fitness of premises.]—**CHARSLEY v. JONES (1889), 53 J. P. 280; 5 T. L. R. 412.

**Annotation:—**Rejd. Collins v. Hopkins, [1923] 2 K. B. 617.

**3144. Defective water supply.]—**CHESTER v. POWELL, POWELL v. CHESTER, No. 3126, *ante*.

**3145. Whether defects in repair—Plastering of ceilings.]—**A tenant is not justified in determining a tenancy of a furnished house, because during the term a portion of the plastering of the ceilings, which were cracked & fractured at the commencement of the tenancy, fell in one room, & the plastering of the ceilings in other rooms was unsound & liable to fall. On a letting of a furnished house, the implied term that it shall be fit for human habitation only applies to the condition of the premises at the commencement of the tenancy.—MACLEAN v. CURRIE (1884), Cab. & El. 361.

**ii. Remedies of Tenant.**

**3146. Rescission.]—**SMITH v. MARRABLE, No. 3122, *ante*.

**3147. — Without notice.]—**CHESTER v. POWELL, POWELL v. CHESTER, No. 3126, *ante*.

**3148. —.]—**WILSON v. FINCH HATTON, No. 3124, *ante*.

**3149. —.]—**BIRD v. GREVILLE (LORD), No. 3137, *ante*.

**3150. —.]—**COLLINS v. HOPKINS, No. 3125, *ante*.

**3151. Right to damages.]—**HARRISON v. MALET (1886), 3 T. L. R. 58.

**3152. —.]—**CHARSLEY v. JONES (1889), 53 J. P. 280; 5 T. L. R. 412.

**Annotation:—**Rejd. Collins v. Hopkins, [1923] 2 K. B. 617.

**E. Furnished Lodgings.**

Furnished lodgings generally, see Part VI., Sect. 7, *ante*.

**3153. Whether warranty implied.]—**A party actually occupied premises which had been let to him under a written agreement; in the course of his tenancy a nuisance occurred, which put an end to the comfortable occupation of the premises; this nuisance was not remedied by the landlord, & the tenant quitted as soon as he could obtain other premises:—**Held:** he was not liable to rent for the period between the time of the occurrence of the nuisance & that at which he quitted the premises.—COWIE v. GOODWIN (1840), 9 C. & P.

**PART XIII. SECT. 3, SUB-SECT. 2.—D. (b) i.**

**h. Absence of proper furniture.]—**SANDERS v. CHAPERON, [1919] App. D. 191.—S. AF.

**PART XIII. SECT. 3, SUB-SECT. 2.—D. (b) ii.**

**3151 i. Right to damages.]—**MACLEOD v. HARBOTTLE (1913), 24 W. L. R. 54; 4 W. W. R. 136; 11 D. L. R. 126.—CAN.

378, N. P.; *subsequent proceedings, sub nom.* COWEY v. GOODWIN, 4 Jur. 506.  
*Annotation*:—*Distd.* Surplice v. Farnsworth (1844), 7 Man. & G. 576.

3154. —.]—SMITH v. MARRABLE, No. 3122, *ante*.

3155. — Fitness during whole term—Subsequent infectious illness—Duty of landlord to give notice.]—SARSON v. ROBERTS, No. 3131, *ante*.

3156. Breach—What amounts to—Premises infested with vermin.]—SMITH v. MARRABLE, No. 3122, *ante*.

#### F. Other Premises.

3157. Warehouse.] — Pltfs. demised certain floors in a warehouse to deft. at a rent. He covenanted to repair, maintain, & keep the inside of the premises in good & tenantable repair & condition, & to deliver them up at the end of the term, damage by fire, storm, or tempest, or other inevitable accident, & reasonable wear & tear only excepted. Pltfs. covenanted to keep the walls, roof & main timbers of the premises in good & substantial repair & condition. The lease also contained a provision for the suspension of the rent in the event of the premises being burnt down, or damaged by fire, storm, or tempest.

Sub-lessees of deft. overloaded a floor with flour, in consequence of which the whole building fell. Pltfs. rebuilt it & sued for rent during the time the building was unoccupied, & for damages. Deft. denied liability, & claimed damages from pltfs.:—*Held*: there was no implied warranty by the pltfs. that the building was fit for the purpose for which it was to be used.

The law was, I thought, clear that on the letting of a house there is no implied warranty that it is fit for habitation (LORD COLERIDGE, C.J.).—MANCHESTER BONDED WAREHOUSE Co. v. CARR (1880), 5 C. P. D. 507; 49 L. J. Q. B. 809; 43 L. T. 476; 45 J. P. 7; 29 W. R. 354.

*Annotations*:—*Refd.* Huggall v. McKean (1884), Cab. & --- 391; Murphy v. Hurly, [1922] 1 A. C. 369. *Mentd.* Maori King (Cargo Owners) v. Hughes, [1895] 2 Q. B. 550.

#### G. By Statute.

See, now, Housing Act, 1925 (c. 14), s. 1.

3158. What amounts to breach—Effect of occa-

sional incursions by rats.]—A landlord does not commit a breach of the condition that a house is reasonably fit for human habitation within Housing, Town Planning, etc., Act, 1909 (c. 44), ss. 14, 15, because it is from time to time invaded from without by rats in considerable numbers. *Semble*: there may be a breach of the condition implied by those sects. if a house is infested with rats in the sense that they breed there, are regularly there, & as it were, form part of the house.—STANTON v. SOUTHWICK, [1920] 2 K. B. 642; 89 L. J. K. B. 1066; 123 L. T. 651; 84 J. P. 207; 36 T. L. R. 567; 64 Sol. Jo. 498; *sub nom.* SOUTHWICK v. STANTON, 18 L. G. R. 425, D. C.

3159. Remedy of tenant for breach—Damages.]—By Housing of the Working Classes Act, 1885 (c. 72), s. 12, "in any contract for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation":—*Held*: a tenant has, under that sect., a right to sue his landlord for damages for injuries caused by the premises not being reasonably fit for human habitation owing to any defective state of repair.—WALKER v. HOBBS & Co. (1889), 23 Q. B. D. 458; 59 L. J. Q. B. 93; 61 L. T. 688; 54 J. P. 199; 38 W. R. 63; 5 T. L. R. 640, D. C.

3160. — Whether notice of disrepair condition precedent.]—Where a tenant of a house to which the provisions of the Housing, Town Planning, etc., Act, 1909 (c. 44), apply, sustains damage owing to a latent defect in the structure of the house, he is entitled to recover damages from the landlord for a breach of the condition of reasonable fitness for human habitation which by sects. 14 & 15 of the Act is to be implied in a letting of this character, although he has not given any notice to the landlord of want of repair.—FISHER v. WALTERS, [1926] 2 K. B. 315; 95 L. J. K. B. 846; 135 L. T. 411; 42 T. L. R. 499; 70 Sol. Jo. 710, D. C.

Housing of the working classes generally, *see* PUBLIC HEALTH.

## Part XIV.—Fixtures.

### SECT. 1.—IN GENERAL.

3161. Definition of "fixture"—Anything annexed to freehold & removable at will.]—The term "fixtures" has now acquired the peculiar meaning of personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them (PARKE, B.).—HALLEN v. RUNDER (1834), 1 Cr. M. & R. 266; 3 Tyr. 959; 3 L. J. Ex. 260; 149 E. R. 1080.

*Annotations*:—*Apld.* Elliott v. Bishop (1854), 10 Exch. 496; Lee v. Gaskell (1876), 1 Q. B. D. 700; *Re* De Falbe, Ward v. Taylor, [1901] 1 Ch. 523. *Refd.* Minshall v. Lloyd (1837), 2 M. & W. 450; Darby v. Harris (1841), 1 Q. B. 895; Kelly v. Webster (1852), 12 C. B. 283; Mather v. Fraser (1856), 4 W. R. 387; London & Westminster Loan & Discount Co. v. Drake (1859), 6 C. B. N. S. 793; Thomas v. Jennings (1896), 66 L. J. Q. B. 5. *Mentd.* Moor v. Roberts (1858), 3 C. B. N. S. 830.

3162. — — — — —.]—Here the question is as to fixtures, trade fixtures, & what I may call domestic fixtures, & I wish to state that by "fixtures," we, for the Lords Justices & myself take the same view of the case, understand such

things as are ordinarily affixed to the freehold for the convenience of the occupier, & which may be removed without material injury to the freehold, such will be machinery, using a generic term, & in houses, grates, cupboards, & other like things (LORD CRANWORTH, C.).—*Re* GAWAN, *Ex p.* BARCLAY (1855), 5 De G. M. & G. 403; 25 L. J. Bcy. 1; 26 L. T. O. S. 97; 19 J. P. 804; 1 Jur. N. S. 1145; 43 E. R. 926; *sub nom.* GAWAN v. BARCLAY, *Ex p.* BARCLAY, 4 W. R. 80, L. C. & L. J.

*Annotations*:—*Consd.* Mather v. Fraser (1856), 2 K. & J. 536. *Apld.* Boyd v. Shorrocks (1867), L. R. 5 Eq. 72. *Refd.* Whitmore v. Empson (1857), 23 Beav. 313; Begbie v. Fenwick, Fenwick v. Begbie (1871), 8 Ch. App. 1075, n.; Gough v. Wood, [1894] 1 Q. B. 713. *Mentd.* Tebb v. Hodge (1869), 38 L. J. C. P. 217; Reynolds v. Ashby, [1904] A. C. 466.

3163. — — — — —.]—As regards fixtures, we all know that the time was when everything affixed to the freehold was held to go with the freehold, & it was only by slow degrees that that unbending rule was modified, & came at last to assume the

*Sect. 1.—In general. Sect. 2: Sub-sect. 1, A. (a), (b) & (c).]*

propositions which it now retains. In modern times there have come to be important exceptions to this rule, one being in favour of trade fixtures & entitling a person who has put up what are now called "fixtures," which means removable fixed things, for the purposes of trade to remove them. That exception is not confined to the case of landlord & tenant, meaning thereby the owner of the immediate reversion & a tenant for years only. The exception extends equally to the case of a tenant for life, & the person who comes into possession of the estate upon his death. There is another equally important & well-established exception from the rule, namely, in the case of articles which have been affixed to the freehold, not with the object of enhancing its value, but for purposes of ornamentation. Objects so fixed, as, for instance, chimney-glasses, are removable . . . & the exception would apply not only as between landlord & tenant for years, but also as between a tenant for life & the remainderman or reversioner who takes the estate subject to the life tenancy; & if the exception applies to a chimney-glass, I cannot see why it does not apply generally to all articles affixed for the purpose of enjoyment & ornamentation. . . . A great deal of time has been spent on the point how these tapestries were affixed to the walls. I daresay they were as firmly affixed as they would have been by a person who intended them to remain there always, but I do not think that is of much importance. Fortunately in such cases the ct. is not driven to inquire whether the screws which fix an object to a wall are one inch or two or three inches long, whether there were half-a-dozen or a dozen of them, or whether they did or did not penetrate into the plaster of the wall (RICHY, L.J.).

In dealing with the question of fixtures it sometimes becomes material to consider the object & purpose of the annexation, by which I do not mean that there must be an inquiry into the motive of the person who annexed them, but a consideration of the object & purpose of the annexation as it is to be inferred from the circumstances of the case (VAUGHAN WILLIAMS, L.J.).—*Re DE FALBE, WARD v. TAYLOR*, [1901] 1 Ch. 523; 70 L. J. Ch. 286; 84 L. T. 273; 49 W. R. 455; 17 T. L. R. 246; 45 Sol. Jo. 291. C. A.; *affd. sub nom. LEIGH v. TAYLOR*, [1902] A. C. 157, H. L.

*Annotations:—Consd. Reynolds v. Ashby*, [1903] 1 K. B. 87; *Re Whaley, Whaley v. Roehrich*, [1908] 1 Ch. 615. *Reid. Reynolds v. Ashby*, [1904] A. C. 466; *Re Hulse, Beattie v. Hulse*, [1905] 1 Ch. 406; *Horwich v. Symond* (1914), 110 L. T. 1016. *Mentd. Bickmore v. Dimmer*, [1903] 1 Ch. 158.

**3164.** — — —.]—The term "fixture" is an ambiguous one. It has been defined to be such an annexation as can be removed from land by the party annexing it adversely to the owner, but in its more general sense it means any annexation or addition which has been affixed to or planted in the soil of the land. Were this case one between landlord & tenant there is no doubt whatever but that the tenant could lawfully remove the steam engine & boiler in question (KELLY, C.B.).—*CLIMIE v. WOOD* (1868), L. R. 3 Exch. 257; 37 L. J. Ex. 158; 18 L. T. 609; 32 J. P. 712; *affd.* (1869), L. R. 4 Exch. 328, Ex. Ch.

*Annotations:—Consd. Begbie v. Fenwick, Fenwick v. Begbie*

(1871), 8 Ch. App. 1075, n.; *Hobson v. Gorringe*, [1897] 1 Ch. 182; *Re British Red Ash Collieries*, [1920] 1 Ch. 326. *Reid. Longbottom v. Berry* (1869), L. R. 5 Q. B. 123; *Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Cross v. Barnes* (1877), 46 L. J. Q. B. 479; *Wake v. Hall* (1880), 50 L. J. Q. B. 545; *Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562; *Gough v. Wood*, [1894] 1 Q. B. 713; *Reynolds v. Ashby*, [1904] A. C. 466.

**3165.** — — —.]—There are, with regard to matters of this kind, which are included under the comprehensive term of "fixtures," two general rules. . . . One of those rules is the general well-known rule that whatever is fixed to the freehold of land becomes part of the freehold or inheritance. The other is quite a different & a separate rule, whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or for years. . . . To the second rule, namely the irremovability of things fixed to the inheritance, there is undoubtedly ground for a very important exception . . . in favour of fixtures which have been attached . . . for the purpose of trade, & perhaps in a minor degree for the purpose of agriculture. Under that exception a tenant who has fixed to the inheritance things for the purpose of trade has a certain power of severance & removal during the tenancy. . . . The fixture does become part of the inheritance; it does not remain a movable *quoad omnia*; there does exist on the part of the tenant a right to remove that which has been thus fixed, but if he does not exercise that right it continues to be that which it became when it was first fixed, a part of the inheritance (LORD CAIRNS, C.).

The meaning of the word [fixture] is anything annexed to the freehold, that is, fastened to or connected with it, not in mere juxtaposition with the soil. . . . An exception has been long established in favour of a tenant erecting fixtures for the purposes of trade, allowing him the privilege of removing them during the continuance of the term (LORD CHELMSFORD).—*BAIN v. BRAND* (1876), 1 App. Cas. 702, H. L.

*Annotations:—Apld. Holson v. Gorringe*, [1897] 1 Ch. 182. *Consd. Re Chesterfield's S. E.*, [1911] 1 Ch. 237. *Reid. Re Hulso, Beattie v. Hulso*, [1905] 1 Ch. 406.

**3166.** — — —.]—Whether physical annexation necessary.—*SHEEN v. RICKIE*, No. 3515, *post*.

**3167.** — — —.]—*BAIN v. BRAND*, No. 3165, *ante*.

**3168.** — — —.]—*MOODY v. STEGGLES*, No. 3191, *post*.

**3169.** — — —.]—Things affixed to premises after structure completed.—Not things forming part of original structure.—*BOSWELL v. CRUCIBLE STEEL CO.*, No. 3275, *post*.

Nature of fixtures—Whether "interest in land" within Stat. Frauds, s. 4.—*See SALE OF LAND*.

— Whether goods & chattels within Stat. Frauds, s. 17.—*See SALE OF GOODS*.

— Whether "goods, wares & merchandise"—Within Stamp Acts.—*See REVENUE, SALE OF GOODS*.

Recovery of fixtures—Whether trover lies.—*See Sect. 8, sub-sect. 2, post*.

As between mortgagor & mortgagee.—*See MORTGAGE*.

As between tenant for life & remainderman.—*See SETTLEMENTS*.

As between executor & heir or devisee.—*See REAL PROPERTY; WILLS*.

#### PART XIV. SECT. 1.

**31641.** Definition of "fixture"—Anything annexed to freehold.—*CHATURBHUS MORARJI v. BENNETT* (1905), 1 L. R. 29 Bom. 323.—*IND.*

## SECT. 2.—WHAT ARE FIXTURES.

## SUB-SECT. 1.—ARTICLES NOT ATTACHED.

## A. Articles Resting by their own Weight.

## (a) In General.

**3170. Not fixtures.]—**(1) The principle upon which the old rule of law, that fixtures pass with the soil, was relaxed in favour of trade, has no application where, as here, the parties who affixed the machinery were themselves the owners in fee of the soil (PAGE WOOD, V.-C.).

(2) As to the particular articles, the cisterns, standing merely by their own weight, do not pass (PAGE WOOD, V.-C.).

(3) If the thing in question is an essential part of the machine, then, although movable, & although it may have been actually removed for a particular purpose—as a millstone removed for repair, still it is to be treated as belonging to the machine; & if the machine itself is held to be a fixture, the movable part of it must be also so held (PAGE WOOD, V.-C.).—*MATHER v. FRASER* (1856), 2 K. & J. 536; 25 L. J. Ch. 361; 27 L. T. O. S. 41; 2 Jur. N. S. 900; 4 W. R. 387; 69 E. R. 895.

*Annotations:—As to (1) Apud. Longbottom v. Berry* (1869), L. R. 5 Q. B. 123. *Consd. Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Re Chesterfield's S. E.*, [1911] 1 Ch. 237. *Reid. Walmsley v. Milne* (1859), 7 C. B. N. S. 115; *Climie v. Wood* (1868), L. R. 3 Exch. 256; *Begbie v. Fenwick*, *Fenwick v. Begbie* (1871), 8 Ch. App. 1075; *Re Arnytage, Ex p. Moore & Robinson's Banking Co.* (1880), 14 Ch. D. 379; *Gough v. Wood*, [1894] 1 Q. B. 713; *Huddersfield Banking Co. v. Lister* (1895), 72 L. T. 703. *As to (2) Reid. Re Richards, Ex p. Astbury, Ex p. Lloyd's Banking Co.* (1869), L. R. 4 Ch. App. 630. *As to (3) Apud. Re Richards, Ex p. Astbury, Ex p. Lloyd's Banking Co.* (1869), 4 Ch. App. 630. *Reid. Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97. *Generally, Reid. Waterfall v. Penistone* (1856), 6 E. & B. 876; *Metropolitan Counties, etc., Soc. v. Brown* (1859), 26 Beav. 454; *Haley v. Hammersley* (1861), 3 De G. F. & J. 587; *Culwick v. Swindell* (1866), L. R. 3 Eq. 249; *Boyd v. Shorrocks* (1867), L. R. 5 Eq. 72; *Hawtry v. Butlin* (1873), L. R. 8 Q. B. 290; *Meux v. Jacobs* (1875), L. R. 7 H. L. 481; *Cross v. Barnes* (1877), 46 L. J. Q. B. 479; *Southport & West Lancashire Banking Co. v. Thompson* (1887), 57 L. J. Ch. 114; *Re Yates, Hatchelder v. Yates* (1888), 38 Ch. D. 112; *Hobson v. Gorringe*, [1897] 1 Ch. 182; *Keynolds v. Ashby*, [1904] A. C. 466; *Re Rogerstone Brick & Stone Co., Southall v. Wescomb*, [1919] 1 Ch. 110.

**3171. — Subject to intention—Onus of proof.]—***HOLLAND v. HODGSON*, No. 3225, *post*.

## (b) Forming Part of Architectural Design.

**3172. Stone garden seats.]—**Testator, who was tenant for life of settled estates, on which he had erected, fitted up, & furnished a mansion house, an old one having fallen into decay, bequeathed all the tapestry, marbles, statues, pictures with their frames & glasses, which should be in or about the house at the time of his death, & of which he had power to dispose, to be enjoyed as heirlooms by the persons who, under the limitations in his will, would be entitled to his own estates thereby devised in strict settlement, being the same as those entitled to the settled estates, subject to a condition, with a shifting clause in case the condition were not fulfilled. After testator's death, A. became tenant for life of both the settled & devised estates, & on his death the settled estates devolved on B.; but, as the condition was not fulfilled, C. became entitled to the devised estates & to the heirlooms under the shifting clause in testator's will. The question arose, as between B. & C., which of the articles passed under the will:—*Held: tapestry, pictures in panels, frames filled with*

*satin, & attached to the walls, & also statues, figures, vases, & stone garden-seats, purchased & placed by testator, which were essentially part of the house, or of the architectural design of the building or grounds, however fastened, were fixtures, & could not be removed; but glasses & pictures not in panels, not being part of the building, passed under testator's will.*

In all these cases the question is not whether the thing itself is easily removable, but whether it is essentially a part of the building itself from which it is proposed to remove it, as in the familiar instance of the grinding stone of a flour mill, which is easily removable, but which is nevertheless a part of the mill itself. . . . With respect to the carved kneeling figures on the staircase in the great hall, & the sculptured marble vases in the hall, they appear to me to come within the category of articles that cannot be removed. I think it does not depend on whether any cement is used for fixing these articles, or whether they rest by their own weight, but upon this, whether they are strictly & properly part of the architectural design for the hall & staircase itself, & put in there as such, as distinguished from mere ornaments to be afterwards added (LORD ROMILLY, M.R.).—*D'EYNCOURT v. GREGORY* (1866), L. R. 3 Eq. 382; 36 L. J. Ch. 107; 15 W. R. 186.

*Annotations:—Consd. Bulkeley v. Lyne Stephens, Re Lyne Stephens, Lyne Stephens v. Lubbock* (1895), 11 T. L. R. 561. *Reid. Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Chidley v. West Ham* (1874), 32 L. T. 486; *Norton v. Dashwood*, [1896] 2 Ch. 497; *Hill v. Bullock*, [1897] 2 Ch. 482; *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523; *Monti v. Barnes*, [1901] 1 K. B. 205; *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97; *Vaudoille Electric Cinema v. Murlset*, [1923] 2 Ch. 74.

**3173. Statues.]—***D'EYNCOURT v. GREGORY*, No. 3172, *ante*.

**3174. — On pedestals attached to soil.]—***BULKELEY v. LYNE STEPHENS, Re LYNE STEPHENS, LYNE STEPHENS v. LUBBOCK* (1895), 11 T. L. R. 564.

*Annotation:—Reid. Hill v. Bullock*, [1897] 2 Ch. 55.

**3175. Vases.]—***D'EYNCOURT v. GREGORY*, No. 3172, *ante*.

**3176. — On pedestals attached to soil.]—***BULKELEY v. LYNE STEPHENS, Re LYNE STEPHENS, LYNE STEPHENS v. LUBBOCK* (1895), 11 T. L. R. 564.

*Annotation:—Reid. Hill v. Bullock*, [1897] 2 Ch. 55.

## (c) Buildings.

**3177. General rule.]—**A covenant, by a tenant, to yield up in repair at the expiration of his lease, all buildings, which should be erected during the term, upon the demised premises, includes buildings erected & used, by the tenant, for the purpose of trade & manufacture, if such buildings be let into the soil or otherwise fixed to the freehold, but not where they merely rest upon blocks or pattens.—*NAYLOR v. COLLINGE* (1807), 1 Taunt. 19; 127 E. R. 736.

*Annotations:—Reid. Thresher v. East London Water Works Co.* (1824), 2 B. & C. 608; *Martyr v. Bradley* (1832), 9 Bing. 24; *Re Ogden, Ex p. Loyd* (1834), 3 Deac. & Ch. 765; *West v. Blakeway* (1841), 2 Man. & G. 720.

**3178. Barn—Resting on blocks & pattens.]—***CULLING v. TUENAL* (1894), Bull. N. P. 34.

*Annotations:—Consd. Elwes v. Maw* (1802), 3 East, 38; *Wiltshire v. Cottrell* (1853), 1 E. & B. 674.

**3179. — Resting on pillars.]—**A pauper rented a windmill & a brick-built cottage & garden at the rent of £30 *per annum* for six years, & during

PART XIV. SECT. 2, SUB-SECT. 1.—  
A. (a).

**3170 i. Not fixtures.]—***WETHERSDANE PARK CO., LTD. v. WATSON* (1890), 16

V. L. R. 758.—AUS.

PART XIV. SECT. 2, SUB-SECT. 1.—

A. (a).

k. Resting on blocks of wood.]—

Pltf. owning land mortgaged it & afterwards built a house thereon which was placed on blocks of wood & was held by its own weight on them:—*Held: the house was a fixture.*—

**Sect. 2.—What are fixtures: Sub-sect. 1, A. (c) & (d), & B.]**

that time held & occupied the same, & actually paid that rent, & was rated to & paid the rates for the relief of the poor. The cottage & garden, with the mill, were together of more than the annual value of £10, but exclusive of the mill, they were not of that annual value. The mill was of wood, & had a foundation of brick; but the wood-work was not inserted in the brick foundation, but rested upon it by its own weight alone. No part of the machinery of the mill touched the ground or any part of the foundation:—*Held*: the windmill not being affixed to the freehold, nor to anything connected with it, was not parcel of a tenement, & consequently, the pauper gained no settlement.

The question is, whether the mill be parcel of a tenement? To be so, it must be part & parcel of the freehold. Now it is not parcel of the freehold unless it be affixed to it, or to something previously connected with it. Here the mill was not affixed to the land, but merely rested on a foundation of brick. This is analogous to the case of a barn set upon pillars; & that is nothing more than a chattel (BAYLEY, J.).—*R. v. OTLEY SUFFOLK (INHABITANTS)* (1830), 1 B. & Ad. 161; 9 L. J. O. S. M. C. 11; 109 E. R. 747.

*Annotations*:—*Follid*, Wansbrough v. Maton (1836), 4 Ad. & El. 884. *Consd.* *Re Gye & Hughes, Ex p. Reynal* (1841), 2 Mont. D. & De G. 443. *Reid*, Wood v. Hewitt (1846), 8 Q. B. 913; Wiltshire v. Cottrell (1853), 1 E. & B. 674; Lancaster v. Eve (1859), 5 C. B. N. S. 717; Sumner v. Broadlow (1865), 34 L. J. Q. B. 130; Pole-Carew v. Western Counties & General Manure Co., [1920] 2 Ch. 97.

**3180. — Resting on foundation of brick & stone.**—A tenant is entitled, at the expiration of his term, to remove a wooden barn which he has erected on a foundation of brick & stone, the foundation being let into the ground, but the barn resting upon it by weight alone. He may maintain trover for such a barn, against a party converting it. If the reversioner, having refused, while off the premises, to allow such tenant to take away the barn, afterwards, while a third party is in possession of the land, come on the land & prevent the tenant from entering to take the barn away, this is a conversion by the reversioner.—*WANSBROUGH v. MATON* (1836), 4 Ad. & El. 884; 6 Nev. & M. K. B. 367; 5 L. J. K. B. 150; 111 E. R. 1016; *sub nom.* *WANDSBOROUGH v. MATON*, 2 Har. & W. 37.

*Annotations*:—*Reid*, *R. v. Guest* (1838), 7 Ad. & El. 951; *Re Gye & Hughes, Ex p. Reynal* (1841), 2 Mont. D. & De G. 443; *Wiltshire v. Cottrell* (1853), 1 E. & B. 674; *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97.

**3181. Windmill—Resting on brick pillars.**—*R. v. LONDONTORPE (INHABITANTS)* (1795), 6 Term Rep. 377; 101 E. R. 604.

*Annotations*:—*Follid*, *R. v. Otley, Suffolk* (1830), 1 B. & Ad. 161. *Reid*, *Wiltshire v. Cottrell* (1853), 1 E. & B. 674; *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97.

**3182. —**—*R. v. OTLEY, SUFFOLK (INHABITANTS)*, No. 3179, *ante*.

**3183. Wooden granary with tiled roof—Supported by staddles.**—The granary . . . appeared to be laid on a wooden foundation, supported by staddles; & it lay upon them in the same manner

that the ricks lay upon the rick staddles. The part above the stone caps was wood with a tile roof. . . . It appeared that it was not attached, except by its weight, to the staddles. . . . We think that we are bound by the authorities to consider such an erection as a mere chattel, & neither as part of the land nor affixed to the freehold (COLERIDGE, J.).—*WILTSHIRE v. COTTRELL* (1853), 1 E. & B. 674; 22 L. J. Q. B. 177; 20 L. T. O. S. 259; 17 Jur. 758; 118 E. R. 589.

*Annotations*:—*Reid*, *Elliot v. Bishop* (1854), 10 Exch. 496; *Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Childley v. West Ham* (1874), 32 L. T. 486; *Hobson v. Gorringe*, [1897] 1 Ch. 182; *Monti v. Barnes*, [1901] 1 K. B. 205; *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97; *Vaudeville Electric Cinema v. Muriel*, [1923] 2 Ch. 74.

**3184. Wooden shed—Resting on brick foundation—& removable at will.**—Where a tenant built on a brick foundation a wooden shed, which was so constructed that it could be taken down & removed:—*Held*: it was not a fixture, & the tenant might remove it.—*STEDMAN v. MOORE* (1847), 10 L. T. O. S. 289; 12 J. P. 30, N. P.

*Compare* ECCLESIASTICAL LAW, Vol. XIX., p. 507, No. 3652.

**(d) Other Articles.**

**3185. Altar-stone in private chapel.**—A lessor can maintain an action in detinue or trover for the recovery of specific articles wrongfully removed with the privy of the lessee from the demised premises during the tenancy.

An altar-stone consecrated by the Roman Catholic bishop for the time being of the district, & a case of sacred relics, had for more than twenty years remained in the respective places intended for the reception of such articles, the former in a space or cavity left for it on the top of the altar so that it fitted in & lay level with the rest of the surface, & the case of relics on a fixed marble block or pedestal designed for the purpose under the altar, in a private Roman Catholic chapel forming part of the mansion house on an estate settled in 1867 in a Roman Catholic family, & both altar-stone & relics were during that entire period used solely for purposes of such chapel as a place of religious worship. In 1885 a lease of a mansion house was granted to the husband of a sister of the present tenant for life, who was then an infant, by the trustees of the settlement under the powers thereof, & shortly before the termination of such lease in 1890 the altar-stone & relics were removed by another sister of the tenant for life, with the approval & by the direction of the lessee & his wife, & handed over to the successor of the bishop who had consecrated the altar-stone. At the time of granting the lease, which operated by way of revocation of uses & new appointment, the mansion house & appurtenances were in the charge of caretakers, whose expenses were charged against the tenant for life. The latter having brought an action after the expiration of the lease, against his sister, the late lessee's wife, *pltf.*'s other sister, & the present bishop, to recover the articles so removed, *defts.* contended that, the licence to use the chapel for mass having been withdrawn, the altar-stone was by the law or

*PHILLIPS v. GRAND RIVER FARMERS' MUTUAL FIRE INSURANCE CO.* (1881), 46 U. C. R. 334.—CAN.

**1. Resting on stone & wood.**—A building rested upon piers of stone & wood, earth & stone being dumped between the piers after the building was erected, the whole resting on the surface:—*Held*: the building was a fixture.—*OSWALD v. WHITMAN* (1889),

22 N. S. R. 13.—CAN.

**m. Wooden building—Resting on loose bricks.**—A small building of thin board, lathed & plastered inside, & divided into three rooms, resting by its own weight on loose bricks laid on the soil, built for & used at first as a booth or shop & then for a time as a dwelling-house:—*Held*: a fixture.—*MILES v. ANKATELL* (1898), 25 A. R.

458.—CAN.

**n. —**—*DEVINE v. CALLERY* (1917), 40 O. L. R. 505; 38 D. L. R. 542.—CAN.

**PART XIV. SECT. 2, SUB-SECT. 1.—A. (d).**

**c. Machinery for heating green-houses.**—*GARDINER v. PARKER* (1871), 18 Gr. 26.—CAN.

custom of their church properly given up to the bishop, to whom it belonged as the successor of him who had consecrated it, or else that the altar-stone, as well as, in any case, the relics had passed to one of defts. as personal chattels by the will of a former tenant for life under a bequest of all her "furniture & articles of household use or ornament" in or about the mansion house, & that at all events pltf. had, at the time of the removal neither title to nor possession of the articles so as to enable him to maintain the action:—*Held*: even if the former tenant for life under whose will defts. claimed that the articles had passed had been entitled to them so as to be able to dispose of them by will, which was at least doubtful, they did not under the circumstances of the case pass under the bequest referred to; according to the only law which that ct. could recognise, the bishop had no claim at all to the articles; they had by use come to form part of the chapel; they had been wrongfully removed & ought to be restored; & assuming, as decided, that the articles formed part of the chapel, pltf. had sufficient title by virtue of his estate, & even if that decision were wrong, had, under the circumstances, ample possessory title to enable him to maintain the action for their recovery.—*PETRE v. FRASER* (1891), 61 L. J. Ch. 426; 65 L. T. 568; 8 T. L. R. 17; 36 Sol. Jo. 28.

**3186. Cisterns.]—MATHER v. FRASER**, No. 3170, *ante*.

**3187. Stone basin—Sunk in soil.]—**When a chattel has been annexed by its owner to another's freehold, but may, without injury to the freehold, be severed, it is not necessarily to be inferred from the annexation that such chattel becomes the property of the freeholder. Whether, in a particular case, it has become so or not, may be a question on the evidence; & a jury may infer, from user or other circumstances, an agreement, when the chattel was annexed, that the original owner should have liberty to take it away again.

If a heavy stone basin is placed on a man's land, it is not a fixture. If it sinks into the soil, & in that manner becomes fixed, is it therefore a fixture? The rights, in such a case, must always be subject to explanation by evidence (*LORD DENMAN, C.J.*).—*WOOD v. HEWETT* (1846), 8 Q. B. 913; 15 L. J. Q. B. 247; 7 L. T. O. S. 109; 10 J. P. 664; 10 Jur. 390; 115 E. R. 1118.

*Annotations:—**Apld.* *Lancaster v. Eve* (1859), 5 C. B. N. S. 717. *Reid.* *Moody v. Steggles* (1879), 12 Ch. D. 261; *Hobson v. Gorringe*, [1897] 1 Ch. 182; *Philpot v. Bath* (1905), 21 T. L. R. 634.

**3188. Tramlines & sleepers—Sunk in soil.]—***BEAUFORT (DUKE) v. BATES*, No. 3477, *post*. Compare No. 3293, *post*.

#### B. Articles Essential to Use or Enjoyment of Property.

**3189. Keys.]—**(1) Keys, although they are distinct things, shall pass with the house.

(2) By a lease or conveyance of a mill, a millstone severed for the purpose of picking it passes; so of (3) doors, (4) windows, (5) rings.—*LIFORD'S CASE* (1614), 11 Co. Rep. 46 b; 77 E. R. 1206; *sub nom.* *STAMPE v. CLINTON* (*alias* *LIFORD*), 1 Roll. Rep. 95.

*Annotations:—**As to* (1) *Reid.* *Hellawell v. Eastwood* (1851), 6 Exch. 295; *Elliot v. Bishop* (1854), 10 Exch. 496; *Re Thomas, Ex p. Willoughby D'Erosby* (1881), 44 L. T. 781. *As to* (2) *Consd.* *Place v. Fagg* (1829), 4 Man. & Ry. K. B.

277. *Apld.* *Walmesley v. Milne* (1859), 7 C. B. N. S. 115. *Reid.* *Mather v. Fraser* (1856), 2 K. & J. 536; *Sumner v. Bromilow* (1865), 11 Jur. N. S. 481. *Generally.* *Mentd.* *Russell v. Gulvel* (1599), Cro. Eliz. 657; *Pembroke v. Syms* (1600), Cro. Eliz. 781; *Bowles's Case* (1615), 11 Co. Rep. 79 b; *Magdalen College, Cambridge Case* (1616), 11 Co. Rep. 66 b; *Smith v. Bole* (1618), Cro. Jac. 458; *Whistler v. Paslow* (1618), Cro. Jac. 487; *Berry v. Heard* (1631), Cro. Car. 242; *Jemmot v. Cooley* (1667), 2 Keb. 270; *R. v. Rochester (Bp.) & Clark* (1675), 2 Mod. Rep. 1; *St. David's (Bp.) v. Lucy* (1699), 1 Salk. 134; *Parker v. Kett* (1701), 12 Mod. Rep. 466; *Rosewell v. Prior* (1701), 1 Ld. Raym. 713; *Mitchel v. Reynolds* (1711), 1 P. Wms. 181; *Turner v. Cordwell* (1734), Cunn. 129; *Wallis v. Pain* (1739), 2 Com. 633; *Bradly v. Strachy* (1740), Barn. Ch. 399; *Walton v. Tryon* (1751), Amb. 130; *A.-G. v. Duplessis* (1752), Park. 144; *Paul v. Paul* (1760), 1 Wm. Bl. 255; *Jefferson v. Durham (Bp.)* (1797), 1 Bos. & P. 105; *Ford v. Raster* (1815), 4 M. & S. 130; *Herring v. St. Paul (Dean & Chapter)* (1819), 3 Swan. 492; *Legh v. Hoald* (1830), 1 B. & Ad. 622; *Garland v. Carlisle* (1837), 11 Bl. 421; *Hey v. Moorhouse* (1839), 6 Bing. N. C. 52; *Hewitt v. Isham* (1851), 7 Exch. 77; *Barnett v. Gulladford* (1855), 11 Exch. 19; *Bailey v. Stephens* (1862), 12 C. B. N. S. 91; *Delacherols v. Delacherols* (1864), 4 New Rep. 501; *Goodhart v. Hyett* (1883), 25 Ch. D. 182; *Eastern Construction Co. v. National Trust Co. & Schmidt*, [1914] A. C. 197; *Pwllbach Colliery Co. v. Woodman*, [1915] A. C. 634; *Re Londesborough, Spicer v. Londesborough*, [1923] 1 Ch. 500.

**3190. —.]—HELLAWELL v. EASTWOOD**, No. 3211, *post*.

**3191. —.]—**For a very long period, the cts. have in certain cases substituted, what I may call a metaphysical, for a physical connection with the soil. The old cases which have gone to show that chattels physically capable of being disconnected from the tenement are nevertheless part of the freehold illustrate that principle. Everybody knows that a key, although in its nature a chattel, belongs to the house & passes with the freehold, & that the millstone, which is capable of being detached from the mill, is nevertheless part of the fee simple of the mill & passes with it. Those cases show that physical connection is not always necessary even to constitute a particular thing an integral part of a freehold (*Fry, J.*).—*MOODY v. STEGGLES* (1879), 12 Ch. D. 261; 48 L. J. Ch. 639; 41 L. T. 25.

*Annotation:—**Mentd.* *Swainston v. Finn & Metropolitan Board of Works* (1883), 48 L. T. 634.

**3192. —.]—BISHOP v. ELLIOTT**, No. 3404, *post*.

**3193. Millstone—Severed from mill for repair.]—***WYSTOW'S CASE* (1523), Y. B. 14 Hen. 8, fo. 25, pl. 6; *sub nom.* *WISTOW'S CASE*, cited in 11 Co. Rep. at 50 b; 77 E. R. 1215.

*Annotations:—**Consd.* *Re Richards, Ex p. Astbury, Ex p. Lloyd's Banking Co.* (1869), 4 Ch. App. 630. *Reid.* *Fagg's Case* (1614), 11 Co. Rep. 46 b; *Place v. Fagg* (1829), 4 Man. & Ry. K. B. 277; *Mather v. Fraser* (1856), 2 K. & J. 536; *Walmesley v. Milne* (1859), 7 C. B. N. S. 115; *Sumner v. Bromilow* (1865), 31 L. J. Q. B. 120.

**3194. —.]—LIFORD'S CASE**, No. 3189, *ante*.

**3195. —.]—MATHER v. FRASER**, No. 3170, *ante*.

**3196. —.]—**Millstones pass with a grant of the mill, & are part of the freehold.—*PLACE v. FAGG* (1829), 4 Man. & Ry. K. B. 277; 7 L. J. O. S. K. B. 195.

*Annotations:—**Consd.* *Mather v. Fraser* (1856), 2 K. & J. 536. *Reid.* *Hare v. Horton* (1833), 5 B. & Ad. 715; *Re Ogden, Ex p. Loyd* (1834), 3 Deac. & Ch. 705; *Walmesley v. Milne* (1859), 7 C. B. N. S. 115; *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97. *Mentd.* *Re Maberly, Ex p. Belcher* (1835), 4 Deac. & Ch. 703; *Longbottom v. Berry* (1869), 10 B. & S. 862; *Southport & West Lancashire Banking Co. v. Thompson* (1887), 58 L. T. 143.

**3197. —.]—D'EYNCOURT v. GREGORY**, No. 3172, *ante*.

#### PART XIV. SECT. 2, SUB-SECT. 1.—B.

**3196 l. Millstone.]—DEEBLE v. M'GULLEN** (1857), 8 I. C. L. R. 358.—*IR.*

*P. Tools—For fixed machines.]—*

Tools ordinarily in use for the purpose of working any of the machines so attached as to form part of the freehold:—*Held*: fixtures.—*GOODERHAM v. DENHOLM* (1859), 18 U. C. R. 203.—*CAN.*

*q. Accessories to dock & buildings.]—**GRIER v. R.* (1894), 4 Exch. C. R. 168.—*CAN.*

*r. Fence rails, trucks, etc.]—**MCCARTHY v. MCCARTHY* (circa 1900), 20 C. L. T. 211.—*CAN.*

*Sect. 2.—What are fixtures: Sub-sect. 1, B. & C. (a) & (b); sub-sect. 2, A. (a) & (b).]*

**3198.** —.]—MOODY *v.* STEGGLES, No. 3191, *ante*.

**3199. Rings.**—LIFORD'S CASE, No. 3189, *ante*.

**3200. Bolts & bars.**—BISHOP *v.* ELLIOTT, No. 3494, *post*.

### C. Removable Parts and Accessories.

#### (a) In General.

**3201. General rule.**—MATHER *v.* FRASER, No. 3170, *ante*.

**3202.** —.]—WHITEHEAD *v.* BENNETT, No. 3316, *post*.

#### (b) Particular Instances.

**3203. Anvil—Forming part of steam hammer.**—It appears from the evidence that some Ashlar stone is laid upon a proper foundation made for it, of some depth in the ground, & this Ashlar stone is fixed to it with mortar in the ordinary way, & then the firm part of the steam hammer is screwed down on the stone by a number of screws. I am of opinion . . . that it is a fixture. . . . The anvil, though it is not fixed upon the ground, forms part of [the steam hammer], upon the very just distinction . . . that it essentially forms part of the machine, & which would be incomplete without it, just as much as a pump handle, which, though it may be removed from the pump, is still part of the pump, & passes with the freehold. . . . I am of opinion, also, that the boiler is fastened to the freehold, for it is fixed in the same way (ROMILLY, M.R.).—METROPOLITAN COUNTIES, ETC. SOCIETY *v.* BROWN (1859), 26 Beav. 454; 28 L. J. Ch. 581; 33 L. T. O. S. 53; 23 J. P. 341; 5 Jur. N. S. 378; 7 W. R. 303; 53 E. R. 973.

*Annotations:—Mentd. Re Richards, Ex p. Astbury, Ex p. Lloyd's Banking Co. (1869), 4 Ch. App. 630; Re Yates, Hatchelder v. Yates (1888), 59 L. T. 47.*

**3204. Driving belts—Forming necessary parts of machinery.**—A wheel factory, including the machinery & gear, was mortgaged to ptfs. The deed of mtge. was not registered as a bill of sale. Leather driving-belts were used in working the machinery at the factory; they were fastened to certain wheels or drums, but could be removed at pleasure when the machinery was thrown out of gear. They were necessary parts of the machinery. The mtgor. having liquidated his affairs under Bkpcy. Act, 1869 (c. 71), deft., his trustee, sold the belts:—*Held:* the belts passed to ptfs. under the mtge. & they were entitled to maintain an action of conversion against deft.

These belts are not merely pieces of leather, but they were essential parts of certain machines, & these machines were affixed to the freehold. These belts were fitted to the machine, & were only fit to be used with it as part of it; & if the machine was part of the land, these belts were parts of the land (COTTON, L.J.).—SHEFFIELD & SOUTH YORKSHIRE PERMANENT BENEFIT BUILDING SOCIETY *v.* HARRISON (1884), 15 Q. B. D. 358; 54 L. J. Q. B.

15; 51 L. T. 649; 33 W. R. 144; 1 T. L. R. 61, O. A.

*Annotation:—Reid. Re Rose, Ex p. Linnell (1888), 4 T. L. R. 255.*

**3205. Electric filament lamps—Not essential part of wiring installation.**—Ptfs. let electric light filament lamps on hire to the lessees of a theatre. The lamps were affixed to their brackets by the bayonet attachment in common use for this purpose. Defts., who were the owners of the theatre, re-entered for non-payment of rent, the lamps being then still on the premises & no demand being then made for them by ptfs. Shortly afterwards ptfs. claimed them from defts., & as the latter did not give them up ptfs. sued them in detinue:—*Held:* ptfs. were not entitled to recover.

A filament lamp, although fitted or fixed in its socket, is only temporarily fixed with a view to the efficient use of the chattel itself, & that being so it does not, in my opinion, cease to be a chattel or pass to the landlord when the term comes to an end merely because it happens to be in the socket at that time. The lamps were not, I think, part of the installation. The installation is complete though no lamp may be supplied or be in the socket (LUSH, J.).—BRITISH ECONOMIC LAMP CO., LTD. *v.* EMPIRE, MILE END, LTD. (1913), 29 T. L. R. 386.

**3206. Gaseliers—Necessary to gas pipe installation.**—S. bought from A. the lease of a house, & one clause of the lease covenanted to convey under it all the fixtures on the premises generally. Under this clause A. claimed a right to remove certain gaseliers which were affixed to the gas pipes by means of screws, & could easily be removed without causing any injury to the freehold, on the ground that they came within the rule of tenants' fixtures:—*Held:* the gaseliers passed under the general description of fixtures in the lease, & became the property of S., as although they were removable without injury to the freehold, yet they were necessary to the practical enjoyment of the gas pipes, to which they were affixed, which without the gaseliers would be useless.—SEWELL *v.* ANGERSTEIN (1868), 18 L. T. 300, N. P.

**3207. Machinery & accessories.**—WHITEHEAD *v.* BENNETT, No. 3316, *post*.

**Millstones.**—See Nos. 3193–3198, *ante*.

**3208. Pipes of heating apparatus—Connected with boiler by screws.**—JENKINS *v.* GETHING, No. 3280, *post*.

**3209. Pump handle.**—METROPOLITAN COUNTIES, ETC. SOCIETY *v.* BROWN, No. 3203, *ante*.

### SUB-SECT. 2.—ARTICLES ATTACHED.

#### A. Sufficiency of Attachment.

##### (a) In General.

**3210. Dependent on mode & object of attachment.**—WOOD *v.* HEWETT, No. 3187, *ante*.

### PART XIV. SECT. 2, SUB-SECT. 1.—C. (b).

**3207 i. Machinery & accessories.**—ROSE *v.* HOPE (1872), 22 C. P. 482.—CAN.

**3207 ii.** —.]—SEELEY *v.* CALDWELL (1908), 18 O. L. R. 472; 12 O. W. R. 1245.—CAN.

**3207 iii.** —.]—DOMINION BRIDGE CO. *v.* BRITISH-AMERICAN NICKEL CORPN., [1925] 2 D. L. R. 138; 56

O. L. R. 288.—CAN.

**3207 iv.** —.]—CAMPBELL *v.* HOWDEN (1825), 3 Sh. (Ct. of Sess.) 569.—SCOT.

*t. Shop fittings—Gas & electric light fittings.*—STACK *v.* EATON (T.) CO. (1902), 22 C. L. T. 322; 4 O. L. R. 335; 1 O. W. R. 511.—CAN.

*a. Electric light fittings.*—Electric light fixtures & an electric light sign on the outside of the building, put up

by the tenant were considered not to have become part of the realty, but to be chattels removable by the tenant.—ROHLS & CO. *v.* MACLEAN (1913), 25 W. L. R. 358; 13 D. L. R. 519; 6 Alta. L. R. 250.—CAN.

### PART XIV. SECT. 2, SUB-SECT. 2.—A. (a).

**3210 i. Dependent on mode & object of attachment.**—Re HUNTER (1859), 33 L. T. O. S. 13.—IR.

3211. —.]—(1) The keys of a house are fixtures.

(2) Machinery for the purposes of manufacture, e.g. "mules" used for spinning cotton, fixed, by means of screws, some into the wooden floors of a cotton-mill, & some by being sunk into the stone flooring, & secured by molten lead, are at law distrainable for rent. . . . The only question is, whether the machines when fixed were parcel of the freehold; & this is a question of fact, depending on the circumstances of each case, & principally on two considerations; first, the mode of annexation to the soil or fabric of the house, & the extent to which it is united to them, whether it can easily be removed, *integre, salve, et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object & purpose of the annexation, whether it was for the permanent & substantial improvement of the dwelling, or merely for a temporary purpose, or the more complete enjoyment & use of it as a chattel. . . . We cannot doubt that the machines never became a part of the freehold. They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves; & the object & purpose of the annexation was, not to improve the inheritance, but merely to render the machines steadier & more capable of convenient use as chattels. They were never a part of the freehold, any more than a carpet would be which is attached to the floor by nails for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures & other matters of an ornamental nature, which have been slightly attached to the walls of a dwelling as furniture, & which is probably the reason why they & similar articles have been held, in different cases, to be removable (PARKE, B.).—*HELLAWELL v. EASTWOOD* (1851), 6 Exch. 295; Cox, M. & H. 452; 20 L. J. Ex. 154; 15 J. P. 724; 155 E. R. 554; *sub nom.* *HALLIWELL v. EASTWOOD*, 17 L. T. O. S. 96.

*Annotations*:—As to (1) *Expld.* *Mather v. Fraser* (1856), 2 K. & J. 536. *Consd.* *R. v. Lee* (1866), L. R. 1 Q. B. 241; *Longbottom v. Berry* (1869), L. R. 5 Q. B. 123; *Turner v. Cameron* (1870), L. R. 5 Q. B. 306; *Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Hobson v. Gorringe* (1896), 75 L. T. 610; *Crossley v. Lee*, [1908] 1 K. B. 86. *Refd.* *Re Wood* (1852), 1 Bankr. & Ins. R. 70, n.; *Re Gibbs, Ex p. Humphrey* (1853), 1 Bankr. & Ins. R. 68; *Elliott v. Bishop* (1854), 10 Exch. 496; *Re Brooke, Ex p. Scott* (1857), 29 L. T. O. S. 314; *Dumergue v. Ramsey* (1862), 10 W. R. 844; *Parsons v. Hind* (1866), 14 W. R. 860; *Chimie v. Wood* (1869), 38 L. J. Ex. 223; As to (2) *Apld.* *Waterfall v. Penstone* (1856), 6 E. & B. 876. *Consd.* *Walmisley v. Milne* (1859), 7 C. B. N. S. 115; *Holland v. Hodgson* (1872), L. R. 7 C. P. 328. *Apld.* *Chamberlayne v. Collins* (1894), 70 L. T. 217. *Refd.* *Re Clarkson, Ex p. Langton* (1854), 1 Bankr. & Ins. R. 241; *Re Thomas, Ex p. Willoughby D'Eresby* (1881), 44 L. T. 781; *Lambourn v. McLellan*, [1903] 2 Ch. 268; *Reynolds v. Ashby*, [1904] A. C. 466; *Vaudeville Electric Cinema v. Muriset*, [1923] 2 Ch. 74. *Generally, Mentd.* *Williams v. Jones* (1864), 11 L. T. 108; *Tyne Boiler Works Co. v. Longbenton Overseers* (1886), 18 Q. B. D. 81.

3212. —.]—The term [fixtures] does not include everything which is fixed & so rendered immovable. The object & purpose of the annexation in fixing must be looked at; & if a chattel be fixed to the building merely for the more complete enjoyment & user of it as a chattel, it is not a fixture at all in the technical legal meaning of the word, but still remains a chattel (MARTIN, B.).

—*ELLIOTT v. BISHOP* (1854), 10 Exch. 496; 3 O. L. R. 272; 24 L. J. Ex. 33; 24 L. T. O. S. 217; 19 J. P. 71; 3 W. R. 160; 156 E. R. 534; *on appeal, sub nom.* *BISHOP v. ELLIOTT* (1855), 11 Exch. 113, Ex. Ch.

*Annotations*:—*Consd.* *Wilde v. Waters* (1855), 24 L. J. C. P. 193. *Refd.* *Sumner v. Bromilow* (1865), 34 L. J. Q. B. 130; *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523; *Lambourn v. McLellan*, [1903] 2 Ch. 268. *Mentd.* *Re Gawan, Ex p. Barclay* (1855), 5 De G. M. & G. 403; *Burt v. Haslett* (1856), 2 Jur. N. S. 974; *Dumergue v. Rumsey* (1863), 2 H. & C. 777; *Pugh v. Arton* (1869), 20 L. T. 865; *Leschallas v. Woolf*, [1908] 1 Ch. 641; *Re British Red Ash Collieries*, [1920] 1 Ch. 326.

3213. —.]—LANCASTER v. EVE, No. 3219, *post*.

3214. —.]—GIBSON v. HAMMERSMITH & CITY RY. CO., No. 3300, *post*.

3215. —.]—HOLLAND v. HODGSON, No. 3225, *post*.

3216. — As inferred from circumstances of case.]—*Re DE FALBE, WARD v. TAYLOR*, No. 3103, *ante*.

3217. How far mode of attachment material—Length of screws.]—*Re DE FALBE, WARD v. TAYLOR*, No. 3163, *ante*.

3218. —.]—LEIGH v. TAYLOR, No. 3343, *post*.

#### (b) Intention of Parties.

3219. Material in determining sufficiency.]—It is a question of evidence, depending on circumstances & the intention of the parties, whether A.'s chattel, fixed on B.'s soil, becomes part of the soil or remains the chattel of A.

Piles fixed, in the bed of the Thames, in front of a wharf, for the purpose of mooring vessels making to the wharf, & long enjoyed for such purpose without interruption by the Crown or the conservators of the river, will be taken to have been put down in the exercise of an easement, & to remain as chattels in the owners of the wharf, so as to give them a right of action against any one injuring the piles.—*LANCASTER v. EVE* (1859), 5 C. B. N. S. 717; 28 L. J. C. P. 235; 32 L. T. O. S. 278; 5 Jur. N. S. 683; 7 W. R. 260; 141 E. R. 288.

*Annotations*:—*Apld.* *Parsons v. Hind* (1866), 14 W. R. 860. *Expld.* *Hobson v. Gorringe*, [1897] 1 Ch. 182. *Refd.* *Ilaro v. Metropolitan Board of Works* (1874), L. R. 9 Q. B. 296; *Moody v. Stoggles* (1870), 12 Ch. D. 261; *Philpot v. Bath* (1905), 21 T. L. R. 634.

3220. —.]—HOLLAND v. HODGSON, No. 3225, *post*.

3221. —.]—WAKE v. HALL, No. 3464, *post*.

3222. —.]—LEIGH v. TAYLOR, No. 3343, *post*.

3223. —.]—*Re HULSE, BEATTIE v. HULSE*, No. 3394, *post*.

3224. — How far material.]—In determining whether or not a chattel has become a fixture, the intention of the person affixing it to the soil is material only so far as it can be presumed from the degree & object of the annexation.

A gas engine was let out on the hire & purchase system under an agreement in writing, which provided that it should not become the property of the hirer until the payment of all the instalments, & should be removable by the owner on the failure of the hirer to pay any instalment. The engine was affixed to freehold land of the hirer

#### PART XIV. SECT. 2, SUB-SECT. 2.—A. (b).

3219 i. Material in determining —.]—The lessee of land under —.]—renewable from term to term at his option, affixed to the soil a dwelling-house with a shop in the lower storey:—*Held*: his acts in the circumstances furnished evidence of his intention to annex the building to the

freehold.—*ALLAN v. ROWE* (1894), 1 N. B. Eq. Rep. 41.—CAN.

3219 ii. —.]—*HAGGETT v. BRAMPTON TOWN* (1897), 28 S. C. R. 174.—CAN.

3224 i. — How far material.]—In considering whether a chattel is a fixture regard should be had to the object & purpose of attaching it to the freehold; it is a fixture if it is attached

for the better enjoyment of the freehold & not for the enjoyment of the chattel itself. Such intention can only be gathered from the nature of the chattel & the degree of annexation, expressions of intention on the part of the tenant cannot be regarded.—*LOVE v. BLOOMFIELD*, [1906] V. L. R. 723.—AUS.

3224 ii. —.]—The tendency of modern decisions seems to be to

**Sect. 2.—What are fixtures: Sub-sect. 2, A. (b), B. & C. (a) i. & ii.]**

by bolts & screws to prevent it from rocking, & was used by him for the purposes of his trade. Default having been made in the payment of the instalments, the engine was claimed by the owner, & also by a mtgee. of the land, who took his mtge. after the hiring agreement & without notice of it, & had entered into possession while the engine was still on the land:—*Held*: the engine was sufficiently annexed to the land to become a fixture, & any intention to be inferred from the terms of the hiring agreement that it should remain a chattel did not prevent it from becoming a fixture; & consequently it passed to the mtgee. as part of the freehold.—*HOBSON v. GORRINGE*, [1897] 1 Ch. 182; 66 L. J. Ch. 114; 75 L. T. 610; 45 W. R. 356; 13 T. L. R. 139; 41 Sol. Jo. 154, C. A.

**Annotations:—***Distd.* Lyon v. London City & Midland Bank, [1903] 2 K. B. 135. *Apprvd.* Reynolds v. Ashby, [1904] A. C. 466. *Consd. & Distd.* *Re* Allen, [1907] 1 Ch. 575. *Fold.* Crossley v. Lee, [1908] 1 K. B. 86. *Consd.* Becker v. Rebold (1913), 30 T. L. R. 142. *Apld.* Horwich v. Symond (1914), 110 L. T. 1016. *Consd.* *Re* Morrison, Jones & Taylor, Cookes v. Morrison, Jones & Taylor, [1914] 1 Ch. 50. *Refd.* Ellis v. Glover & Hobson, [1908] 1 K. B. 388; Vaudeville Electric Cinema v. Muriest, [1923] 2 Ch. 74.

**3225. Burden of proof.]—**The general maxim of law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, & mainly on two circumstances, as indicating the intention, viz. the degree of annexation & the object of the annexation. . . . Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the *onus* of showing that they were so intended lying on those who assert that they have ceased to be chattels, & that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the *onus* lying on those who contend that it is a chattel (*BLACKBURN, J.*)—*HOLLAND v. HODGSON* (1872), L. R. 7 C. P. 328; 41 L. J. C. P. 146; 26 L. T. 709; 20 W. R. 990, Ex. Ch.

**Annotations:—***Apld.* Chidley v. West Ham (1874), 32 L. T. 486; *Re* Rosco, *Ex p.* Linnell (1888), 4 T. L. R. 255; Huddersfield Banking Co. v. Lister (1895), 72 L. T. 703. *Consd.* Hobson v. Gorrings, [1897] 1 Ch. 182. *Apld.* Monti v. Barnes, [1901] 1 K. B. 205; Vaudeville Electric Cinema v. Muriest, [1923] 2 Ch. 74. *Refd.* Hawtry v. Butlin (1873), L. R. 8 Q. B. 290; Cross v. Barnes (1877), 46 L. J. Q. B. 479; *Re* Armytage, *Ex p.* Moore & Robinson's Banking Co. (1880), 14 Ch. D. 379; Southport & West Lancashire Banking Co. v. Thompson (1887), 37 Ch. D. 64; *Re* Yates, Batchelder v. Yates (1888), 59 L. T. 47; Gough v. Wood, [1894] 1 Q. B. 713; Bulkeley v. Lyne Stephens, *Re* Lyne Stephens, Lyne Stephens v. Lubbock (1895), 11 T. L. 564; *Re* De Falbe, Ward

v. Taylor, [1901] 1 Ch. 523; Reynolds v. Ashby, [1904] A. C. 466; Crossley v. Lee, [1908] 1 K. B. 86; *Re* Chesterfield's S. E., [1911] 1 Ch. 237.

**3226. —.]—***Re* ROSE, *Ex p.* LINNELL & Co. (1888), 4 T. L. R. 255, C. A.

**3227. Agreement may be inferred.]—**WOOD v. HEWETT, No. 3187, *ante*.

**B. Articles Not Removable without Great Damage.**

**3228. General rule.]—**GIBSON v. HAMMERSMITH & CITY RY. CO., No. 3300, *post*.

**3229. —.]—**WAKE v. HALL, No. 3464, *post*.

**3230. —.]—**Things annexed to the freehold as furnaces, millstones, chimney-pieces, & the like, cannot be distrained, because they cannot be taken away without doing damage to the freehold, which the law will not allow (*per* CUR.).—SIMPSON v. HARTOPP (1744), Willes, 512; 125 E. R. 1295.

**Annotations:—***Refd.* Darby v. Harris (1841), 1 Q. B. 895; Walmsley v. Milne (1859), 7 C. B. N. S. 115. *Mentd.* Gorton v. Falkner (1792), 4 Term Rep. 565; Gilman v. Elton (1821), 3 Brod. & Bing. 75; Wood v. Clarke (1831), 1 Cr. & J. 484; Adams v. Crane (1833), 1 Cr. & M. 380; Fenton v. Logan (1833), 3 Moo. & S. 82; Brown v. Shevill (1834), 2 Ad. & El. 138; Muspratt v. Gregory (1838), 3 M. & W. 677; Gibson v. Irson (1842), 3 Q. B. 39; Parsons v. Gingell (1847), 4 C. B. 545; Morley v. Pincombe (1848), 2 Exch. 101; Clarke v. Millwall Dock Co. (1886), 17 Q. B. D. 494; Von Knoop v. Moss & Jameson (1891), 7 T. L. R. 500; Edwards v. Fox (1896), 60 J. P. Jo. 404; Lavell v. Richings, [1906] 1 K. B. 480; Challoner v. Robinson, [1908] 1 Ch. 49.

**C. Attached for Particular Purpose.**

**(a) Temporary User and Enjoyment.**

**i. In General.**

**3231. Not fixtures.]—**ELLIOTT v. BISHOP, No. 3212, *ante*.

**3232. —.]—**If things or chattels be fixed to the premises, but so as to be still chattels, being only fixed & steadied for the purposes of use there, they remain chattels altogether . . . although fixed for the purpose of the enjoyment of them, still they remain movable chattels. . . . A grate which is built into a chimney, although it is capable of being removed by the tenant, would still be fixed to the premises, so that it would be part of the premises (*BLACKBURN, J.*)—*R. v. LEE* (INHABITANTS) (1866), L. R. 1 Q. B. 241; 7 B. & S. 188; 35 L. J. M. C. 105; 13 L. T. 704; 30 J. P. 132; 12 Jur. N. S. 225; 14 W. R. 311.

**Annotations:—***Refd.* Tyne Boiler Works Co. v. Longbenton Overseers (1886), 18 Q. B. D. 81. *Mentd.* *Re* v. Brinjes (1871), 35 J. P. 456; Latug v. Bishopwearmouth Overseers (1878), 3 Q. B. D. 299; Crockett v. Northampton Assessment Committee (1902), 72 L. J. K. B. 320; Devon & Exeter Constitutional Newspaper Co. v. Exeter Union (1903), Ryde, & K. Rat. App. 101; Kirby v. Hunslet Union Assmt. Com. (1905), 93 L. T. 32; London United Tramways (1901), Ltd. v. Brentford Union Assmt. Com. (1907), 96 L. T. 528.

**3233. —.]—**The rule that chattels attached to the soil are fixtures may be displaced by showing that they were not annexed for the permanent improvement of the land, but for the purpose of their temporary enjoyment as chattels.

Accordingly, chairs in a theatre which are com-

effectuate the apparent intention of the parties at the time the article in question was attached to the freehold.—*BURNSIDE v. MARCUS* (1867), 17 C. P. 430.—*CAN.*

**3224 iii. —.]—**SCOTT FRUIT CO., LTD. v. WILKINS & REECE, [1920] 3 W. W. R. 155; 54 D. L. R. 401.—*CAN.*

**3224 iv. —.]—**COCKBURN v. COCKBURN, [1921] N. Z. L. R. 652.—*N.Z.*

**3224 v. —.]—**OLIVIER v. HAARHOF & Co. (1906), T. S. 497.—*S. AF.*

**3225 i. Burden of proof.]—**In a dispute as to the degree & object of the annexation of buildings erected upon demised

land by the tenant, the *onus* of showing that in the circumstances in which they were placed upon the land there was an intention that they should become part of the freehold lies upon the party who asserts that they have ceased to be chattels.—*BING KEE v. YICK CHONG* (1910), 43 S. C. R. 334.—*CAN.*

**PART XIV. SECT. 2, SUB-SECT. 2.—B.**

**3228 i. General rule.]—**GOPAUL MULICK v. ANUNDO CHUNDER CHATTERJEE (1871), 14 B. L. R. 205, n.; 15 W. R. 363.—*IND.*

**PART XIV. SECT. 2, SUB-SECT. 2.—C. (a) i.**

**3231 i. Not fixtures.]—**In the absence of special agreement, a lessee annexing materials, not being growing trees, to the soil is presumed to do so for the sake of temporary & not perpetual use & as between himself & the owner of the land, does not, during his tenancy, lose his ownership in the materials.—*DE BEERS CONSOLIDATED MINES v. LONDON & SOUTH AFRICAN EXPLORATION CO.* (1893), 3 C. T. R. 438; 10 S. C. 359; *affd. on appeal* (1895), 12 S. C. 107.—*S. AF.*

plete in themselves but are screwed to the floor for their better use & enjoyment are not fixtures, & do not pass under a mtge. of the premises & fixtures.—*LYON & Co. v. LONDON CITY & MIDLAND BANK*, [1903] 2 K. B. 135; 72 L. J. K. B. 465; 88 L. T. 392; 51 W. R. 400; 19 T. L. R. 334; 47 Sol. Jo. 386.

*Annotations*.—*Apprvd.* *Reynolds v. Ashby*, [1904] A. C. 466. The decision . . . appears to have been correctly decided upon the special facts of that case (LORD JAMES). *Distd.* *Vaudeville Electric Cinema v. Muriset*, [1923] 2 Ch. 74.

**3234.** —.]—Articles were annexed by a shopkeeper to the premises of which he was a tenant for the purposes of the business without any intention, except so far as might be inferred from the degree of annexation, of permanently making them part of the freehold. These articles he assigned to a money-lender by a bill of sale. In considering whether these articles were "goods" in the possession, order, or disposition of the shopkeeper in his trade or business within Bkpcy. Act, 1883 (c. 52), s. 44 :—*Held* : the mere fact of some annexation of the articles to the freehold for the more efficient use of the articles as chattels was not of itself sufficient to convert them into realty, & therefore these articles remained goods within Bkpcy. Act, 1883 (c. 52), s. 44, but that where the articles by their nature & by the degree of fixing were so annexed to the freehold as to lead to the inference that they were affixed for the better enjoyment of the freehold during the occupancy of the shopkeeper, they were not "goods" within Bkpcy. Act, 1883 (c. 52), s. 44, although probably severable under the term.—*HORWICH v. SYMOND* (1915), 84 L. J. K. B. 1083; 112 L. T. 1011; 31 T. L. R. 212; [1915] H. B. R. 107, C. A.

#### ii. Particular Instances.

**3235. Carpet.**—(1) Looms put up by the lessee of a cotton mill for his convenience during the existence of his term, & fastened to the floor by nails driven through the loom feet into wooden plugs fitted into the floor, are, though easily movable without injury to the freehold, fixtures which will pass under an assignment of "the mill, fixed machinery, & hereditaments, with all looms & other machinery, fixed or movable," without the necessity of registering the assignment of chattels under 17 & 18 Vict. c. 36.

(2) If the tenant has affixed to the freehold, during his tenancy, articles in such a manner as to make it appear that during the term they are not to be removed, & that he regards them as attached to the property, according to his interest in the property, then, on any dealing by him with the property to which these articles are affixed, the ct. would presume that he meant to deal with the property as it stood, with all these things so attached, & to pass the property in its then condition. . . . [Fixtures] are those things which an occupier has put up for his own convenience, & has also, for his own convenience, during the term, or during the existence of his interest, attached to the property which he holds. In the case of a carpet, it would be absurd to call that attached or fixed which, for the tenant's convenience, is removable, & is repeatedly removed, independently of the existence of the term, & without the least notion that the thing is then & there attached for the purpose of being so enjoyed during the continu-

ance of the tenant's interest (PAGE WOOD, V.-C.).—*BOYD v. SHORROCK* (1867), L. R. 5 Eq. 72; 37 L. J. Ch. 144; 17 L. T. 197; 32 J. P. 211; 16 W. R. 102.

*Annotations*.—*As to* (1) *Consd.* *Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Re Rogerstone Brick & Stone Co., Southall v. Weescomb*, [1919] 1 Ch. 110. *Refd.* *Begbie v. Fenwick*, *Fenwick v. Begbie* (1871), 8 Ch. App. 1075, n.; *Hawtry v. Butin* (1873), L. R. 8 Q. B. 290; *Re Wilde, Ex p. Daglish* (1873), 8 Ch. App. 1072; *Re Trethowan, Ex p. Tweedy* (1877), 5 Ch. D. 559. *As to* (2) *Refd.* *Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Childley v. West Ham* (1874), 32 L. T. 486.

**3236. Chairs—Screwed to floor of theatre.**—*LYON & Co. v. LONDON CITY & MIDLAND BANK*, No. 3233, *ante*.

**3237. Fences.**—*FITZHERBERT v. SHAW* (1789), 1 Hy. Bl. 258; 126 E. R. 150.

*Annotations*.—*Consd.* *Elwes v. Maw* (1802), 3 East. 38. *Refd.* *Penton v. Robart* (1801), 2 East. 88; *Trappes v. Harter* (1833), 3 Tyr. 603; *Heap v. Barton* (1852), 12 C. B. 274; *Bishop v. Elliott* (1855), 3 W. R. 454; *Mears v. Callender*, [1901] 2 Ch. 388; *Leschallas v. Woolf*, [1908] 1 Ch. 641.

**3238.** —.]—The iron fence is a fixture, not distinguishable from a wooden one. If there are hurdles of iron or wood, moved from day to day, or from season to season, they are not fixtures; but if put up as a permanent fence, they are (*per CUR.*).—*Re MABERLY, Ex p. BELCHER* (1835), 2 Mont. & A. 160; 4 Deac. & Ch. 703; 4 L. J. Bcy. 29, Ct. of R.

*Annotations*.—*Refd.* *Walmsley v. Milne* (1859), 7 C. B. N. S. 115. *Mentd.* *Tottenham v. Swansea Zinc Ore Co.* (1885), 52 L. T. 738.

**3239. Brass plate—Attached to outer door.**—*Pltf.*, by permission of *deft.*, had placed a brass plate, with his name upon it, on the outer door; & the declaration, after alleging the breaking & entry into the apartments, alleged that during the time aforesaid, to wit, *etc.* *deft.* removed & took a certain brass plate from the outer door of the dwelling-house, & kept it so removed, *etc.* Defendant pleaded, *inter alia*, that *pltf.* was not possessed of the brass plate. There was no evidence, & no point made at the trial, as to whether or not the plate was affixed to the door :—*Held* : it must now be assumed that it was not affixed, & the trespass would, therefore, lie for the removal of it. *Qu.* : whether it would have lain if it had been proved to be affixed.—*LANE v. DIXON* (1847), 3 C. B. 776; 16 L. J. C. P. 129; 8 L. T. O. S. 316; 11 Jur. 89; 136 E. R. 311.

*Annotations*.—*Mentd.* *Curlewis v. Laurie* (1848), 12 Q. B. 640; *Provincial Insee. of Canada v. Leduc* (1874), 31 L. T. 142.

**3240. Hydraulic press—Fixed to floor of factory.**—A hydraulic press was fixed by means of bricks & mortar to the floor of a factory. The press in question was not essential to the carrying on of the works at the factory, but merely a convenience :—*Held* : such a press remained a chattel, & did not become a part of the freehold.—*PARSONS v. HIND* (1866), 14 W. R. 860.

*Annotation*.—*Refd.* *Holland v. Hodgson* (1872), 41 L. J. C. P. 146, n.

**3241. Looms in cotton mill—Let into floor—To secure steadiness of working.**—Looms in a mill were not fixed, but were merely steadied, by having their four iron legs let into four loom foots dropped into the floor :—*Held* : they did not pass by a mtge. of the mill & the machinery belonging to the mill, nor by a contract for sale in similar terms.

I am clear they are not fixtures in any proper sense of the term (ROMILLY, M.R.).—*HUTCHINSON*

#### PART XIV. SECT. 2, SUB-SECT. 2.—C. (a) ii.

*b. Cottage.*—*Pltf.* leased a certain portion of land for five years & erected

thereon a summer cottage, resting on sills which rested on & were nailed to posts, sunk from 6 to 9 inches into the earth. The inside was neither lathed nor plastered & although fairly sub-

stantial was not warm enough for winter use :—*Held* : *prima facie* the building became part of the land.—*SEWELL v. DOTH*, [1921] 1 W. W. R. 347.—*CAN.*

*Sect. 2.—What are fixtures: Sub-sect 2, C. (a) ii., (b) i. & ii., & D. (a) & (b).]*

*v. KAY (1857), 23 Beav. 413; 26 L. J. Ch. 457; 29 L. T. O. S. 138; 3 Jur. N. S. 652; 5 W. R. 341; 53 E. R. 163.*

*Annotations:—Distd. Boyd v. Shorrock (1867), L. R. 5 Eq. 72. Refd. Cort v. Sagar (1858), 3 H. & N. 370; Metropolitan Counties, etc. Soc. v. Brown (1859), 26 Beav. 454.*

**3242. Machinery.]—HELLAWELL v. EASTWOOD, No. 3211, ante.**

**3243. — Spinning “mules”—Fixed to floor of mill.]—HELLAWELL v. EASTWOOD, No. 3211, ante.**

**3244. — Fixed to floor of mill.]—J. mortgaged to M. the freehold of a mill, with machinery thereon. Afterwards J. assigned to deft. the equity of redemption, & certain machinery which had been fixed in the mill since the first mtge. Afterwards, by indenture, in consideration of £500 paid to J. by deft., J. did bargain, sell, assign & set over to deft. machinery erected since the conveyance of the equity of redemption, subject to redemption on payment of the £500; & by the same indenture, J. covenanted that the mill & machinery specified in the previous conveyance of the equity of redemption should be charged with the £500, as well as the money before secured upon it. The machinery comprised in the last mentioned indenture was erected for the purpose of carrying on the manufactory in the mill: & for the more conveniently so doing, a part of it was screwed, nailed & otherwise fixed to the mill. J. became bkpt.; in anticipation of which, deft. took possession, & entered on the mill & the machinery, J. having been in possession for more than twenty-one days after the making of the indenture, up to the time of such entry. The machinery comprised in the last mentioned indenture still remaining on the premises, J.'s assignees claimed it, on the ground that such indenture had not been registered under 17 & 18 Vict. c. 36:—*Held*: they were entitled to the machinery, the conveyance thereof being void as against them for want of registration; for that under the interpretation clause, sect. 7, the machinery was personal chattels, as the intention of the parties appeared to be that the machinery should pass separately from the realty, & so it had not become parcel of the freehold by annexation subsequent to the conveyance of the equity of redemption.—*WATERFALL v. PENISTONE (1856), 6 E. & B. 876; 26 L. J. Q. B. 100; 27 L. T. O. S. 252; 3 Jur. N. S. 15; 4 W. R. 726; 119 E. R. 1090.***

*Annotations:—Consd. Walmsley v. Milne (1859), 7 C. B. N. S. 115; Cullwick v. Swindell (1866), L. R. 3 Eq. 249; Begbie v. Fenwick, Fenwick v. Begbie (1871), 8 Ch. App. 1075, n. Refd. Turner v. Cameron (1870), L. R. 6 Q. B. 306; Ite Armytage, Ex p. Moore & Robinson's Banking Co. (1880), 42 L. T. 443.*

**3245. — Fastened to secure steadiness of working.]—Machinery fastened to the soil or to buildings only for the purpose of steadying it in working is a chattel, & properly forms part of the tenant's capital.—MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. & TRENT, ANCOLME & GREAT GRIMSBY RY. CO. v. CAISTOR GUARDIANS, MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. & TRENT, ANCOLME & GREAT GRIMSBY RY. CO. v. GLANFORD BRIGG GUARDIANS (1874), 32 L. T. 264; 2 Ry. & Can. Tr. Cas. 53.**

*Annotation:—Mentd. G. N. Ry. v. Hitchin Union (1906), 1 Konst. Rat. App. 116.*

**3246. —.]—Pitfs. agreed to supply L. with certain machinery upon the condition that the same was to remain their property until paid for. After the machinery was supplied, L. was made**

a bkpt., upon which L.'s landlord re-entered upon the premises & took possession of the machinery:—*Held*: the machinery was erected in such a way as not to become part of the freehold, & pitfs. were entitled to have the same returned to them.—*LINCOLNSHIRE FINANCE CO. v. FARRANT (1886), 2 T. L. R. 248.*

**3247. — Fastened to fixed mechanism.]—A machine which is kept in position by its own weight, & does not require fixing, is not a fixture, even though it is attached to & driven by fixed mechanism, & though its removal would cause some damage to the building.—NORTHERN PRESS & ENGINEERING CO. v. SHEPHERD (1908), 52 Sol. Jo. 715.**

**3248. Railway constructed by licence.]—NEVER-STOP RY. (WEMBLEY), LTD. v. BRITISH EMPIRE EXHIBITION (1924) INCORPORATED, No. 3390, post.**

**3249. Steam engine & boiler.]—CLIMIE v. WOOD, No. 3164, ante.**

**3250. Switchback railway.]—[The switchback railway] is also a “chattel” within the covenant. . . . It is erected on the soil, not for the purpose of increasing the value of the land, but only for its more convenient use as machinery (LORD Esher, M.R.).—CHAMBERLAYNE v. COLLINS (1894), 70 L. T. 217; 10 T. L. R. 233; 9 R. 311, C. A.**

**3251. Tapestry.—Fixed to lathes nailed to walls.]—LEIGH v. TAYLOR, No. 3343, post.**

#### (b) Permanent Benefit of Property.

##### i. In General.

**3252. General rule.]—Where the owner of the inheritance annexes thereto [trade] fixtures, which would in the ordinary case of landlord & tenant be removable by the latter during his term, for a permanent purpose, & for the better enjoyment of his estate, they become part of the freehold.**

A., the owner of land, in 1853, mortgaged it in fee to B., & afterwards erected certain buildings thereon, to which, for the more convenient use of the premises in his business of an innkeeper, brewer, & bath proprietor, he affixed a steam engine & boiler, a hay cutter, a malt mill or corn crusher, & a pair of grinding-stones. The lower grinder-stone was boxed on to the floor of part of the premises, by means of a frame screwed thereto, the upper one being fixed in the usual way; & the steam engine & other articles, except the boiler, were fastened by means of bolts & nuts to the walls or the floors for the purpose of steadying them, but were all capable of being removed without injury either to themselves or to the premises. The engine was used to supply water to the baths & to put the other machines in motion; & the whole were subservient to the business carried on by A. A. continued in possession until 1858, when he became bkpt.:—*Held*: his assignees were not entitled to claim these fixtures, but they passed to the assignee of the mtgee. as part of the freehold.—*WALMSLEY v. MILNE (1859), 7 C. B. N. S. 115; 29 L. J. C. P. 97; 1 L. T. 62; 6 Jur. N. S. 125; 8 W. R. 138; 141 E. R. 759.*

*Annotations:—Consd. Climie v. Wood (1869), L. R. 4 Exch. 328; Holland v. Hodgson (1872), L. R. 7 C. P. 328. Refd. Cullwick v. Swindell (1866), L. R. 3 Eq. 249; R. v. Lee (1866), L. R. 1 Q. B. 241; Longbottom v. Berry (1869), L. R. 5 Q. B. 123; Tottenham v. Swansea Zinc Ore Co. (1885), 52 L. T. 738; Gough v. Wood, [1894] 1 Q. B. 713; Hobson v. Gorringe, [1897] 1 Ch. 182; Reynolds v. Ashby, [1904] A. C. 466. Mentd. Tyne Boiler Works Co. v. Longbenton Overseers (1886), Ryde, Rat. App. (1886-90) 241.*

**3253. —.]—BOYD v. SHORROCK, No. 3235, ante.**

**3254. —.]—WAKE v. HALL, No. 3464, post.**

## ii. Particular Instances.

**3255. Building over saw-pit.]**—If the erection over the saw-pit is let into the freehold p<sup>l</sup>tf. has a right to it, & consequently his title depends upon its sustaining that character. This case therefore is so constituted that a matter of fact becomes a matter of title (SHADWELL, V.-C.).—SHIRREFF v. BARNARD (1836), 8 Sim. 161; 59 E. R. 65.

**3256. Machinery—Affixed for purposes of trade.]**—The owner in fee in possession of land & premises deposited the title deeds with a banking co. as an equitable mtge., to secure the balance of his account with them for the time being. He then erected a mill, & set up, not only steam power applicable to all mills, but machinery applicable only to the purposes of a particular manufacture which he carried on there. He afterwards made a bill of sale of all the machinery, the assignee having notice of the previous deposit of the deeds:—*Held*: as between the mtgees. & assignee, all of the machinery which was annexed to the floor, ceilings, or sides of the building, in a "quasi permanent manner," by means of bolts & screws, passed to the mtgees.; & it made no difference that the object of the annexation was merely to steady the machines when in use, & that they could be removed without any injury to them or the freehold, nor that the machines were in the nature of trade fixtures, which would, as between landlord & tenant, belong to the tenant.

It is, no doubt, said in this case that the object of fixing was to insure steadiness & keep the machines in their places when worked; but the same thing could probably be said of most trade fixtures . . . & if the effect of this fixing is to cause the whole set of machines to be effectually used in the manufacture of wool & cloth, it seems very difficult to avoid coming to the conclusion that a necessary consequence is to cause the mill to be put to a more profitable use as a wool mill than it otherwise would be (HANNEN, J.).—LONG-BOTTOM v. BERRY (1869), L. R. 5 Q. B. 123; 10 B. & S. 852; 39 L. J. Q. B. 37; 22 L. T. 385.

*Annotations*:—*Consd.* Holland v. Hodgson (1872), L. R. 7 C. P. 328; Sheffield & South Yorkshire Permanent Benefit Bldg. Soc. v. Harrison (1884), 15 Q. B. D. 358; Gough v. Wood, [1894] 1 Q. B. 713. *Reid.* Turner v. Cameron (1870), L. R. 5 Q. B. 306; Cross v. Barnes (1877), 46 L. J. Q. B. 479; *Re* Armytage, *Ex p.* Moore & Robinson's Banking Co. (1880), 14 Ch. D. 379; Huddersfield Banking Co. v. Lister (1895), 72 L. T. 703; Hobson v. Gorringe, [1897] 1 Ch. 182; Reynolds v. Ashby, [1904] A. C. 466.

**3257. — Let with mill.]**—A., who was a partner with B., deposited with their bankers the deeds of a freehold cotton mill belonging to A., as a security for advances made by the bankers for the use of the firm of A. & B.; & in the memorandum of deposit it was stated, that the buildings were insured for £2,000 & "the machinery, etc., for £2,000 more"; a steam-engine & other machinery having been previous to the deposit erected by A. & B. for the purposes of their trade. A. & B. continued in possession of the premises, with all the machinery, up to the period of their bkpcy.:—*Held*: the steam-engine & machinery, though removable by a tenant as fixtures erected by him for the purposes of trade, yet being firmly

attached to the walls & floors of the buildings, & being such fixtures as are frequently put up by the owners of cotton mills, & let with the mills to a tenant, were not to be considered as in the reputed ownership of the bkpts., within 6 Geo. 4, c. 16, s. 72.—*Re* OGDEN, *Ex p.* LOYD (1834), 3 Deac. & Ch. 765; 1 Mont. & A. 494; 3 L. J. Bcy. 108, Ct. of R.

*Annotations*:—*Reid.* *Re* Maberly, *Ex p.* Belcher (1835), 4 Deac. & Ch. 703; *Re* McNeill, *Ex p.* Broadwood (1841), 1 Mont. D. & De G. 631.

## D. Articles Constituting Essential Part of Property.

## (a) In General.

**3258. General rule—Not removable by tenant.]**—D'ÉYNCOURT v. GREGORY, No. 3172, *ante*.

**3259. — — — — —]**—*Re* DE FALBE, WARD v. TAYLOR, No. 3163, *ante*.

## (b) Particular Instances.

**3260. Bolts & bars.]**—BISHOP v. ELLIOTT, No. 3494, *post*.

**3261. Chimney-piece.]**—POOLE'S CASE (1703), Holt, K. B. 65; 1 Salk. 368; 90 E. R. 934.

*Annotations*:—*Consd.* Elwes v. Maw (1802), 3 East. 38; Birch v. Dawson (1834), 4 Nev. & M. K. B. 22. *Reid.* Ryall v. Rowles (1750), 1 Ves. Sen. 348; Steward v. Lombe (1820), 1 Brod. & Bing. 506; Winn v. Ingilby (1822), 5 B. & Ald. 625; A.-G. v. Gibbs (1829), 3 Y. & J. 332; Lyde v. Russell (1830), 1 B. & Ad. 394; Hallon v. Inder (1834), 1 Cr. M. & R. 266; *Ex p.* Loyd (1834), 3 Deac. & Ch. 765; Minshall v. Lloyd (1837), 2 M. & W. 450; Bishop v. Elliott (1855), 11 Exch. 113; Dumergue v. Rumsey (1863), 12 W. R. 205; Pugh v. Arton (1869), 20 L. T. 865; Meux v. Jacobs (1875), L. R. 7 H. L. 481; Saint v. Pilley (1875), L. R. 10 Exch. 137; *Re* Roberts, *Ex p.* Brook (1878), 10 Ch. D. 100; Cumberland Union Banking Co. v. Maryport Hematite Iron & Steel Co., *Re* Maryport Hematite Iron & Steel Co., [1892] 1 Ch. 415; Gough v. Wood (1894), 63 L. J. Q. B. 504; Crossley v. Lee, [1908] 1 K. B. 86; Leschallas v. Woolf, [1908] 1 Ch. 641. *Mentd.* Evans v. Roberts (1820), 5 B. & C. 829.

**3262. — — — — —]**—LEACH v. THOMAS, No. 3352, *post*.

**3263. — — — — —]**—BISHOP v. ELLIOTT, No. 3494, *post*. *See, also*, No. 3230, *ante*.

**3264. Doors — Inner doors.]**—COOKE'S CASE (1582), Moore, K. B. 177; 72 E. R. 515.

*Annotation*:—*Consd.* Elwes v. Maw (1802), 3 East. 38.

**3265. — Outer doors.]**—COOKE'S CASE (1582), Moore, K. B. 177; 72 E. R. 515.

*Annotation*:—*Consd.* Elwes v. Maw (1802), 3 East. 38.

**3266. — — — — —]**—WYSTOW'S CASE (1523), Y. B. 14 Hen. 8 fo. 25, pl. 6; *sub nom.* WISTOW'S CASE, cited in 11 Co. Rep. at p. 50 b; 77 E. R. 1215.

*Annotations*:—*Consd.* Mather v. Fraser (1856), 2 K. & J. 536. *Reid.* Lifford's Case (1615), 11 Co. Rep. 46 b; Place v. Fagg (1829), 4 Man. & Ry. K. B. 277; Walmsley v. Milne (1859), 7 C. B. N. S. 115; Sumner v. Bromfiow (1865), 34 L. J. Q. B. 130; *Re* Richard's, *Ex p.* Astbury, *Ex p.* Lloyds Banking Co. (1869), 4 Ch. App. 630.

**3267. — — — — —]**—BISHOP v. ELLIOTT, No. 3494, *post*.

**3268. — — — — —]**—There is no doubt that sometimes things annexed to land remain chattels as much after they had been annexed as they were before. The case of pictures hung on a wall for the purpose of being more conveniently seen may be mentioned by way of illustration. On the other hand, things may be made so completely a part of the land, as being essential to its convenient use, that even a tenant could not remove them. An

## PART XIV. SECT. 2, SUB-SECT. 2.—C. (b) ii.

**3256 i. Machinery—Affixed for purposes of trade.]**—Action for detention of machinery:—*Held*: the windmill in question was a permanent improvement, & affixed as it was became part of the realty.—COCKSHUTT v. McLOUGHERY (1909), 11 W. L. R. 90.—CAN.

**c. Wire fence.]**—KNOX v. BROTHER-

TON (1875), 14 N. S. W. S. C. R. (L.) 185.—AUS.

**d. Iron piping in drying kiln.]**—BURKE v. TAYLOR (1881), 46 U. C. R. 371.—CAN.

**e. Heating apparatus.]**—Heating apparatus put in by the tenant should be regarded as a permanent portion of the building & not a removable fixture.—CULLEN v. McPHERSON (1900), 40

N. S. R. 241.—CAN.

## PART XIV. SECT. 2, SUB-SECT. 2.—D. (b).

**3261 i. Chimney-piece.]**—HACKETT v. BENNETT (1874), 12 N. S. W. S. C. R. (L.) 327.—AUS.

**f. Bar fixtures.]**—D'AUGINEY v. BRUNSWICK-BALKE COLLENDER CO., [1917] 1 W. W. R. 1331.—CAN.

**Sect. 2.—What are fixtures: Sub-sect. 2, D. (b), & E. Sect. 3: Sub-sect. 1.]**

example of this class of chattel may be found in doors or windows. Lastly, things may be annexed to land, for the purposes of trade or of domestic convenience or ornament, in so permanent a manner as really to form a part of the land; & yet the tenant who had erected them is entitled to remove them during his term, or, it may be, within a reasonable time after its expiration. Now in the present case we think, upon the evidence & findings of the jury, that the engine & boiler belonged to this last class, & if erected by a tenant might have been removed by him during his term. The reasons, however, for a tenant with a limited interest being allowed to remove trade fixtures, are not applicable to the owner of the fee (WILLES, J.).—CLIMIE v. WOOD (1869), L. R. 4 Exch. 328; 38 L. J. Ex. 223; 20 L. T. 1012, Ex. Ch.

**Annotations:—**Consd. Longbottom v. Berry (1869), L. R. 5 Q. B. 123; Begbie v. Fenwick, Fenwick v. Begbie (1871), 8 Ch. App. 1075, n; Holland v. Hodgson (1872), L. R. 7 C. P. 328. **Apld.** Cross v. Barnes (1877), 46 L. J. Q. B. 479. **Consd.** Hobson v. Gorringe, [1897] 1 Ch. 182; Reynolds v. Ashby, [1904] A. C. 466; *Re* British Red Ash Collieries, [1920] 1 Ch. 326. **Refd.** Wake v. Hall (1880), 50 L. J. Q. B. 545; Elwes v. Brigg Gas Co. (1886), 33 Ch. D. 562; Gough v. Wood, [1894] 1 Q. B. 713.

**3269. Grate.]—**R. v. LEE (INHABITANTS), No. 3232, *ante*.

**3270. Hearths.]—**POOLE'S CASE (1703), Holt, K. B. 65; 1 Salk. 368; 90 E. R. 934.

**Annotations:—**Consd. Elwes v. Maw (1902), 3 East, 38; Birch v. Dawson (1834), 4 Nev. & M. K. B. 22. **Refd.** Ryall v. Howles (1750), 1 Ves. Sen. 348; Steward v. Lombe (1820), 1 Brod. & Bing. 506; Winn v. Ingilby (1822), 5 B. & Ald. 625; A.-G. v. Gibbs (1829), 3 Y. & J. 332; Lyde v. Russell (1830), 1 B. & Ad. 394; Hallen v. Runder (1834), 1 Cr. M. & It. 266; *Ex p.* Lloyd (1834), 3 Deac. & Ch. 766; Minshall v. Lloyd (1837), 2 M. & W. 450; Bishop v. Elliott (1855), 11 Exch. 113; Dumergue v. Rumsey (1863), 12 W. R. 205; Pugh v. Arton (1869), 20 L. T. 865; Moux v. Jacobs (1875), L. R. 7 H. L. 481; Saint v. Pilley (1875), L. R. 10 Exch. 137; *Re* Roberts, *Ex p.* Brook (1878), 10 Ch. D. 100; Cumberland Union Banking Co. v. Maryport Hematite Iron & Steel Co., *Re* Maryport Hematite Iron & Steel Co., [1892] 1 Ch. 415; Gough v. Wood (1894), 63 L. J. Q. B. 504; Crossley v. Lee, [1908] 1 K. B. 86; Lechallas v. Woolf, [1908] 1 Ch. 641. **Mentd.** Evans v. Roberts (1826), 5 B. & C. 829.

**3271. Locks.]—**BISHOP v. ELLIOTT, No. 3494, *post*.

**3272. Windows.]—**WARNER v. FLEETWOOD (1600), cited in 4 Co. Rep. 64 a.

**3273. —.]—**BISHOP v. ELLIOTT, No. 3494, *post*.

**3274. —.]—**CLIMIE v. WOOD, No. 3268, *ante*.

**3275. —.]—**In a lease of a house the term "fixture" means something which is affixed to the premises after the structure of the house is completed. It does not include things which form part of the original structure itself.

A tenant of business premises, the sides of which mainly consisted of plate-glass windows of the ordinary kind, which do not open, covenanted to repair (*inter alia*) the landlord's fixtures:—**Held:** as the windows formed part of the structure of the house, the covenant did not extend to them.—BOSWELL v. CRUCIBLE STEEL CO., [1925] 1 K. B. 119; 94 L. J. K. B. 383; 132 L. T. 274; 60 Sol. Jo. 842, C. A.

**3276. Tapestries—In frames.]—**D'EYNCOURT v. GREGORY, No. 3172, *ante*.

**Articles of domestic convenience & utility.]—**See Part XIV., Sect. 6, *post*.

**E. Other Cases.**

**3277. Advertisement hoardings—Attached in substantial manner.]—**By an agreement in writing debts. agreed to let & ptfs. to take the exclusive right of putting up advertisement hoardings & posting bills thereon upon specified land of debts. for seven years, ptfs. paying debts. a fixed annual sum, payable quarterly; rates & taxes to be paid by "the tenants." Ptfs. erected hoardings, which were affixed in a very substantial manner to the land, & exhibited advertisements upon them. Ptfs. fell into arrear in their payments under the agreement, & debts. levied a distress upon the hoardings & ultimately carried them away & sold them. Ptfs. brought an action to recover damages for wrongful distress, & debts. counterclaimed for the amount of the arrears due under the agreement:—**Held:** even assuming the agreement created the relation of landlord & tenant between the parties, the advertisement hoardings, although removable by ptfs. at the end of the tenancy, were fixtures & not mere chattels, & were therefore not distrainable, & ptfs. were entitled to recover damages for the wrongful distress.

The chattels were so dealt with, by affixing them to the soil, that they became part of the soil & although they were capable of becoming chattels again at the will of the tenant, they were at the date of the distress part of the soil (BUCKLEY, L.J.).—PROVINCIAL BILL POSTING CO. v. LOW MOOR IRON CO., [1909] 2 K. B. 344; 78 L. J. K. B. 702; 100 L. T. 726; 16 Mans. 157, C. A.

**3278. Barn—& outhouses.]—**A barn & outhouses standing & being in & upon a close, are attached to the freehold, & are the subject-matter of an ejectment.—ANTHONY v. HANEY (1832), 8 Bing. 186; 1 Moo. & S. 300; 1 L. J. C. P. 81; 131 E. R. 372.

**Annotations:—**Mentd. Patrick v. Colerick (1838), 3 M. & W. 483; Jay's Furnishing Co. v. Brand, [1914] 2 K. B. 132.

**3279. Boiler—Screwed to stone foundation.]—**METROPOLITAN COUNTIES, ETC., SOCIETY v. BROWN, No. 3203, *ante*.

**3280. — Built into masonry of greenhouse.]—**(1) Greenhouses built in a garden & constructed of wooden frames fixed with mortar to foundations walls of brickwork, held, to be fixtures, & not removable by the occupier who built them.

(2) A boiler built into the masonry of the greenhouse also held to be irremovable.

(3) The pipes of a heating apparatus, which were connected with the boiler by screws, held to be removable.—JENKINS v. GETHING (1862), 2 John. & H. 520; 70 E. R. 1165.

**Annotation:—**As to (1) *Distd.* Mears v. Callender, [1901] 2 Ch. 388.

**3281. Brick pillars—Supporting dairy pans—Not let into soil.]—**LEACH v. THOMAS, No. 3352, *post*.

**3282. Cattle shed—In unfinished condition.]—**A tenant, by the permission of his landlord, used trees on the land for the erection of a cattle house, which was completed, with the exception of the roof, when the landlord assigned his reversion, & the tenant gave the new landlord notice to quit, & took down the building & removed the materials:—**Held:** as the materials of which the cattle house consisted was timber taken from the land by the permission of the owner for its construction, the building, though unfinished, vested

**PART XIV. SECT. 2, SUB-SECT. 2.—E.**

**g. Advertisement hoardings.]—****Held:** an advertising board or hoarding erected on mtgd. land by debts. under an

agreement with the mtgor. which accord- ing to the ct. created the relation- ship of landlord & tenant was a fixture, but was a tenant's fixture removable during the term.—CREDIT FONCIER FRANCO-CANADIAN v. LINDSAY-

WALKER CO., [1919] 2 W. W. R. 385.—CAN.

**h. Factory bell.]—**BARR v. M'ILWHAM (1821), 1 Sh. (Ct. of Sess.) 124.—SCOT.

**k. Trees & bushes.]—**BURNS v.

in the landlord, & the tenant could not remove it. *Qu.*: whether a tenant who has used his own materials may take down an incompleting building erected by him on the demised land without committing waste.—*SMITH v. RENDER* (1857), 27 L. J. Ex. 83; 29 L. T. O. S. 264; 21 J. P. 776; 5 W. R. 875.

**3283. Dyer's vat—Fastened to wall of house.]**—A dyer's vat fastened to the wall of a house is parcel of the freehold, & cannot be taken in execution under a *fi. fa.*—*DAY v. BISBITCH* (1595), Cro. Eliz. 374; 78 E. R. 622.

**3284. Furnaces.]**—*SIMPSON v. HARTOPP*, No. 3230, *ante*.

**3285. Gas engine—Secured by bolts & screws—In concrete bed—To prevent rocking.]**—*HOBSON v. GORRINGE*, No. 3224, *ante*.

**3286. ———.]**—A gas engine was let out by plffs. on hire under an agreement in writing which provided for monthly payments, & that the engine should remain the property of plffs. until the hirer had exercised the option of purchase given by the agreement, & should be removable by plffs. on the failure of the hirer to pay any instalment. The engine was affixed to the floor of premises, of which the hirer was deft.'s tenant, by bolts & screws, & was used by the hirer for the purposes of his trade. The engine was seized by deft. under a distress for rent due from the hirer & sold:—*Held*: the engine had become a fixture, & was therefore not distrainable.—*CROSSLEY BROTHERS, LTD. v. LEE*, [1908] 1 K. B. 86; 77 L. J. K. B. 199; 97 L. T. 850; 24 T. L. R. 35; 52 Sol. Jo. 30, D. C.

*Annotations*:—*Apprvd.* Provincial Bill Posting Co. v. Low Moor Iron Co., [1909] 2 K. B. 344. *Refd.* Horwich v. Symond (1914), 110 L. T. 1016.

**3287. Greenhouse—On brick foundation—& communicating with house by windows & flue.]**—*BUCKLAND v. BUTTERFIELD*, No. 3327, *post*.

**3288. ———.]**—*JENKINS v. GETHING*, No. 3280, *ante*.

**3289. Looms in cotton mill—Fastened to wooden plugs in floor.]**—*BOYD v. SHORROCK*, No. 3235, *ante*.

**3290. Millstone.]**—*SIMPSON v. HARTOPP*, No. 3230, *ante*.

**3291. Steam hammer—Secured by screws—To stone foundation.]**—*METROPOLITAN COUNTIES, ETC. SOCIETY v. BROWN*, No. 3203, *ante*.

**3292. Straightening plates—Embedded in floor of foundry.]**—No doubt a flat plate will rest by its own weight but if you have it laid in, embedded, & overlaid with that which is part of the permanent floor, & the permanent floor cannot be removed without damage to the freehold, as it clearly cannot be here, I can have no doubt whatever but that the straightening plates are fixtures (*GIFFARD, L.J.*).—*Re RICHARDS, Ex p. ASTBURY, Ex p. LLOYD'S BANKING CO.* (1869), 4 Ch. App. 630; 38 L. J. Bcy. 9; 20 L. T. 997; 17 W. R. 997, L. J.

*Annotations*:—*Refd.* Cross v. Barnes (1877), 46 L. J. Q. B. 479; *British Economical Lamp Co. v. Empire Mile End* (1913), 29 T. L. R. 386.

**3293. Rails & sleepers—Laid in ballast.]**—Three railways were connected with a coal mine, one within the mine, one within a yard attached to the colliery, & the third extending from the

yard & affecting a junction with a public railway. The lessee of the mine had mortgaged it to plff., who had entered into possession. The rent being in arrear, the lessor distrained, amongst other things, the three railways. The railways were constructed in the following manner, the surface of the ground was prepared by having ballast spread upon it; sleepers were then embedded in the ballast & the ballast packed, & the rails were fastened to the sleepers by nails. In order to remove the rails, they were wrenched off the sleepers by means of bars & picks; & to remove the sleepers it was necessary to loosen the ballast by means of picks, & then with levers to raise them. The removal of the sleepers made holes in the ballast:—*Held*: the railways, by their mode of annexation to the soil, became fixtures & were not distrainable.—*TURNER v. CAMERON* (1870), L. R. 5 Q. B. 306; 10 B. & S. 931; 39 L. J. Q. B. 125; 22 L. T. 525; 18 W. R. 544.  
*Annotations*:—*Refd.* Holland v. Hodgson (1872), L. R. 7 C. P. 328; *Chamberlayne v. Colltus* (1894), 70 L. T. 217.

*Compare* No. 3477, *post*.

### SECT. 3.—TRADE FIXTURES.

#### SUB-SECT. 1.—IN GENERAL.

**3294. General rule—Removable by tenant.]**—Things set up by lessee for years, for the convenience of trade are removable during the term.—*POOLE'S CASE* (1703), 1 Salk. 368; *Holt, K. B.* 65; 91 E. R. 320.

*Annotations*:—*Consd.* *Elwes v. Maw* (1802), 3 East, 38. *Refd.* *A-G v. Gibbs* (1829), 3 Y. & J. 333; *Lyde v. Russell* (1830), 1 B. & Ad. 394; *Minshall v. Lloyd* (1837), 2 M. & W. 450; *Pugh v. Arton* (1869), 20 L. T. 865; *Meux v. Jacobs* (1875), L. R. 7 H. L. 481; *Saint v. Pilley* (1875), L. R. 10 Exch. 137; *Cumberland Union Banking Co. v. Maryport Hematite Iron & Steel Co., Re Maryport Hematite Iron & Steel Co.*, [1892] 1 Ch. 415. *Mentd.* *Ryall v. Rolfe* (1749), 1 Atk. 165; *Steward v. Lombe* (1820), 1 Brod. & Bink. 506; *Winn v. Ingilby* (1822), 5 B. & Ald. 625; *Evans v. Roberts* (1826), 5 B. & C. 829; *Hallen v. Runder* (1834), 1 Cr. M. & R. 266; *Re Ogden, Ex p. Loyd* (1834), 3 Deac. & Ch. 765; *Bishop v. Elliott* (1855), 11 Exch. 113; *Dumergue v. Rumsey* (1863), 12 W. R. 205; *Re Roberts, Ex p. Brook* (1878), 10 Ch. D. 100; *Gough v. Wood* (1894), 63 L. J. Q. B. 564; *Crossley v. Lee*, [1908] 1 K. B. 86; *Leschallas v. Woolf*, [1908] 1 Ch. 641.

**3295. ———.]**—Tenant for life, or in tail, erects a fire engine to work a colliery. It shall on his death be considered as part of his personal estate, & not go with the estate to the remainder man.

Some general rules are very clear, as what is annexed to the freehold is to be considered as part of it, & yet there are some exceptions to that rule, as between landlord & tenant; what is erected by the latter for the sake of trade may be removed, though fixed to the freehold; indeed such removal must be during the term, or he will be a trespasser; so marble chimney-pieces, etc.: but this does not hold between the heir & exor.; so might these engines be removed as between landlord & tenant (*LORD HARDWICKE, C.*).—*DUDLEY (LORD) v. WARDE (LORD)* (1751), Amb. 113; 27 E. R. 73, L. C.

*Annotations*:—*Refd.* *Elwes v. Maw* (1802), 3 East, 38; *Hubbard v. Bagshaw* (1831), 4 Sim. 326; *Elliott v. Bishop* (1854), 10 Exch. 496; *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523; *Re Hulse, Beattie v. Hulse*, [1905] 1 Ch. 406.

*FLEMING* (1880), 8 R. (Ct. of Sess.) 226; 18 Sc. L. R. 132.—*SCOT*.

#### PART XIV. SECT. 3, SUB-SECT. 1.

**3294 i. General rule—Removable by tenant.]**—*LAIDLAW v. TAYLOR* (1881), 2 R. & G. 155.—*CAN.*

**3294 ii. ———.]**—Where a trade J.—VOL. XXXI.

fixture is attached to the freehold, it becomes part thereof, subject to the right of the tenant to remove it, if he does so in proper time.—*SCARTH v. ONTARIO POWER & FLAT CO.* (1894), 24 O. R. 446.—*CAN.*

**3294 iii. ———.]**—*ARGLES v. McMATH* (1895), 26 O. R. 224 (1896), 23 A. R. 44.—*CAN.*

**3294 iv. ———.]**—*COSBY v. SHAW* (1888), 23 L. R. Ir. 181.—*IR.*

**3294 v. ———.]**—Trade fixtures attached by a tenant to the *solum* become the property of the landlord subject to the tenant's right to remove them.—*MILLER v. MUIRHEAD* (1894), 21 R. (Ct. of Sess.) 658; 31 Sc. L. R. 569; 1 S. L. T. 578.—*SCOT*.

*Sect. 3.—Trade fixtures: Sub-sects. 1 & 2.]*

**3296.** ———.]—LAWTON v. SALMON, No. 3348, *post*.

**3297.** ———.]—DEAN v. ALLALLEY, No. 3314, *post*.

**3298.** ———.]—To trespass for breaking & entering, etc., & pulling down & taking away certain buildings etc., *deft.* as to the breaking & entering suffered judgment by default, & pleaded not guilty as to the rest:—*Held*: such plea was sustained by showing that the building taken away, which was of wood, was erected by him as tenant of the premises on a foundation of brick, for the purpose of carrying on his trade, & that he still continued in possession of the premises at the time when, etc., though the term was then expired.

The old cases upon this subject lean to consider as realty whatever was annexed to the freehold by the occupier: but in modern times the leaning has always been the other way in favour of the tenant, in support of the interests of trade which is become the pillar of the state (LORD KENYON, C.J.).—PENTON v. ROBERT (1801), 2 East, 88; 102 E. R. 302.

*Annotations:—*Consd. Elwes v. Maw (1802), 3 East, 38. *Reid*. Buckland v. Butterfield (1820), 2 Brod. & Bing. 54; Hubbard v. Bagshaw (1831), 4 Sim. 326; *Re Ogdon*, *Ex p.* Lloyd (1834), 3 Deac. & Ch. 765; Minshall v. Lloyd (1837), 2 M. & W. 450; Heap v. Barton (1852), 12 C. B. 274; Leader v. Hornewood (1858), 5 C. B. N. S. 546; Stansfield v. Portsmouth Corp'n. (1858), 27 L. J. C. P. 124; Wake v. Hall (1880), 44 L. T. 42; Barff v. Probyn (1895), 64 L. J. Q. B. 557; Mears v. Callender, [1901] 2 Ch. 388; Leshall v. Woolf, [1908] 1 Ch. 441. *Mentd.* Graves v. Weld (1833), 2 Nev. & M. K. B. 725; *Re Mann & Harvey* (1920), 123 L. T. 242.

**3299.** ———.]—(1) Questions respecting the right to what are ordinarily called fixtures, principally arise between three classes of persons. First between different descriptions of representatives of the same owner of the inheritance; viz. between his heir & exor. In this first case, i.e. as between heir & exor., the rule obtains with the most rigour in favour of the inheritance & against the right to disannex therefrom, & to consider as a personal chattel anything which has been affixed thereto. Secondly, between the exors. of tenant for life or in tail, & the remainderman or reversioner; in which case the right to fixtures is considered more favourably for exors. than in the preceding case between heir & exor. The third case, & that in which the greatest latitude & indulgence has always been allowed in favour of the claim to having any particular articles considered as personal chattels as against the claim in respect of freehold or inheritance, is the case between landlord & tenant (LORD ELLENBOROUGH, C.J.).

(2) The general rule on this subject is . . . that where a lessee having annexed anything to the freehold during his term, afterwards takes it away, it is waste. But this rule at a very early period had several exceptions attempted to be engrafted upon it, & which were at last effectually engrafted upon it, in favour of trade & of those vessels & utensils which are immediately subservient to the purposes of trade (LORD ELLENBOROUGH, C.J.).

(3) The indulgence in favour of the tenant for years during the term has since been carried still further, & he has been allowed to carry away matters of ornament, as ornamental marble chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, & the like (LORD ELLENBOROUGH, C.J.).—ELWES v. MAW (1802), 3 East, 38; 102 E. R. 510.

*Annotations:—*As to (1) *Reid*. Lee v. Risdon (1816), 7 Taunt. 188; Farrant v. Thompson (1822), 2 Dow. & Ry. K. B.

1; Wake v. Hall (1883), 8 App. Cas. 195. *As to* (2) *Reid*. Trappes v. Harter (1833), 2 Cr. & M. 153; *Re Ogdon*, *Ex p.* Lloyd (1834), 3 Deac. & Ch. 765. *As to* (3) *Reid*. Buckland v. Butterfield (1820), 2 Brod. & Bing. 54; Bishop v. Elliott (1855), 11 Exch. 113. *Generally, Reid*. Whitehead v. Bennett (1858), 27 L. J. Ch. 474; *Mentd.* Steward v. Lombe (1820), 4 Moore, C. P. 281; Winn v. Ingilby (1822), 5 B. & Ald. 625; Place v. Fagg (1829), 4 Man. & Ry. K. B. 277; Darby v. Harris (1841), 10 L. J. Q. B. 294; Wiltshear v. Cottrell (1853), 1 E. & B. 674; London & Westminster Loan & Discount Co. v. Drake (1859), 5 Jur. N. S. 1407; Walmsley v. Milne (1859), 7 C. B. N. S. 115; Powell v. Farmer (1865), 18 C. B. N. S. 168; Ward v. Dudley (1887), 57 L. T. 20; *Re De Falbe*, Ward v. Taylor (1901), 84 L. T. 273; Mears v. Callender, [1901] 2 Ch. 388; *Re Mann & Harvey* (1920), 123 L. T. 242; Pole-Carew v. Western Counties & General Manure Co., [1920] 2 Ch. 97.

**3300.** ———.]—(1) As a general rule, the right of a landlord to fixtures annexed to the freehold is subject to two exceptions; one in favour of trade fixtures, if removed during the term, the other in favour of ornamental fixtures; the principle of the exceptions referring to the right of removal, & not to the affixing to the freehold.

That being the state of the law as to trade fixtures, the question arises which I have to determine, namely, when the exception to the general law was introduced in favour of trade fixtures, was it the principle of that exception that they were never affixed to the freehold at all; or was it that, although affixed to the freehold, there was an exception in favour of the right of removal. . . . The exception in favour of trade fixtures clearly was not to the annexation to the freehold, but that they were capable of being removed by the tenant within the term (KINDERSLEY, V.-C.).

(2) There is another exception . . . with regard to ornamental fixtures, marble chimney-pieces for example. . . . It has been frequently held that, although they are built into the wall, or that portion of it where the aperture of the chimney is, still that the tenant may within the term remove them, on the ground that they were put there by the tenant merely for his temporary domestic use while he occupied the premises, & not as a permanent addition to the freehold (KINDERSLEY, V.-C.).

(3) As to what constitutes such an annexation as to make a chattel a fixture in the house, it is impossible to lay down any rule. It depends on the circumstances of each case, which must be determined by the ct. or jury (KINDERSLEY, V.-C.).

(4) If a tenant of premises carried on a trade or manufactory of any kind in those premises, & for the purposes & in exercise of that trade, put up fixtures, though they were clearly & firmly annexed to the freehold in the ordinary sense of the term, he was entitled, as between himself & landlord, but within the term only, to remove those fixtures. . . . There was, however, the proviso that they could . . . be removed without material injury to the freehold. I assume that if they cannot be removed without material injury to the freehold, the tenant has no right to remove them at all (KINDERSLEY, V.-C.).—GIBSON v. HAMMERSMITH & CITY RY. Co. (1863), 2 Drew. & Sm. 603; 1 New Rep. 305; 32 L. J. Ch. 337; 8 L. T. 43; 27 J. P. 132; 9 Jur. N. S. 221; 11 W. R. 299; 62 E. R. 748.

*Annotations:—*Generally, *Mentd.* Cotter v. Metropolitan Ry. (1864), 10 L. T. 777; Hunter v. Dowling, [1895] 2 Ch. 223.

**3301.** ———.]—CLIMIE v. WOOD, No. 3268, *ante*.

**3302.** ———.]—BAIN v. BRAND, No. 3165, *ante*.

**3303.** ———.]—*Re DE FALBE*, WARD v. TAYLOR, No. 3163, *ante*.

**3304.** ———.]—*Re HULSE, BEATTIE v. HULSE*, No. 3394, *post*.

**3305.** Application of rule—Effect of annexation by owner of soil.]—*MATHER v. FRASER*, No. 3170, *ante*.

**3306.** ———.]—*WALMSLEY v. MILNE*, No. 3252, *ante*.

**3307.** ———.]—*CLIMIE v. WOOD*, No. 3268, *ante*.

**3308.** ———. Fixtures removable bodily—Or removable piecemeal—If capable of identical re-erection.]—*WHITEHEAD v. BENNETT*, No. 3316, *post*.

**3309.** ———. Erections of permanent nature—Brick buildings—On brick foundations let into soil.]—*WHITEHEAD v. BENNETT*, No. 3316, *post*.

**3310.** ———. Removal resulting in waste.]—*OAKLEY v. MONCK*, No. 2069, *ante*.

——— Agricultural fixtures.]—See AGRICULTURE, Vol. II., pp. 49–51.

#### SUB-SECT. 2.—WHAT ARE.

Agricultural fixtures, see AGRICULTURE, Vol. II., pp. 49–51, Nos. 268–270.

**3311.** Buildings—Wooden building on brick foundation.]—*PENTON v. ROBERT*, No. 3298, *ante*.

**3312.** ———. Brick building on brick foundation.]—*WHITEHEAD v. BENNETT*, No. 3316, *post*.

**3313.** Coppers & brewing vessels.]—(1) Landlords have no right to retain coppers & brewing vessels against a tenant, as they were laid for the convenience of trade.

(2) To remove wainscot fixed only by screws, & marble chimney-pieces is not waste.

(3) It is true, the old rules of law have indeed been relaxed chiefly between landlord & tenant, & not so frequently between an ancestor & heir-at-law, or tenant for life & remainderman (*LORD HARDWICKE, C.*)—*LAWTON v. LAWTON* (1743), 3 Atk. 13; 26 E. R. 811, L. C.

*Annotations:—As to (1) Apld. Trappes v. Harter* (1833), 2 Cr. & M. 153. *Consd. Ward v. Dudley* (1887), 57 L. T. 20. *Refd. Re Walsh, Ex p. King* (1840), 4 Jur. 510; *Walmsley v. Milne* (1859), 7 C. B. N. S. 115; *Wake v. Hall* (1883), 8 App. Cas. 195; *Gough v. Wood* (1894), 42 W. R. 469. *As to (2) Consd. Bishop v. Elliott* (1855), 11 Exch. 113. *Apld. Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523. *Refd. Elwes v. Maw* (1802), 3 East, 38; *Grimes v. Boweron* (1830), 6 Bing. 437; *Re Whaley, Whaley v. Rochrich*, [1908] 1 Ch. 615. *As to (3) Refd. Dudley v. Warde* (1751), 1 Amb. 113; *Hill v. Bullock*, [1897] 2 Ch. 55; *Re Hulse, Beattie v. Hulse*, [1905] 1 Ch. 406. *Generally, Mentd. Egerton v. Brownlow* (1853), 4 H. L. Cas. 1.

**3314.** Sheds.]—What erections the outgoing tenant may carry away from the premises. The buildings in question were two sheds, called Dutch barns, which had been erected by deft. during his term; & which, his counsel contended, he had by law a right to remove.

If a tenant will build upon premises demised to him, a substantial addition to the house, or add to its magnificence, he must leave his additions, at the expiration of his term, for the benefit of his landlord: but the law will make the most favour-

able construction for the tenant, where he has made necessary & useful erections for the benefit of his trade or manufacture, & which enable him to carry it on with more advantage. It has been held so in the case of cyder mills, & in other cases; & I shall not narrow the law, but hold erections of this sort, made for the benefit of trade, or constructed as the present, to be removable at the end of the term (*LORD KENYON, C.J.*)—*DEAN v. ALLALLEY* (1799), 3 Esp. 11, N. P.

*Annotations:—Consd. Elwes v. Maw* (1802), 3 East, 38. *Refd. Mears v. Callender* (1901), 70 L. J. Ch. 621.

**3315.** Engines.]—*DUDLEY (LORD) v. WARDE (LORD)*, No. 3295, *ante*.

**3316.** ———.]—(1) Machinery, engines, plant, vats or utensils may be removed by a tenant as trade fixtures. Trade fixtures to be removable must be either capable of being removed bodily, or taken to pieces & put up again, so as to be identically what they were before; but this does not apply to brick buildings let into the freehold.

(2) Accessories or adjuncts to trade fixtures, & which have no other existence or purpose, may be removed with the fixtures, such as sheds.

Suppose the case of a building or utensil which, by the rule of law, a tenant might remove as a trade fixture, if there is anything which is a more accessory or adjunct to it, & has no other existence or purpose, then if you may remove the principal thing, you may also remove the accessory (*KINDERSLEY, V.-C.*).

(3) Brick buildings, although used as such accessories, are not removable.—*WHITEHEAD v. BENNETT* (1858), 27 L. J. Ch. 474; 22 J. P. 257; 6 W. R. 351.

*Annotations:—As to (3) Apprvd. Wake v. Hall* (1880), 7 Q. B. D. 295. *Apld. Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97. *Refd. Ward v. Dudley* (1887), 57 L. T. 20; *Mears v. Callender*, [1901] 2 Ch. 388.

**3317.** ———.]—*Re OGDEN & WALMSLEY, Ex p. LOYD*, No. 3257, *ante*.

**3318.** ———.]—*CLIMIE v. WOOD*, No. 3268, *ante*.  
Glass houses—Erected by market gardener.]—See AGRICULTURE, Vol. II., pp. 50, 51, Nos. 275, 276.

——— Erected by private tenants.]—See No. 3280, *ante*, No. 3327, *post*.

**3319.** Limekilns.]—*THREESHER v. EAST LONDON WATER WORKS CO.*, No. 3480, *post*.

**3320.** Machinery & plant.]—*WHITEHEAD v. BENNETT*, No. 3316, *ante*.

**3321.** ———.]—In 1905 M. granted a mining lease to the predecessors in title of the co. whereby the lessees covenanted (clause 13) that “at the end or sooner determination of the term all erections, fences, & fixed machinery in the demised seams or on the surface of the premises shall be left in good repair & condition by the lessees.” The working of the coal proved unremunerative & certain holders of debentures issued by the co. brought an action to enforce their security, & obtained the appointment of a receiver. In pursuance of an order in the action the receiver, during the existence of the term, sold the machinery

#### PART XIV. SECT. 3, SUB-SECT. 2.

1. Buildings.]—*WELLER v. EVERITT* (1900), 25 V. L. R. 683.—AUS.

m. ———.]—*Prima facie* an hotel is part of the freehold, but if it has been erected by a tenant for the purpose of trade it is to be regarded, in the absence of evidence to the contrary, as a trade fixture.—*GRAY v. MACLENNAN* (1886), 3 Man. L. R. 337.—CAN.

n. ———.]—*LISCOMBE FALLS GOLD MINING CO. v. BISHOP* (1905), 25 C. L. T. 78; 35 S. C. R. 539.—CAN.

**3315 i. Engines.]**—An engine & boiler put into a carpenter's shop & manufactory of agricultural implements:—*Held*: to be trade fixtures, as between landlord & tenant, & removable by the tenant.—*PRONGUEY v. GURNEY* (1875), 37 U. C. R. 347.—CAN.

**3320 i. Machinery & plant.]**—The saws & other machinery of a saw-mill, are not trade fixtures.—*RICHARDSON v. RANNEY* (1853), 2 C. P. 460.—CAN.

o. Scales for weighing coal.]—A set of scales for weighing coal was set

in a pit prepared for the scales & fastened at the corner with screw bolts to the timbers of the frame of the pit; over a portion of this frame was erected a scale house & this was so fastened to the frame that part of the scale house would have to be taken apart before the scales could be removed:—*Held*: the scales should be treated as a trade fixture.—*HANDRACHAN v. BUNTAIN* (1913), 13 E. L. R. 377; 15 D. L. R. 117.—CAN.

p. Beaver-board.]—Beaver-board,

**Sect. 3.—Trade fixtures: Sub-sect. 2. Sects. 4 & 5: Sub-sects. 1 & 2, A., B. & C.]**

& plant upon the premises, & paid the proceeds into ct. Upon a motion by M. for a declaration that certain articles of machinery sold by the receiver were fixed machinery or erections within clause 13, the judge held that the machinery in question was fixed machinery forming part of the tenant's trade fixtures, & that clause 13 only prevented the removal of such fixed machinery as was in fact fixed or *in situ* at the end or sooner determination of the term:—*Held*: clause 13 operated to deprive the tenants of their right to remove trade fixtures, & as the articles in question had been severed & sold during the term M. was entitled to affirm the sale & to recover the proceeds immediately without waiting until the end of the term.—*Re BRITISH RED ASH COLLIERIES, LTD.*, [1920] 1 Ch. 326; 88 L. J. Ch. 212; *sub nom. Re BRITISH RED ASH COLLIERIES, LTD., EASTERN VALLEYS BLACK VEIN COLLIERIES, LTD. v. BRITISH RED ASH COLLIERIES, LTD.*, 120 L. T. 551, C. A.

**3322.** —.]—*Re OGDEN & WALMSLEY, Ex p. LOYD*, No. 3257, *ante*.

— **Temporary user & enjoyment.**—]—*See* Nos. 3242–3247, *ante*.

— **Permanent benefit of property.**—]—*See* Nos. 3256, 3257, *ante*.

**3323. Vats.**—]—*POOLE'S CASE* (1703), 1 Salk. 368; *Holt*, K. B. 65; 91 E. R. 320.

*Annotations*.—*Reid*, *Ilwies v. Maw* (1802), 3 East, 38; *Lyde v. Russell* (1830), 1 B. & Ad. 34; *Pugh v. Arton* (1809), 20 L. T. 865. *Mentd.* *Ryall v. Rolle* (1749), 1 Atk. 165; *Steward v. Lombe* (1820), 1 Brod. & Bing. 506; *Winn v. Ingilby* (1822), 5 B. & Ald. 625; *Evans v. Roberts* (1826), 5 B. & C. 829; *A.-G. v. Gibbs* (1829), 3 Y. & J. 333; *Hallen v. Runder* (1834), 1 Cr. M. & R. 266; *Re OGDEN, Ex p. Loyd* (1834), 3 Deac. & Ch. 765; *Minshall v. Lloyd* (1837), 2 M. & W. 450; *Bishop v. Elliott* (1855), 11 Exch. 113; *Dumergue v. Rumsey* (1863), 12 W. R. 205; *Meux v. Jacobs* (1875), L. R. 7 H. L. 481; *Saint v. Pilley* (1875), L. R. 10 Exch. 137; *Re Roberts, Ex p. Brook* (1878), 10 Ch. D. 100; *Cumberland Union Banking Co. v. Maryport Hematite Iron & Steel Co.*, *Re Maryport Hematite Iron & Steel Co.*, [1892] 1 Ch. 415; *Gough v. Wood* (1894), 63 L. J. Q. B. 564; *Crossley v. Lee*, [1908] 1 K. B. 86; *Leschallas v. Woolf*, [1908] 1 Ch. 641.

**3324.** —.]—*WHITEHEAD v. BENNETT*, No. 3316, *ante*.

**3325. Chemical plant—Acid chambers.**—]—A co. from the year 1857 until the year 1912 continuously occupied & carried on the business of manufacturers of artificial manure & sulphuric acid on premises held by them under three successive leases, being (a) a lease for lives granted in 1857, (b) a lease for lives granted in 1868 in consideration of the surrender of the 1857 lease & including a small additional piece of land, & (c) a lease for fourteen years, but determinable by the co. on six months' notice, granted in 1912 in pursuance of an agreement made in 1910, though subsequently varied in certain respects, immediately after the expiration of lease (b) by the cesser of the last life therein mentioned. Leases (b) & (c) contained a covenant to repair & yield up in repair the demised premises, including any existing or future "erections" or "buildings." The 1912 lease also contained a covenant to insure against damage by fire & to reinstate out of the policy moneys. Upon the premises the co., at their own expense, erected various ordinary buildings for the purposes of their manure manufacture, & also a complete set of

sulphuric acid making plant on the "chamber process," consisting of pyrites burners, four reaction chambers, & two so-called "towers" usually known as a "Glover tower" & "Gay-Lussac tower." The "towers" & the three chambers were so erected before the 1868 lease, but the fourth chamber was put up between 1868 & 1910. Three of the chambers were of great size, approximately 140 feet long, 20 feet wide, & 14 feet high, & each consisted of a rectangular leaden vessel supported by & enclosed in a substantial wooden framework, the lowest part of which consisted of a series of beams resting mainly on but not fixed to stone walls & pillars, except in the case of one chamber, which rested almost entirely on unfixed iron columns. The fourth chamber was really an open tank standing on a wooden platform upon beams themselves rested on the stone walls & pillars. Each of the "towers" was in effect an upright "chamber" enclosed in a wooden framework & supported by four wooden posts having iron "shoes" & resting by their own weight on a necessary foundation. In 1916 a fire occurred on the premises, & shortly afterwards deft. co. determined their lease & removed all that was left of the materials of the chambers & towers. In an action by the lessor for damages for breach of the covenants in the 1912 lease:—*Held*: (1) the chambers & the towers must, having regard to all the circumstances, be regarded as integral portions of one composite building permanently annexed to the freehold, & not as chattels or as tenant's fixtures, & they were within the express terms of the covenant in the 1912 lease to repair & yield up; (2) (*WARRINGTON, L.J.*) even if during the term of the 1857 lease the three chambers then existing & the towers had been removable as tenant's fixtures, yet on the principle of *Leschallas v. Woolf*, No. 3498, *post*, the effect of the grant & acceptance of the 1868 lease was to put an end to any right of removal.—*POLE-CAREW v. WESTERN COUNTIES & GENERAL MANURE CO.*, [1920] 2 Ch. 97; 89 L. J. Ch. 559; 123 L. T. 12; 36 T. L. R. 322, C. A.

**SECT. 4.—AGRICULTURAL FIXTURES.**

*See* AGRICULTURE, Vol. II., pp. 49–51, Nos. 268–279.

**SECT. 5.—ORNAMENTAL FIXTURES.**

**SUB-SECT. 1.—IN GENERAL.**

**3326. General rule—Removable by tenant.**—]—*ELWES v. MAW*, No. 3299, *ante*.

**3327.** —.]—A conservatory erected by tenant for years . . . on a brick foundation, attached to a dwelling-house, & communicating with it by windows opening into the conservatory, & a flue passing into the parlour chimney, becomes part of the freehold, & cannot be removed by the tenant or his assignees.

The general rule is, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste. In the progress of time this rule has been relaxed, & many exceptions have been grafted upon it. One has been in favour of matters of ornament,

made in sections to permit of its removal, & attached to the wall of an office by wooden plugs inserted between the bricks, to which the beaver-board was fastened by nails or screws:—*Held*: to be a trade fixture & removable

by the tenant.—*HENDERSON v. CRAIG*, [1923] 1 D. L. R. 1174; 1 W. W. R. 306; 32 Man. L. R. 369.—*CAN.*

*q. Yale lock.*—]—A yale lock which could not be removed without leaving

a hole in the door:—*Held*: not to be a trade fixture.—*HENDERSON v. CRAIG*, [1923] 1 D. L. R. 1174; 1 W. W. R. 306; 32 Man. L. R. 369.—*CAN.*

as ornamental chimney pieces, pier glasses, hangings, wainscot fixed only by screws, & the like (DALLAS, C.J.).—BUCKLAND v. BUTTERFIELD (1820), 2 Brod. & Bing. 54; 4 Moore, C. P. 440; 129 E. R. 878.

*Annotations*.—*Distd.* Grymes v. Boweren (1830), 6 Bing. 437. *Fold.* Jenkins v. Gething (1862), 2 John. & H. 520. *Appl.* *Re* De Falbe, Ward v. Taylor, [1901] 1 Ch. 523. *Refd.* *Re* Ogden, *Ex p.* Loyd (1834), 3 Deac. & Ch. 765; Leach v. Thomas (1835), 7 C. & P. 327; West v. Blakeway (1841), 2 Man. & G. 729; Bishop v. Elliott (1855), 11 Exch. 113; Mears v. Callender, [1901] 2 Ch. 388.

3328. ———.]—GIBSON v. HAMMERSMITH & CITY RY. CO., No. 3300, *ante*.

3329. ———.]—CLIMIE v. WOOD, No. 3268, *ante*.

3330. ———.]—*Re* DE FALBE, WARD v. TAYLOR, No. 3163, *ante*.

#### SUB-SECT. 2.—WHAT ARE.

##### A. Wainscot.

3331. Whether removable by tenant.]—BRIDGEMAN'S CASE (1615), 1 Roll. Rep. 216; 81 E. R. 442.

3332. ———.]—Glass annexed to windows shall descend to the heir, & shall not go to the exors.; & wainscot, in whatever way fastened to the posts or walls of the house, cannot be removed by the lessee.—HERLAKENDEN'S CASE (1589), 4 Co. Rep. 62 a; 76 E. R. 1025.

*Annotations*.—*Refd.* Bowles's Case (1615), 11 Co. Rep. 79 b; Squier v. Mayer (1701), 2 Freem. Ch. 248; Cave v. Cave (1705), 2 Vern. 508; Bullythorpe v. Turner (1744), Willes, 475; Elwes v. Maw (1802), 3 East, 38; Channon v. Patch (1826), 5 B. & C. 897; Boydell v. M'Michael (1834), 3 Tyr. 974; *Re* De Falbe, Ward v. Taylor, [1901] 1 Ch. 523. *Mentd.* Rowles v. Mason (1612), 2 Brownl. 88, 192; Heydon v. Cockett (1613), 11 Co. Rep. 5 a; Lord's Case (1615), 11 Co. Rep. 46 b; Wilson v. Dodd (1615), 2 Bulst. 335; Smith v. Bole (1618), Cro. Jac. 458; Burry v. Heard (1632), Cro. Car. 242; Abraham v. Bubb (1680), 2 Freem. Ch. 53; Williams v. Williams (1808), 15 Ves. 419; Berriman v. Peacock (1832), 9 Bing. 384; Culvert v. Moggs (1839), 3 Jur. 1171; Eastern Construction Co. v. National Trust Co. & Schmidt, [1914] A. C. 197.

3333. ———.]—*Ex p.* QUINCY, No. 3346, *post*.

3334. ———.]—Fixed by screws.]—LAWTON v. LAWTON, No. 3313, *ante*.

3335. ———.]—ELWES v. MAW, No. 3299, *ante*.

3336. ———.]—BUCKLAND v. BUTTERFIELD, No. 3327, *ante*.

3337. ———.]—GRYMES v. BOWEREN, No. 3383, *post*.

##### B. Tapestry and Hangings.

3338. Removable by tenant.]—BRIDGEMAN'S CASE (1615), 1 Roll. Rep. 216; 81 E. R. 442.

3339. ———.]—BUCKINGHAM (DUKE) v. PEM-BROOKE (LORD) (1672), 3 Keb. 74; 84 E. R. 602.

3340. ———.]—BECK v. REBOW, No. 3354, *post*.

3341. ———.]—ELWES v. MAW, No. 3299, *ante*.

3342. ———.]—BUCKLAND v. BUTTERFIELD, No. 3327, *ante*.

3343. ———.]—Whether a chattel is so annexed to the freehold as to be intended as an improvement to it, & to pass with it, or is annexed only for the purpose of temporary use or ornament, so as to be removable, is a question to be decided upon the facts of the case.

Valuable tapestries belonging to a tenant for life were fastened to the walls of the drawing-room in a mansion house by fixing small strips of wood by means of nails & screws to the wood with which the walls were lined; canvas was then stretched over the strips of wood & nailed to them, & the tapestries were fastened to the canvas by very small tacks. Mouldings were fixed round the

strips of wood by thin nails & screws, some of which penetrated the face of the wall. The tapestries were an essential feature of the general scheme of decoration of the room:—*Held*: the tapestries were fixed for purposes of ornament in the only way in which it was possible to use & enjoy them, & did not pass to the remainderman on the death of the tenant for life, but were removable by her exors.

It is all very well to say that there is a difference between the cases of an heir & an exor. on the one hand, & a landlord & a tenant on the other; but if you grant the proposition that it must depend upon the purpose of the annexation, & you must attend to the degree of the annexation, I am wholly unable to frame a hypothesis of a state of things in which these two principles will not decide the question, whether you are dealing with a landlord & tenant, or whether you are dealing with a tenant for life & a remainderman, or with people standing in any other relation to these things (LORD HALSBURY, C.).

It appears to me that the thing is so easily susceptible of being removed & has in fact been removed, without any damage or material injury to the structure of the wall, that to my mind, so far as it is dependent upon a question of fact it never was intended to form part of the structure of this house (LORD HALSBURY, C.).

The mode of annexation is only one of the circumstances of the case, & not always the most important, & its relative importance is probably not what it was in ruder or simpler times (LORD MACNAGHTEN).

Where a tenant for a time or a tenant for life has purchased tapestries or pictures & affixed them to the walls for the purposes of ornamentation, he is entitled to remove them (LORD SHAND).—LEIGH v. TAYLOR, [1902] A. C. 157; 71 L. J. Ch. 272; 86 L. T. 239; 50 W. R. 623; 18 T. L. R. 293; 46 Sol. Jo. 264, H. L.; *affg.* S. C. *sub nom.* *Re* DE FALBE, WARD v. TAYLOR, [1901] 1 Ch. 523, C. A.

*Annotations*.—*Distd.* *Re* Whaley, Whaley v. Roehrich, [1908] 1 Ch. 615. *Refd.* Reynolds v. Ashby, [1904] A. C. 466; *Re* Hulst, Beattie v. Hulst, [1905] 1 Ch. 406; Horwich v. Symond (1914), 110 L. T. 1016. *Mentd.* Bickmore v. Dimmer, [1903] 1 Ch. 158.

Tapestry forming part of walls—Not removable by tenant.]—*See* Sect. 2, sub-sect. 2, D., *ante*.

##### C. Chimney-Pieces.

Non-ornamental chimney-pieces—Constituting essential part of property.]—*See* Sect. 2, sub-sect. 2, D., *ante*.

3344. Removable by tenant.]—Though a tenant may take down marble chimney-pieces, etc., yet a devisee of the furniture cannot, in prejudice of the heir.—ALLEN v. ALLEN (1729), Mos. 112; 25 E. R. 300, L. C.

3345. ———.]—LAWTON v. LAWTON, No. 3313, *ante*.

3346. ———.]—(1) A tenant during the term may take chimney pieces, & even wainscot, if after he is a trespasser.

(2) Beds fastened to the ceiling with ropes, or even nailed, are not fixtures, but may be removed.—*Ex p.* QUINCY (1750), 1 Atk. 477; 26 E. R. 304.

*Annotations*.—*Consd.* *Ex p.* Reynal (1841), 2 Mont. D. & De G. 443; Bishop v. Elliott (1855), 11 Exch. 113. *Refd.* Elwes v. Maw (1802), 3 East, 38; Winn v. Ingilby (1822), 5 B. & Ald. 625; *Ex p.* Belcher (1835), 4 Deac. & Ch. 703; *Re* Walsh, *Ex p.* King (1840), 4 Jur. 510.

3347. ———.]—DUDLEY (LORD) v. WARDE (LORD), No. 3295, *ante*.

3348. ———.]—(1) Whatever is connected with the freehold, as wainscot, furnaces, pictures fixed



3378. —.]—GRYMES v. BOWEREN, No. 3383, *post*.

3379. —.]—DARBY v. HARRIS, No. 3373, *ante*.

3380. —.]—*Re* GAWAN, *Ex p.* BARCLAY, No. 3162, *ante*.

3381. Kitchen range.]—DARBY v. HARRIS, No. 3373, *ante*.

3382. Ladder.]—WILDE v. WATERS, No. 3371, *ante*.

3383. Pump.]—A pump erected by a tenant during his term, & very slightly affixed to the freehold, is removable as a tenant's fixture.

The rule has always been more relaxed as between landlord & tenant, than as between persons standing in other relations. It has been held that stoves are removable during the term; grates, ornamental chimney-pieces, wainscots fastened with screws, coppers, & various other articles: & the circumstance that, upon a change of occupiers, articles of this sort are usually allowed by landlords to be paid for by the incoming to the outgoing tenant, is confirmatory of this view of the question. Looking at the facts of this case; considering that the article in dispute was one of domestic convenience; that it was slightly fixed; was erected by the tenant; could be moved entire; & that the question is between the tenant & his landlord; I think the rule should be made absolute (TINDAL, C.J.).—GRYMES v. BOWEREN (1830), 6 Bing. 437; 4 Moo. & P. 143; 8 L. J. O. S. C. P. 140; 130 E. R. 1349.

*Annotation*:—*Re*ld. Lancaster v. Eve (1859), 5 C. B. N. S. 717.

3384. Stoves.]—R. v. ST. DUNSTON, KENT (INHABITANTS) (1825), 4 B. & C. 686; 7 Dow. & Ry. K. B. 178; 3 Dow. & Ry. M. C. 378; 107 E. R. 1216.

*Annotations*:—*Re*ld. Danby v. Harris (1841), 5 Jur. 988; Walsley v. Milne (1859), 7 C. B. N. S. 115.

3385. —.]—GRYMES v. BOWEREN, No. 3383, *ante*.

3386. —.]—DARBY v. HARRIS, No. 3373, *ante*.  
Domestic articles—Constituting essential part of property—Not removable.]—*See* Sect. 2, sub-sect. 2, D., *ante*.

## SECT. 7.—REMOVAL OF FIXTURES.

### SUB-SECT. 1.—RULE AT COMMON LAW.

#### A. In General.

3387. Fixtures not removable.]—MINSHALL v. LLOYD, No. 3418, *post*.

3388. —.]—BAIN v. BRAND, No. 3165, *ante*.

3389. —.]—*Re* DE FALBE, WARD v. TAYLOR, No. 3163, *ante*.

3390. —.]—(1) A licence to construct & work a railway over the land of the licencor does not import an implied obligation on the part of the licensee to remove the structures at the termination of the licence. Nor can the licencor in the absence of express contract to that effect, compel the licensee to remove such structures.

In the case of landlord & tenant, in the absence of agreement to the contrary, a building erected by the tenant upon the demised land becomes part of the land, & at the expiration of the lease reverts to the landlord, who cannot oblige the tenant to remove it. The relationship of licencor & licensee presents an *a fortiori* case (LAWRENCE, J.).

(2) Pltf. co. became entitled, under two agreements made respectively in 1923 & 1925, to the right to occupy sufficient land of defts. at W. to construct & work a railway. Under the agree-

ments, the co. were to be at liberty to sell the railway at the termination of the exhibition to be held on defts.' land at W., in which event defts. agreed to grant to the purchasers an option to be exercised by notice to defts. within fourteen days after the date of the contract for sale to occupy the land for the further period of one year from the closing of the exhibition, & the like option to be exercised within three months before the expiration of each succeeding year for an aggregate period of six years from the closing of the exhibition of 1925. The railway was worked during the exhibition which was held in the years 1924 to 1925. On Oct. 31, 1925, the exhibition was closed & defts. went into voluntary liquidation on Nov. 10, 1925. On Dec. 16, 1925, pltf. co., by a letter written by their solrs., asked the liquidators to renew the licence in their favour for another year, instead of in favour of purchasers of the railway from them. On Dec. 30, 1925, the liquidators wrote refusing that request, & claimed that, owing to the lapse of time since the closing of the exhibition, the licence had lapsed, & requested pltf. co. to remove the railway structures from the land of the deft. In this action, to which the liquidators were also defts., pltf. co. asked for a declaration that they were entitled to sell the railway with the benefit of the options, & an injunction to restrain defts. from selling their undertaking or assets except subject to the rights of pltf. co. Defts. counterclaimed for an order against pltf. co. to remove the railway structures from their land or damages for leaving them there. At the hearing, the liquidators, being desirous of selling the exhibition lands, free from the options, agreed that £35,000 debentures held by defts. in pltf. co. should be surrendered in consideration of pltf. co. foregoing any right they might have to specific performance & confining their claim to damages for breach of contract. On the questions whether the option had been exercised within a reasonable time, & whether pltf. co. were bound to remove the railway:—*Held*: on Dec. 30, 1925, a reasonable time had not elapsed from the closing of the exhibition, & an inquiry as to damages must be held.—NEVER-STOP RY. (WEMBLEY), LTD. v. BRITISH EMPIRE EXHIBITION (1924) INCORPORATED (1926), 95 L. J. Ch. 411; 135 L. T. 405; 70 Sol. Jo. 735.

— Removal amounts to waste.]—*See* Part XIX., Sect. 2, sub-sect. 1, C. (d), *post*.

3391. Right of landlord to compel removal.]—NEVER-STOP RY. (WEMBLEY), LTD. v. BRITISH EMPIRE EXHIBITION (1924) INCORPORATED, No. 3390, *ante*.

#### B. Relaxation of Rule.

##### (a) In General.

3392. Effect of relaxation—Whether chattel affixed becomes part of freehold.]—GIBSON v. HAMMERSMITH & CITY RY. CO., No. 3300, *ante*.

3393. —.]—BAIN v. BRAND, No. 3165, *ante*.

3394. —.]—(1) The principle which, as between tenant & landlord, enables the former to remove during his term chattels which he has affixed to the soil for the benefit of his trade applies also to the case of tenant for life & remainderman, & allows the former, or his personal representatives, to remove chattels affixed to improve the estate for his own enjoyment. This is an exception to the maxim *Quicquid plantatur solo, solo cedit*, & not a concession allowing what has become part of the soil to be removed.

The question has been argued whether the true

**Sect. 7.—Removal of fixtures: Sub-sect. 1, B. (a), (b) & (c); sub-sect. 2, A. & B. (a).]**

principle is that where the tenant fixes chattels to the freehold with the right to remove them during his term, that right is an exception which enables him to remove part of the freehold or an exception by which the chattels do not become part of the freehold. It appears to me that the exception is an exception to the maxim *Quicquid plantatur solo, solo cedit*. It is not that the law allows the tenant for years to remove part of the freehold, but that the chattels have not become part of the freehold. The exception makes them not part of the freehold (BUCKLEY, J.).

(2) The question is, not what is the nature of the attachment of the chattel to the soil, but what, having regard to all the facts of the case, must have been the intention of the tenant for life (BUCKLEY, J.).—*Re HULSE, BEATTIE v. HULSE*, [1905] 1 Ch. 406; 74 L. J. Ch. 246; 92 L. T. 232.

(b) *Annexation for Particular Purpose.*

**Trade fixtures.]—See Sect. 3, sub-sect. 1, ante.**

**Ornamental fixtures.]—See Sect. 5, sub-sect. 1, ante.**

**Articles of domestic convenience & utility.]—See Sect. 6, sub-sect. 1, ante.**

(c) *Relationship of Parties.*

**3395. Degree of relaxation.—Between landlord & tenant.]—ELWES v. MAW, No. 3299, ante.**

**3396. ———.]—GRYMES v. BOWEREN, No. 3383, ante.**

**3397. ———.]—Tapestry which had been cut & pieced so as to cover the walls of a room & the spaces left by the doors & mantelpiece, & hung by being nailed to wooden battens let into the plaster & nailed to the brickwork:—Held: to pass as a fixture under a devise of the mansion house.**

In regard to fixtures & a claim to remove them, the law has regard to the relations of the parties, & differs according to the nature of that relation. It will suffice to mention three sets of cases. As between landlord & tenant, the claim of the tenant to remove fixtures set up by himself is the most favoured; as between tenant for life & remainderman, the claim of the tenant for life to remove fixtures set up by himself is less favoured; & as between exor. & heir, where both claim under the same owner, the claim of the exor. to remove fixtures set up by the same owner is still less favoured. In considering any question of fixtures the important circumstances to be regarded are, first, the mode of annexation of the article & the extent to which it is united with the freehold; secondly, its nature & construction, as whether it has been put up for a temporary purpose or by way of permanent improvement; & thirdly, the effect its removal will have upon the freehold (CHITTY, J.).—NORTON v. DASHWOOD, [1896] 2 Ch. 497; 65 L. J. Ch. 737; 75 L. T. 205; 44 W. R. 680; 12 T. L. R. 512; 40 Sol. Jo. 635.

**Annotations:—Distd. Re Do Falhe, Ward v. Taylor, [1901] 1 Ch. 523. Refd. Hill v. Bullock, [1897] 2 Ch. 55; Re Chesterfield's S. E., [1911] 1 Ch. 237.**

**3398. —Between tenant for life & remainderman—Less than between landlord & tenant.]—LAWTON v. LAWTON, No. 3313, ante.**

**3399. ———.]—ELWES v. MAW, No. 3299, ante.**

**3400. ———.]—NORTON v. DASHWOOD, No. 3397, ante.**

**3401. ———.]—Re HULSE, BEATTIE v. HULSE, No. 3394, ante.**

**See, also, No. 3343, ante, & generally, SETTLEMENTS.**

**3402. —Between executor & heir.]—LAWTON v. LAWTON, No. 3313, ante.**

**3403. —Less than between parties in other relations.]—ELWES v. MAW, No. 3299, ante.**

**3404. ———.]—NORTON v. DASHWOOD, No. 3397, ante.**

**See, also, No. 3343, ante, & generally, SETTLEMENTS.**

**Between mortgagor & mortgagee.]—See MORTGAGE.**

## SUB-SECT. 2.—TIME FOR REMOVAL.

### A. General Rule.

**3405. Within term.]—POOLE'S CASE, No. 3294, ante.**

**3406. ———.]—Ex p. QUINCY, No. 3346, ante.**

**3407. ———.]—DUDLEY (LORD) v. WARDE (LORD), No. 3295, ante.**

**3408. ———.]—FITZHERBERT v. SHAW (1780), 1 Hy. Bl. 258; 126 E. R. 150.**

**Annotations:—Consd. Elwes v. Maw (1802), 3 East, 38; Heap v. Barton (1852), 12 C. B. 274. Refd. Penton v. Robert (1801), 2 East, 88; Trappes v. Harter (1833), 3 Tyr. 603; Bishop v. Elliott (1855), 3 W. R. 454; Mears v. Callender, [1901] 2 Ch. 388; Leschallas v. Woolf, [1908] 1 Ch. 641.**

**3409. ———.]—Unless the lessee uses during his term his continuing privilege to sever them, he cannot afterwards do it; & it never I believe was heard of that trover could be afterwards brought (GIBBS, C.J.).—LEE v. RISDON (1816), 7 Taunt. 188; 2 Marsh. 495; 129 E. R. 76.**

**Annotations:—Apld. Colegrave v. Dias Santos (1823), 2 B. & C. 76. Consd. Hallen v. Runder (1834), 1 Cr. M. & L. 266. Foll'd. Minshall v. Lloyd (1837), 2 M. & W. 450. Refd. Salmon v. Watson (1819), 4 Moore, C. P. 73; Ex p. Lloyd (1834), 3 Doac. & Ch. 765; Re Butterworth, Ex p. Wilson (1835), 2 Mont. & A. 61; Ex p. Reynal (1841), 2 Mont. D. & De G. 443; London & Westminster Loan & Discount Co. v. Drake (1859), 6 C. B. N. S. 798; Gough v. Wood, [1894] 1 Q. B. 713. Ment'd. R. v. Townley (1870), L. R. 1 C. C. R. 315; R. v. Foley (1889), 17 Cox, C. C. 142.**

**3410. ———.]—MINSHALL v. LLOYD, No. 3418, post.**

**3411. ———.]—(1) An outgoing tenant has no right to enter for the purpose of severing & removing fixtures after the expiration of his term, & a new tenant has been let into possession.**

**(2) Qu.: whether a tenant holding over at sufferance would be entitled to remove fixtures.—LEADER v. HOMEWOOD (1858), 5 C. B. N. S. 546; 27 L. J. C. P. 316; 23 J. P. 56; 4 Jur. N. S. 1062; 141 E. R. 221.**

**Annotations:—As to (2) Consd. Barff v. Probyn (1895), 64 L. J. Q. B. 557; Re Glasdir Copper Works, English Electro-Metallurgical Co. v. Glasdir Copper Works, [1904] 1 Ch. 819. Refd. Re Roberts, Ex p. Brook (1878), 10 Ch. D. 100; Leschallas v. Woolf, [1908] 1 Ch. 641.**

**3412. ———.]—On a count for entering a house & taking fixtures, etc., it appearing that the removal was after the determination of the tenancy:—Held: pltf. was entitled to the verdict.**

**[The fittings] could not be taken away after the tenancy had been determined, & the entry cannot be justified (COCKBURN, C.J.).—MOXON v. SAVAGE (1860), 2 F. & F. 182.**

**3413. ———.]—GIBSON v. HAMMERSMITH & CITY Ry. Co., No. 3300, ante.**

**3414. ———.]—MEUX v. JACOBS, No. 3471, post.**

## PART XIV. SECT. 7, SUB-SECT. 1.—B. (c).

**v. By agreement between lessor & lessee.]—DAVY v. LEWIS (1859), 18 U. C. R. 21.—CAN.**

**3415.** —.]—*Semble*: no property in tenant's fixtures vests in the landlord before the determination of the tenant's term.—**CUMBERLAND UNION BANKING CO. v. MARYPORT HEMATITE IRON & STEEL CO., Re MARYPORT HEMATITE IRON & STEEL CO.,** [1892] 1 Ch. 415; 61 L. J. Ch. 227; 66 L. T. 108; 40 W. R. 280.

*Annotations*:—**Consd.** Gough v. Wood, [1894] 1 Q. B. 713. **Reid.** Thomas v. Jennings (1896), 66 L. J. Q. B. 5; *Re* Glasdir Copper Works, English Electro-Metallurgical Co. v. Glasdir Copper Works, [1904] 1 Ch. 819. **Mentd.** Huddersfield Banking Co. v. Lister, [1895] 2 Ch. 273; Hobson v. Gorringe, [1897] 1 Ch. 182; Lyon v. London City & Midland Bank, [1903] 2 K. B. 135; Ellis v. Glover & Hobson, [1908] 1 K. B. 388; Pritchett Co. v. Currie, [1916] 2 Ch. 515.

**3416.** —.]—*In absence of special contract.*—**PUGH v. ARTON, No. 3420, post.**

### B. Expiration or Determination of Term.

#### (a) In General.

**3417. Whether mode of determination of term material—Forfeiture.**—Various engines & other fixtures, used in mining & smelting, were standing on the premises at the date of the demise, of which the engines were purchased by the incoming from the outgoing tenants, & were not mentioned in the general words of the demise, nor in the clause of re-entry. But the lessees covenanted to keep the "said engines," the word engines not having occurred before, in good & tenantable repair, & same in such state to yield up at the end, or other sooner determination of the term. The lessor covenanted that the lessees might remove, at the end of the term or sooner, except as in the cases & events before-mentioned, in any of which, a taking in execution being one, it was made lawful for the lessor to re-enter, as into his first or former estate, all such engines, etc., as had theretofore been erected, & all such as should by themselves be erected for carrying on the smelting business. By other covenants, the lessees covenanted to build an engine on the mining premises; & the lessor, that the lessees might, at any time during the term, or within twelve months after the expiration, or other sooner determination thereof, remove all such engines as last mentioned, unless the lessor should wish to repurchase same. The lessees built one engine & part of another, during the term:—*Held*: upon the forfeiture of the demise, by the taking in execution, the lessees had lost their right to remove any of the fixtures, & they all belonged to the lessor, such being the intention of the parties, as collected from the covenants.—**It. v. TOPPING (1825), M'Cle. & Yo. 544; 148 E. R. 529.**

**3418** —.]—A tenant's right to things affixed to the freehold is at an end if he omits to detach them during his term or possession; & he cannot afterwards treat them as chattels, in an action of trover brought against the sheriff, for taking them under a writ of *fi. fa.*

Accordingly, where the lessee of certain collieries assigned good and chattels, & engines partly affixed to the freehold, to ptfs., & the lessor afterwards took possession of the collieries and engines, by reason of a forfeiture:—*Held*: ptfs. could not maintain an action of trover against the sheriff, who had taken the engines under a *fi. fa.* against the lessee, inasmuch as the latter had not detached them during the continuance of his possession.

The principle of law is, that *quicquid solo plantatur, solo cedit*. The right of a tenant is only to remove during his term the fixtures he may have put up, & so to make them cease to be any longer fixtures. . . . These engines, therefore, were never goods & chattels at all, so as to pass to ptfs. They had only the same right of removal as the tenant, which certainly ceased in June, 1829. . . . Here there is no doubt that the steam engines were left affixed to the freehold after the expiration of the term, & after ptfs. had any right to consider themselves tenants; & I am of opinion that trover is not maintainable for them (**PARKE, B.**).—**MINSHALL v. LLOYD (1837), 2 M. & W. 450; Murp. & H. 125; 6 L. J. Ex. 115; 1 Jur. 336; 150 E. R. 834.**

*Annotations*:—**Foll.** Weeton v. Woodcock (1840), 7 M. & W. 14. **Consd.** Wilde v. Waters (1855), 16 C. B. 637. **Reid.** Mackintosh v. Trotter (1838), 3 M. & W. 184; Elliott v. Bishop (1854), 10 Exch. 496; Walmsley v. Milne (1859), 7 C. B. N. S. 115; *Re* Trevey (1866), 14 L. T. 193; *Re* Roberts, *Ex p.* Brook (1878), 10 Ch. D. 100; Gough v. Wood, [1894] 1 Q. B. 713; *Re* De Falbe, Ward v. Taylor, [1901] 1 Ch. 523.

**3419.** —.]—**WEETON v. WOODCOCK, No. 3435, post.**

**3420.** —.]—*In the absence of special contract tenant's fixtures cannot be removed after the termination of the lease, & this rule applies whether the lease determines by effluxion of time or by re-entry on forfeiture.*

Where there is an express contract between the parties the ct. will put a reasonable construction upon it & allow a tenant a reasonable time; in the absence of such contract there is no such right (**MALINS, V.-C.**).—**PUGH v. ARTON (1869), L. R. 8 Eq. 626; 38 L. J. Ch. 619; 20 L. T. 865; 17 W. R. 984.**

*Annotation*:—**Dbtd.** *Re* Glasdir Copper Works, English Electro-Metallurgical Co. v. Glasdir Copper Works, [1904] 1 Ch. 819.

**3421.** —.]—*Re* **ROBERTS, Ex p. BROOK, No. 3440, post.**

**3422.** —.]—*Express reservation of fixtures to tenant.*—In the same lease there was a clause that the articles mentioned in the schedule thereto should be the property of the lessees, & be removable by them; & also a clause that said articles should be removed before the cesser or determination of the term:—*Held*: said articles were the property of the lessees irrespective of the time of removal.—*Re* **WALKER, Ex p. GOULD (1884), 13 Q. B. D. 454; 51 L. T. 368; 1 Morr. 168, D. C.**

*Annotation*:—**Mentd.** *Re* Burden, *Ex p.* Wood (1888), 21 Q. B. D. 24.

**3423** —.]—*Effluxion of time.*—**PUGH v. ARTON, No. 3420, ante.**

**3424.** —.]—*Surrender.*—**LONDON & WESTMINSTER LOAN & DISCOUNT CO., LTD. v. DRAKE, No. 3438, post.**

**3425.** —.]—*Re* **ROBERTS, Ex p. BROOK, No. 3440, post.**

**3426.** —.]—The lessee of certain premises erected a greenhouse thereon, which, though a fixture by agreement with the lessor, deft., he was entitled to remove. He subsequently assigned the greenhouse by a bill of sale, & the assignee immediately entered under the powers of the bill of sale. The greenhouse was put up to auction a month after the entry, but not sold. Ten days after the auction the keys of the premises were

### PART XIV. SECT. 7, SUB-SECT. 2.— B. (a).

**3423 i. Whether mode of determination of term material—Effluxion of time.**—**ZOHRAH v. HARRIS (1891), 11 N. Z. L. R. 12.—N.Z.**

**3424 i.** —.]—*Surrender.*—**WILSON v. WILSON (1861), 10 C. P. 476.—CAN.**

**3424 ii.** —.]—**GILLETTE LAWRENCE'S, LTD., (1922) 2 W. W. R. 584; 15 Sask. L. R. 438.—CAN.**

t. —.]—*Sale.*—*Held*: although the safe, when enclosed in the vault, became a fixture, & although it could have been removed with the consent of the original owners of the building, yet the right of removal was lost when

*Sect. 7.—Removal of fixtures: Sub-sect. 2, B. (a) & (b).]*

given up to deft. by the auctioneer, who had been in possession for the assignee, & deft. took possession on the same day the assignee had notice of the surrender. The lessee made no attempt or claim to recover the premises after the entry under the bill of sale. Between three & four weeks after the possession had been given up to deft. the assignee sold the greenhouse to pltf., who claimed to be entitled to enter & remove it:—*Held*: the facts showed a surrender by operation of law, & the greenhouse, not having been removed by the assignee within a reasonable time after notice of the surrender, had become the property of deft., & could not be removed.—*Moss v. JAMES* (1878), 38 L. T. 595, C. A.

3427. ———.]—A firm of brewers leased to one A. certain premises together with the landlord's fixtures & things mentioned in the schedule to the lease. The schedule included "all fixtures not mentioned in the tenant's inventory," & the tenant covenanted to yield up "the said fixtures & things" at the end of the term. A. sub-let part of the premises to a co. for the term of his lease, & the co. went into possession & put up certain fixtures. When A.'s lease was about to expire, it was continued on the same terms except that his tenancy was to be from week to week. Subsequently A. agreed to sell to one B. his term & interest together with the tenant's fixtures, B. expressing willingness to continue the tenancy of the co. No fixtures in the co.'s part of the premises were included in B.'s inventory. B. then obtained from the brewers a yearly tenancy of the premises, including the part sub-let to the co., "together with the landlord's fixtures & things mentioned in the schedule," which, however, was not filled in. On the same day B. sub-let to the co. on a quarterly tenancy the part of the premises previously sub-let to them by A. B. having determined the co.'s quarterly tenancy by notice, the co. began to remove certain fixtures from their part of the premises, but were forcibly prevented by B. from doing so. In an action by the co. against B. & the brewers:—*Held*: the fixtures put up by the co. were not included in the fixtures to be yielded up by A. at the end of his term, as the schedule to his lease only referred to things existing at the time of the demise to him, but as the co. by accepting a new sub-tenancy from B. had surrendered the sub-tenancy granted to them by A., they had no right to remove the fixtures.

In cases where the tenancy determines on an uncertain event, as in a lease for lives, the tenant may have a reasonable time to remove fixtures after the end of the last life (*SCRUTTON, L.J.*).—*SLOUGH PICTURE HALL CO., LTD. v. WADE, WILSON v. NEVILLE, REID & CO., LTD.* (1916), 32 T. L. R. 542.

*Annotation*:—*Consd. Pole-Carew v. Western Counties & General Manure Co.*, (1920), 123 L. T. 12.

3428. ———.]—*Disclaimer by trustee in bankruptcy.*—Where there are trade fixtures on the leasehold premises of a bkpt., removable by the tenant, & the trustee applies for leave to disclaim the lease,

the same rule will be applied as between the landlord & trustee as would obtain if the lease had been determined in an ordinary way. Therefore the landlord must either take over the fixtures at a valuation, or the trustee must have a reasonable time, before disclaiming, in which to sever & remove them.—*Re MOSER* (1884), 13 Q. B. D. 738; *sub nom. Re MOSER, Ex p. PAINTER*, 33 W. R. 16; *sub nom. Re MOSER, Ex p. TRUSTEE*, 1 Morr. 244.

*(b) Continued Possession by Tenant.*

3429. Whether time for removal extended.]—*PENTON v. ROBERT, No. 3298, ante.*

3430. ———.]—*CLIMIE v. WOOD, No. 3268, ante.*

3431. ———.]—*Possession after issue of ejectment—Execution stayed by agreement.*—The purchaser of lands, etc., having brought an ejectment against the tenant from year to year, the parties entered into an agreement that judgment should be signed for pltf., with a stay of execution, till a given period. The tenant cannot in the interval remove buildings, etc., from the premises which he had himself erected during his term, & before the action was brought.—*FITZHERBERT v. SHAW* (1789), 1 Hy. Bl. 258; 126 E. R. 150.

*Annotations*:—*Fold. Heap v. Barton* (1852), 12 C. B. 274. *Reid. Penton v. Robert* (1801), 2 East, 88; *Elwes v. Maw* (1802), 3 East, 38; *Trappes v. Harter* (1833), 3 Tyr. 603; *Bishop v. Elliott* (1855), 3 W. R. 454; *Mears v. Callender*, [1901] 2 Ch. 388; *Leschallas v. Woolf*, [1908] 1 Ch. 641.

3432. ———.]—*HEAP v. BARTON, No. 3437, post.*

3433. ———.]—A tenant whose term has expired, & who has been required by the landlord to give up possession, cannot, after the determination of his tenancy, remove fixtures, although he is still in possession of the premises.

The tenant of a public-house whose lease had expired, but who remained on in possession, although required by the landlord to give up the same, removed his trade fixtures after his tenancy had come to an end & a writ for possession had been served upon him, but before he had actually given up possession of the premises which were not going to be carried on as a public-house:—*Held*: the tenant had no right to remove the fixtures at the time he so removed them, & that the landlord was entitled to damages in respect of such wrongful removal; the measure of the damages was the value of the fixtures as chattels only, & not their value as fixtures if the premises were carried on as a going concern.

At the time deft. removed his fixtures an action of ejectment had been brought against him, which clearly showed his landlord's intention to treat him no longer as a tenant (*CHARLES, J.*).—*BARFF v. PROBYN* (1895), 64 L. J. Q. B. 557; 73 L. T. 118; 11 T. L. R. 467.

3434. ———.]—*Further possession in capacity as tenant.*—A lessee cannot, even during his term, maintain trover for fixtures attached to the freehold.

The tenant has the right to remove fixtures . . . during his term or during what may, for this purpose, be considered as an excrescence on the term (*PARKE, B.*).—*MACKINTOSH v. TROTTER*

defts. bought the premises.—*CANADIAN BANK OF COMMERCE v. LEWIS & LEWIS* (1907), 12 B. C. R. 398.—*CAN.*

a. ———.]—*Held*: fixtures affixed to the freehold by deft. co. for the purposes of its business could not be separated by deft. after the conveyance to pltf., the conveyance of the realty having vested in pltf. the title to the fixtures.—*MAGNET v. INDUSTRIAL CO-OPERATIVE SOCIETY,*

*LTD.* (1921), 62 D. L. R. 653; 55 N. S. R. 29.—*CAN.*

PART XIV. SECT. 7, SUB-SECT. 2.—B. (b).

3434 i. Whether time for removal extended.—*Further possession in capacity as tenant.*—*BACHUS MARSH BRICK & POTTERY CO., LTD. v. FEDERAL BUILDING SOCIETY* (1895), 22 V. L. R.

181.—*AUS.*

3434 ii. ———.]—The right of a tenant to remove fixtures continues only during his original term & during such further period of possession by him as he holds the premises under a right still to consider himself as tenant.—*GRAY v. MACLENNAN* (1886), 3 Man. L. R. 337.—*CAN.*

3434 iii. ———.]—*DUNDAS v. Os-*

(1838), 3 M. & W. 184; 1 Horn & H. 20; 7 L. J. Ex. 65; 150 E. R. 1108.

*Annotations*.—*Consd.* Dumergue v. Rumsey (1863), 2 H. & C. 777; *Re Roberts, Ex p. Brook* (1878), 10 Ch. D. 100; *Leschallas v. Woolf*, [1908] 1 Ch. 641. *Reid.* *Re Lavies, Ex p. Stephens* (1877), 47 L. J. Bcy. 22; *Re Latham, Ex p. Glegg* (1881), 19 Ch. D. 7; *Re Glasdir Copper Works, English Electro-Metallurgical Co. v. Glasdir Copper Works*, [1904] 1 Ch. 819.

**3435.** ———.]—The right of a tenant to remove tenant's fixtures continues only during his original term, & during such further period of possession by him as he holds the premises under a right still to consider himself as tenant.

Where, therefore, the term, pursuant to a proviso in the lease was forfeited by the bkpcy. of the lessee, & the lessor entered upon the assignees, in order to enforce the forfeiture, & three weeks afterwards the assignees, still continuing in possession, removed & sold a fixture put up by the lessee for the purposes of trade, & the jury found that it was not removed within a reasonable time after the entry of the lessor:—*Held*: they had no right so to remove it, & the lessor might recover it in trover. *Semble*: such would have been the case even without such finding of the jury.—*WEETON v. WOODCOCK* (1840), 7 M. & W. 14; 10 L. J. Ex. 183; 151 E. R. 659.

*Annotations*.—*Apld.* *Roffey v. Henderson* (1851), 17 Q. B. 574. *Consd.* *Leader v. Homewood* (1858), 5 C. B. N. S. 546; *Re Roberts, Ex p. Brook* (1878), 10 Ch. D. 100; *Barr v. Probyn* (1895), 64 L. J. Q. B. 557; *Leschallas v. Woolf*, [1908] 1 Ch. 641. *Reid.* *Rugh v. Arton* (1869), 20 L. T. 865; *Re Glasdir Copper Works, English Electro-Metallurgical Co. v. Glasdir Copper Works*, [1904] 1 Ch. 819; *Slough Picture Hall Co. v. Wade* (1916), 32 T. L. R. 542.

**3436.** ———.]—*ROFFEY v. HENDERSON*, No. 3405, *post*.

**3437.** ———.]—An ejectment was brought for the recovery of certain premises on Feb. 8; on Feb. 19 defts. allowed judgment to go by default, upon the lessor of pltf. entering into the following agreement, "In consideration of Messrs. J. & G. B., the tenants, not appearing to this action, I hereby undertake not to issue a writ of possession until after Mar. 25 next":—*Held*: defts. were by this agreement precluded from removing fixtures put up by them on the premises in the interval between Feb. 19 & Mar. 25, the fair construction of the agreement being, that the premises should be given up in the same state they were in on the day judgment was signed. *Qu.*: as to the right of a tenant to remove fixtures after the expiration of his term, where he still continues in actual possession of the premises, whether by wrong, or with the landlord's consent.—*HEAP v. BARTON* (1852), 12 C. B. 274; 21 L. J. C. P. 153; 19 L. T. O. S. 110; 16 Jur. 891; 138 E. R. 909.

*Annotation*.—*Reid.* *Leschallas v. Woolf*, [1908] 1 Ch. 641.

**3438.** ———.]—A lessee mortgaged tenant's fixtures, & afterwards surrendered his lease to the lessor, who granted a fresh term to deft.:—*Held*: the mtgees. had a right to enter & sever the fixtures, it not being competent to the tenant to defeat his grant by a subsequent voluntary act of surrender.

It is fully established that the right of the lessee to remove fixtures continues only during the term & during such further period of possession by him as he holds under a right still to consider himself as tenant (*WILLIAMS, J.*).—*LONDON & WESTMINSTER LOAN & DISCOUNT CO., LTD. v. DRAKE*

(1859), 6 C. B. N. S. 798; 28 L. J. C. P. 297; 5 Jur. N. S. 1407; 7 W. R. 611; 141 E. R. 664.

*Annotations*.—*Consd.* *Saint v. Pilley* (1875), L. R. 10 Exch. 137. *Reid.* *Moss v. James* (1877), 47 L. J. Q. B. 160; *Clements v. Matthews* (1883), 11 Q. B. D. 808; *Re Glasdir Copper Works, English Electro-Metallurgical Co. v. Glasdir Copper Works*, [1904] 1 Ch. 819. *Mentd.* *Re Walker, Ex p. Gould* (1884), 13 Q. B. D. 454.

**3439.** ———.]—The right of a tenant to fixtures is a qualified right. It is a right to have the fixtures if he removes them during his term, or during a certain time after its expiration, something which may be called an enlargement of the term . . . during which the tenant has a right to consider himself as still in possession of the premises as tenant under the landlord (*JAMES, L.J.*).—*Re LAVIES, Ex p. STEPHENS* (1877), 7 Ch. D. 127; 47 L. J. Bcy. 22; 37 L. T. 613; 26 W. R. 136, C. A.

*Annotations*.—*Apld.* *Re Roberts, Ex p. Brook* (1878), 10 Ch. D. 100. *Reid.* *Re Latham, Ex p. Glegg* (1881), 19 Ch. D. 7. *Mentd.* *Re Harrison, Ex p. Meads* (1879), 49 L. J. Bcy. 47; *Hill v. East & West India Dock Co.* (1884), 48 J. P. 788.

**3440.** ———.]—It may be that in cases where a tenant holds over after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord, or in the case where an interest of uncertain duration comes suddenly to an end, & the tenant keeps possession for such reasonable time only as would enable him to sever his fixtures & to remove them with his goods & chattels off the demised premises, or even in cases where the landlord exercises a right of forfeiture, & the tenant remains on the premises for such reasonable time as last referred to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy. But, however that may be, we are clearly of opinion that the case of a surrender of a lease by a tenant, while tenant's fixtures remain affixed to the freehold, does not, either upon principle or the authority of decided cases, give any right to the tenant subsequently to remove such fixtures (*THESSIGER, L.J.*).—*Re ROBERTS, Ex p. BROOK* (1878), 10 Ch. D. 100; 48 L. J. Bcy. 22; 39 L. T. 458; 43 J. P. 53, 286; 27 W. R. 255, C. A.

*Annotations*.—*Consd.* *Re Latham, Ex p. Glegg* (1881), 19 Ch. D. 7; *Leschallas v. Woolf*, [1908] 1 Ch. 641. *Reid.* *Lowroy v. Barker* (1880), 5 Ex. D. 170; *Re Glasdir Copper Works, English Electro-Metallurgical Co. v. Glasdir Copper Works*, [1904] 1 Ch. 819. *Mentd.* *East & West India Dock Co. v. Hill* (1882), 22 Ch. D. 14.

**3441.** ———.]—*Re THOMAS, Ex p. WILLOUGHBY D'ERESBY (BARONESS)*, No. 3461, *post*.

**3442.** ———.]—It was argued that, so soon as the machinery was fixed upon the premises, the property in it vested in the landlord. I am by no means satisfied that it did. . . . No doubt, if it had remained upon the demised premises at the end of the term, it would have become the property of the owner in fee of the land, subject to this, that the tenant might have had a right to remove it, so long as he continued in possession of the demised property (*NORTH, J.*).—*CUMBERLAND UNION BANKING CO. v. MARYPORT HEMATITE IRON & STEEL CO., Re MARYPORT HEMATITE IRON & STEEL CO.*, [1892] 1 Ch. 415; 61 L. J. Ch. 227; 66 L. T. 108; 40 W. R. 280.

*Annotations*.—*Consd.* *Gough v. Wood*, [1894] 1 Q. B. 713. *Reid.* *Ellis v. Glover & Hobson*, [1908] 1 K. B. 388. *Mentd.* *Huddersfield Banking Co. v. Lister*, [1895] 2 Ch. 273; *Thomas v. Jennings* (1896), 66 L. J. Q. B. 5; *Hobson v. Gorringe*, [1897] 1 Ch. 182; *Lyon v. London City & Midland Bank*, [1903] 2 K. B. 135; *Re Glasdir Copper*

*MENT* (1907), 7 Terr. L. R. 342; 6 W. L. R. 86; *affd.* 4 W. L. R. 116.—*CAN.*

**3434 iv.** ———.]—*BADALATO v. TREBILCOCK* (1923), 53 O. L. R. 359.—*CAN.*

**3434 v.** ———.]—*BRAIDWOOD v. DUNN*, [1917] N. Z. L. R. 269.—*N.Z.*

*Sect. 7.—Removal of fixtures: Sub-sect. 2, B. (b) & (c), C. & D.; sub-sects. 3, 4 & 5.]*

*Works, English Electro-Metallurgical Co. v. Glasdir Copper Works, [1904] 1 Ch. 819; Pritchett Co. v. Currie, [1916] 2 Ch. 515.*

**3443.** ———.]—*LESCHALLAS v. WOOLF*, No. 3498, *post*.

**3444.** ———.]—*Wrongful further possession.*—*HEAP v. BARTON*, No. 3437, *ante*.

**3445.** ———.]—*Holding over at sufferance.*—*LEADER v. HOMEWOOD*, No. 3411, *ante*.

*Effect of new lease.*—*See Sub-sect. 4, post.*

(c) *Express Provision for Removal in Lease.*

**3446.** *Time for removal extended.—Within reasonable time of expiry of term.*—By a lease, the lessee covenanted to erect a steam engine, machinery, & buildings proper for carrying on the business of a shipwright, on the land demised, & to leave same for the lessors at the expiration or other sooner determination of the term, "it being by the indenture declared that all steam & other engines, machinery, etc., set up upon the premises at any time during the term for the purpose of carrying on the trade of a shipwright, together with all fixtures, should not be removed therefrom, but should, upon the expiration or other sooner determination of the term, belong to the landlords, & not to the tenant, without any payment being made to him for same." The lease then went on to provide, "that the last mentioned stipulation should not be construed to apply to any machinery or other articles which might be erected or set up on the demised premises by the lessee during the term, for any other purpose than that of carrying on the business of a shipwright; but that it should be lawful for the lessee at any time during the term, or at the expiration thereof, to remove & take away all such last mentioned machinery, etc., from the demised premises." The lease then contained a further proviso, that, in the event of the lessee becoming bkpt., it should be lawful for the lessors to re-enter, " & upon such entry to take possession of, have, etc., as their own property, without paying anything for same, all steam & other engines, etc., which should be found on the premises, & which should be used or employed in or about the business of a shipbuilder thereon." The lessee having become bkpt., the lessors re-entered for the forfeiture:—*Held*: the assignees of the lessee were entitled to enter for the purpose of removing the fixtures other than those set up for the shipbuilding business, & to a reasonable time for that purpose.

It comes, then, to this, that the lessors are, at the expiration or other sooner determination of the term to take the shipbuilding fixtures, & the tenant is to have the others; & if so, it follows that the latter is to have a reasonable time for their removal (*WILLIAMS, J.*)—*STANSFELD v. PORTSMOUTH CORPN.* (1858), 4 C. R. N. S. 120;

**3445 i.** ———.]—*Holding over at sufferance.*—*ANDERSON v. McEWEEN* (1859), 9 C. P. 176.—*CAN.*

**b.** ———.]—*Re-entry for forfeiture.*—Where the lessor has elected to re-enter for a forfeiture, the lessee has the right, while he remains in possession, to remove fixtures put up by him for the purpose of his trade, & has a reasonable time, after such election, within which to do so.—*ARGLES v. McMATH* (1895), 26 O. R. 224; (1896), 23 A. R. 44.—*CAN.*

**c.** ———.]—*Tenant entitled to reasonable time.*—*ANGAMMAL v. ASLAM*

*SAHIB* (1913), 1 L. R. 38 Mad. 710.—*IND.*

**PART XIV. SECT. 7, SUB-SECT. 2.—B. (c).**

**3446 i.** *Time for removal extended.—Within reasonable time of expiry of term.*—*BROWN'S OFFICIAL ASSIGNEE v. MAXWELL* (1892), 11 N. Z. L. R. 312.—*N.Z.*

**3446 ii.** ———.]—*BUSBY v. JOSEPH* (1868), 7 N. S. W. S. C. R. (L.) 200.—*AUS.*

**3446 iii.** ———.]—*COONEY v. MILLAR*, [1921] V. L. R. 254.—*AUS.*

27 L. J. C. P. 124; 30 L. T. O. S. 317; 22 J. P. 355; 4 Jur. N. S. 440; 6 W. R. 296; 140 E. R. 1027.

*Annotations.*—*Apld. Sumner v. Bromilow* (1865), 34 L. J. Q. B. 130. *Expld. Pugh v. Arton* (1869), L. R. 8 Eq. 626. *Consd. Cornish v. Stubbs* (1870), L. R. 5 C. P. 334. *Refd. Re Latham, Ex p. Glegg* (1881), 19 Ch. D. 7. *Mentd. Re Lavies, Ex p. Stephens* (1877), 37 L. T. 613.

**3447.** ———.]—*SUMNER v. BROMILOW*, No. 3496, *post*.

**3448.** ———.]—*PUGH v. ARTON*, No. 3420, *ante*.

*C. Uncertain Tenancies.*

**3449.** *Time for removal extended.—Within reasonable time of expiry of term.*—*SUMNER v. BROMILOW*, No. 3496, *post*.

**3450.** ———.]—*OAKLEY v. MONCK*, No. 2069, *ante*.

**3451.** ———.]—*Re ROBERTS, Ex p. BROOK*, No. 3440, *ante*.

**3452.** ———.]—*SLOUGH PICTURE HALL CO., LTD. v. WADE, WILSON v. NEVILLE, REID & CO., LTD.*, No. 3427, *ante*.

**3453.** ———.]—*Right of purchaser or mortgagee of tenant.*—A lessee of business premises having become insolvent, the trustee in liquidation put up the fixtures for sale by auction, under conditions which required them to be "cleared" by the purchaser in two days from the sale. Pltf. bought the fixtures; but, with the knowledge of the trustee, allowed them to remain on the premises whilst he was treating with the landlord for a new lease. This negotiation fell through, & the trustee surrendered the premises to the landlord, who re-let them, the fixtures still remaining affixed. About a fortnight afterwards pltf., learning of the surrender, applied to the landlord for the fixtures. In an interpleader issue between pltf. & a person claiming title through the new tenant:—*Held*: pltf. had not lost his right by delay or laches, & he was entitled to the fixtures.

Therefore, though the term was surrendered yet pltf.'s right was not affected; deft. came into possession of the premises with chattels upon them, which were subject to the rights of a third person (*CLEASBY, B.*)—*SAINT v. PILLEY* (1875), L. R. 10 Exch. 137; 44 L. J. Ex. 33; 33 L. T. 93; 23 W. R. 753.

*Annotations.*—*Distd. Moss v. James* (1878), 38 L. T. 595. *Refd. Re Roberts, Ex p. Brook* (1878), 10 Ch. D. 100; *Re Glasdir Copper Works, English Electro-Metallurgical Co. v. Glasdir Copper Works*, [1904] 1 Ch. 819.

**3454.** ———.]—Where a tenant surrenders his lease to the landlord, a mtgee or purchaser from the tenant has a right to remove fixtures within a reasonable time after the surrender. So where a co. forfeits a lease by passing a resolution for a voluntary winding-up, in which resolution debenture-holders do not concur, the latter have a similar right to remove fixtures within a reasonable time afterwards.—*Re GLASDIR COPPER WORKS, LTD., ENGLISH ELECTRO-METALLURGICAL CO., LTD. v. GLASDIR*

**PART XIV. SECT. 7, SUB-SECT. 2.—C.**

**3449 i.** *Time for removal extended.—Within reasonable time of expiry of term.*—*CLARKE v. TREESIDER* (1867), 4 W. W. & A. B. 164.—*AUS.*

**3449 ii.** ———.]—Where a tenant at will erects trade fixtures during the time of his tenancy he has a reasonable time after the expiration of the tenancy within which to remove the fixtures, because the tenancy is of uncertain duration.—*BACCHUS MARSH BRICK & POTTERY CO., LTD. v. FEDERAL BUILDING SOCIETY* (1895), 22 V. L. R. 181.—*AUS.*

COPPER WORKS, LTD., [1904] 1 Ch. 819; 73 L. J. Ch. 461; 90 L. T. 412; 11 Mans. 224; *subsequent proceedings*, [1906] 1 Ch. 365, C. A.

*D. Under Agricultural Holdings Acts.*

See Agricultural Holdings Act, 1923 (c. 9), s. 22; &, generally, AGRICULTURE, Vol. II., pp. 49 *et seq.*

SUB-SECT. 3.—EXERCISE OF RIGHT TO REMOVE.

**3455. General rule—Must not result in injury to freehold.]—**(1) The question whether a fixture can be removed by a tenant without substantial injury to the premises, is a proper question for the jury, upon an issue whether the fixture is removable or not by law.

(2) A plea to an action of trespass by a landlord against his tenant for removing a cornice, stated that it was the property of deft., that it was fixed up by him with screws only, for the purpose of ornament, that he carefully removed it during the term, doing no unnecessary damage, & that he repaired all the damage done. The replication stated that it was affixed to the freehold of the house, & was not removable by law. Issue on that question:—*Held*: it was not a misdirection to leave it to the jury to say whether they were of opinion that the cornice was ornamental, & was so affixed to the freehold that it could be removed without substantial injury; & if they thought so, & that it had been so removed, the tenant had a right to remove it.

(3) The question whether removable by law or not is a mixed question of law & fact.—*VERY v. CHESLYN* (1835), 3 Ad. & El. 75; 1 Har. & W. 283; 5 Nev. & M. K. B. 372; 111 E. R. 341.

**3456.** ———.]—*Re GAWAN, Ex p. BIRCLAY*, No. 3162, *ante*.

**3457.** ———.]—*GIBSON v. HAMMERSMITH & CITY RY. CO.*, No. 3330, *ante*.

**3458.** ———.]—*Trifling injury disregarded.]—R. v. ST. DUNSTON, KENT (INHABITANTS)* (1825), 4 B. & C. 686; 7 Dow. & Ry. K. B. 178; 3 Dow. & Ry. M. C. 378; 107 E. R. 1216.

*Annotations:—Reid. Walmsley v. Milne* (1859), 7 C. B. N. S. 115. *Mentd. Danby v. Harris* (1841), 5 Jur. 988.

**3459.** ———.]—We treat the removal by ptfs. as having been in fact effected without injury to the freehold. In all cases of this kind, injury to the freehold must be spoken of with less than literal strictness. A screw or a nail can scarcely be drawn without some attrition; &

when all the harm done is that which is unavoidable to the mortar laid on the brick walls, this is so trifling that the law, which is reasonable, will regard it as none. Upon any other principle the criterion of injury to the freehold would be idle (*LORD CAMPBELL, C.J.*).—*MARTIN v. ROE* (1857), 7 E. & B. 237; 26 L. J. Q. B. 129; 28 L. T. O. S. 283; 21 J. P. 596; 3 Jur. N. S. 465; 5 W. R. 263; 119 E. R. 1235.

*Annotations:—Consd. Jenkins v. Gething* (1862), 2 John. & H. 520. *Expld. Parsons v. Hind* (1866), 14 W. R. 860.

**3460. Disturbance of brickwork—Extent of liability for restoration.]—FOLEY v. ADDENBROOKE**, No. 3485, *post*.

**Trade fixtures.]—See Sect. 3, sub-sect. 1, ante.**

**Ornamental fixtures.]—See Sect. 4, sub-sect. 1, ante.**

SUB-SECT. 4.—EFFECT OF NEW LEASE.

**3461. Whether right to remove fixtures lost.]—**Where a tenant or lessee has put up fixtures & leaves them attached to the freehold, & a new lease is granted to another lessee, the fixtures do not become as "tenant's fixtures" the property of the new tenant, but are to be taken to be part & parcel of the property demised by the landlord. *Qu.*: whether, on the renewal of a lease to the tenant who put the fixtures up, they would, in the absence of stipulation, be taken to be part of the property demised.

If, & when the simple case shall arise of a tenant, having removable fixtures, continuing his possession under a new or extended term, we desire to hold ourselves perfectly free as to the question whether he retains his right of removal during such continuous possession (*JAMES, L.J.*).—*Re THOMAS, Ex p. WILLOUGHBY D'ERESBY (BARONESS)* (1881), 44 L. T. 781; 29 W. R. 527, C. A.

**3462.** ———.]—*In absence of express stipulation.]—LESCHALLAS v. WOLFF*, No. 3498, *post*.

**3463.** ———.]—*POLE-CAREW v. WESTERN COUNTIES & GENERAL MANURE CO.*, No. 3325, *ante*.

SUB-SECT. 5.—EFFECT OF CUSTOM.

**3464. Building erected for mining purposes.]—**Miners working under customs established by a local Act lawfully erected machinery & buildings accessory thereto on surface land, of which the miners were entitled to the exclusive use for mining purposes, but the freehold of which belonged to

PART XIV. SECT. 7, SUB-SECT. 3.

**3455 i. General rule—Must not result in injury to freehold.]—TOWNSLEY v. NEIL (1863), 10 Gr. 72.—CAN.**

**3455 ii.** ———.]—*GOPAL MULLICK v. ANUNDO CHUNDER CHATTERJEE* (1871), 14 B. L. R. 205, n.; 15 W. R. 363.—IND.

**3455 iii.** ———.]—*ROBB v. BAKER, BAKER & CO.*, [1918] E. D. L. 230.—S. AF.

**d. Brick building removed—Foundations left in soil.]—LONDON & SOUTH AFRICAN EXPLORATION CO., LTD. v. DE BEERS CONSOLIDATED MINES, LTD.**, [1895] A. C. 451.—S. AF.

PART XIV. SECT. 7, SUB-SECT. 4.

**3461 i. Whether right to remove fixtures lost.]—LOVE v. BLOOMFIELD**, [1906] V. L. R. 723.—AUS.

**3461 ii.** ———.]—*CAMERON v. TARRATT* (1844), 1 U. C. R. 312.—CAN.

**3461 iii.** ———.]—*PRONGUEY v. GURNEY* (1874), 36 U. C. R. 53.—CAN.

**3462 i.** ———.]—*In absence of express stipulation.]—In 1878, deft. leased from the owner certain premises for a term of four years, under a lease which gave him the right to erect buildings, & before the end of the term to remove. In 1884 a new lease in writing for a year certain was executed, but it contained no provision for erecting or removing buildings:—Held: he had then no right to remove any of the buildings.*—*HARPER v. GAYNOR* (1893), 19 V. L. R. 675.—AUS.

**3462 ii.** ———.]—*WINTERMUTE v. TAYLOR*, [1919] 2 W. W. R. 882.—CAN.

**3462 iii.** ———.]—No case decides that the effect of taking a new lease to begin at the end of an existing term *simpliciter et ipso facto* deprives the tenant of an existing right to remove fixtures.—*BADALATO v. TREKILCOCK*, [1924] 1 D. L. R. 465; 53 O. L. R. 359.—CAN.

**3462 iv.** ———.]—If lessor & lessee agree for a surrender of a term,

& for a new lease, commencing before the expiration of an old lease, & do not agree that the lessee's right to remove fixtures which had existed under the old lease shall continue after the surrender, the lessee's right is gone.—*OKR v. DAVIS* (1898), 17 N. Z. L. R. 106.—N.Z.

**e. Containing express stipulation.]—**On Nov. 10, 1899, defts. obtained a new lease from the owner for five years from Apr. 1, 1890, which contained the clause, "provided that the lessee may remove his fixtures." On Nov. 10, 1904, the owner granted defts. another lease for eighteen months from Apr. 1, 1905, with the same clause as to fixtures, & during its currency defts. removed the door.—*Held*: under the above provisions defts. were not restricted in their right of removal to those fixtures placed subsequent to the dates of the last two demises, & they were entitled to remove the door.—*CRONKHITE v. IMPERIAL BANK OF CANADA* (1907), 8 O. W. R. 18; 9 O. W. R. 326; 14 O. L. R. 270.—CAN.

**Sect. 7.—Removal of fixtures: Sub-sects. 5, 6 & 7, A., B. & C.; sub-sect. 8, A. & B. (a).]**

others. The buildings were attached so as to be part of the soil, & so that they could not be removed without some disturbance which would not amount to a destruction of the soil. The buildings were from the first intended to be accessory to the mining, & there was nothing to show that the property in them was intended to be irrevocably annexed to the soil:—*Held*: the maxim *quicquid plantatur solo solo credit* was not applicable, & the miners were entitled to pull down & remove the buildings while their interest in the mine continued & were not liable to the surface owners for so doing.

Whenever the chattels have been annexed to the land for the purpose of the better enjoying the land itself, the intention must clearly be presumed to be to annex the property in the chattels to the property in the land. . . . Where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land. . . . There can be no doubt on the admissions that the machinery & the buildings were from the first intended to be accessory to the mining & that there was not at any time an intention to make them accessory to the soil; & though, the foundations being . . . below the natural surface, they cannot be removed without some disturbance to the soil, it is, I think, impossible to hold that the amount of this disturbance is so great as to amount to a destruction of the land, or to show that the property in the materials must have been intended to be irrevocably annexed to the soil (*LORD BLACKBURN*).—*WAKE v. HALL* (1883), 8 App. Cas. 195; 52 L. J. Q. B. 494; 48 L. T. 834; 47 J. P. 548; 31 W. R. 585, H. L.; *affg.* (1880), 7 Q. B. 1. 295, C. A.

*Annotations*.—*Consd.* *Ward v. Dudley* (1887), 57 L. T. 20. *Refd.* *Topham v. Greenside Glazed & Firebrick Co.* (1887), 58 L. T. 274; *Reynolds v. Ashby*, [1904] A. C. 466. *Mentd.* *Goodman v. Saltash Corpn.* (1882), 48 L. T. 239; *Gough v. Wood*, [1894] 1 Q. B. 713; *Mears v. Callender*, [1901] 2 Ch. 388; *A.-G. to Prince of Wales v. Collom*, [1916] 2 K. B. 193.

**Exclusion by provision.**—*See* No. 3489, *post*.

**SUB-SECT. 6.—REMOVAL UNDER LICENCE.**

**3465. Necessity for seal.**—*Pltf.*, tenant of a house for a term of years, being possessed of shelves, stoves, ranges, ovens, boilers & other articles of household use, his own property but annexed to the freehold, requested the landlord to purchase them at the expiration of the term or let them remain for purchase by the incoming tenant, but to be taken away by *pltf.* if the tenant should refuse them. The landlord wrote an answer, declining to purchase, but adding: "I have no objection to your leaving them on the premises & making the best terms you can with the incoming tenant." The articles remained unsevered from the freehold till the entry of the new tenant, who came in under demise from the same landlord, but who declined to take them. *Pltf.* then, after the tenant had been two months in possession, demanded liberty to enter & remove the fixtures; but the tenant refused permission; & *pltf.* thereupon brought case for the hindrance,

& trover, against the tenant:—*Held*: (1) if the landlord's letter to *pltf.* amounted to a licence to take away the articles, yet, not being under seal, it was no valid grant of such privilege as against a new lessee in possession of the premises & not party to the licence; (2) the trover did not lie for the above articles, unsevered from the freehold.

The general principle is, that where the articles are of such a kind as to become fixed to the freehold, the tenant, if they are tenants fixtures, may remove them during the term or during such time as he may hold possession after the term in the capacity of a tenant (*PATTESON, J.*).—*ROFFEY v. HENDERSON* (1851), 17 Q. B. 574; 18 L. T. O. S. 154; 16 Jur. 84; 117 E. R. 1401; *sub nom.* *RUFFEY v. HENDERSON*, 21 L. J. Q. B. 49.

*Annotations*.—*As to* (1) *Refd.* *London & Westminster Loan & Discount Co. v. Drake* (1859), 6 C. B. N. S. 798; *Thomas v. Jennings* (1896), 66 L. J. Q. B. 5. *As to* (2) *Refd.* *Wilde v. Waters* (1855), 24 L. J. C. P. 193; *Leader v. Homewood* (1858), 5 C. B. N. S. 546; *London & Westminster Loan & Discount Co. v. Drake* (1859), 6 C. B. N. S. 798.

**3466. —.**—*THOMAS v. JENNINGS*, No. 3521, *post*.

**SUB-SECT. 7.—EFFECT OF NON-REMOVAL WITHIN TERM.**

**A. In General.**

**3467. Property vested in landlord.**—*POOLE'S CASE* (1703), 1 Salk. 368; 11olt, K. B. 65; 91 E. R. 320.

*Annotations*.—*Expld.* *Re Ogden, Ex p. Loyd* (1834), 3 Deac. & Ch. 765. *Consd.* *Birch v. Dawson* (1834), 4 Nev. & M. K. B. 22; *Moux v. Jacobs* (1875), L. R. 7 H. L. 481; *Re Roberts, Ex p. Brook* (1878), 10 Ch. D. 100; *Cumberland Union Banking Co. v. Maryport Hematite Iron & Steel Co., Re Maryport Hematite Iron & Steel Co.*, [1892] 1 Ch. 415; *Leschallas v. Woolf*, [1908] 1 Ch. 641. *Refd.* *Ryall v. Rowles* (1750), 1 Ves. Sen. 348; *Elwes v. Maw* (1802), 3 East, 38; *Lyde v. Russell* (1830), 1 B. & Ad. 394; *Minshall v. Lloyd* (1837), 2 M. & W. 450; *Pugh v. Arton* (1869), 20 L. T. 865. *Mentd.* *Steward v. Lombe* (1820), 1 Brod. & Bing. 506; *Winn v. Ingilby* (1822), 5 B. & Ald. 625; *Evans v. Roberts* (1826), 5 B. & C. 829; *A.-G. v. Gibbs* (1829), 3 Y. & J. 333; *Hallen v. Runder* (1834), 1 Cr. M. & R. 266; *Bishop v. Elliott* (1855), 11 Exch. 113; *Dunergue v. Rumsey* (1863), 12 W. R. 205; *Saint v. Pilley* (1875), L. R. 10 Exch. 137; *Gough v. Wood* (1894), 63 L. J. Q. B. 564; *Crossley v. Lee*, [1908] 1 K. B. 86.

**3468. —.**—*LEE v. RISDON*, No. 3409, *ante*.

**3469. —.**—*LYDE v. RUSSELL*, No. 3370, *ante*.

**3470. —.**—*MINSHALL v. LLOYD*, No. 3418, *ante*.

**3471. —.**—The law has held that trade fixtures may be, at any time during the limited interest which the owner of the lease may have, removed by him, yet, if he do not remove them during the lease he is held to have allowed them to pass to the owner of the reversion (*LORD HATHERLEY, C.*).—*MEUX v. JACOBS* (1875), L. R. 7 H. L. 481; 44 L. J. Ch. 481; 32 L. T. 171; 39 J. P. 324; 23 W. R. 526, H. J.

*Annotations*.—*Refd.* *Bain v. Brand* (1876), 1 App. Cas. 762. *Mentd.* *Re Eslick, Ex p. Alexander* (1876), 4 Ch. D. 503; *Cross v. Barnes* (1877), 46 L. J. Q. B. 479; *Re Trethowan, Ex p. Tweedy* (1877), 5 Ch. D. 559; *Paine v. Matthews* (1885), 53 L. T. 872; *Sanders v. Davis* (1885), 15 Q. B. D. 218; *Topham v. Greenside Glazed Fire-Brick Co.* (1887), 37 Ch. D. 281; *Thomas v. Kelly* (1888), 60 L. T. 114; *Gough v. Wood*, [1894] 1 Q. B. 713; *Ellis v. Glover & Hobson*, [1908] 1 K. B. 388; *Re Rogerstone Brick & Stone Co., Southall v. Wescomb*, [1919] 1 Ch. 110.

*See, also*, No. 3514, *post*.

**PART XIV. SECT. 7, SUB-SECT. 7.—A.**

**3467 i. Property vested in landlord.**—*HARRISON v. SMITH* (1887), 7 R. & G. 516; 8 C. L. T. 58.—*CAN.*

**3467 ii. —.**—*SELKIRK MAGISTRATES v. CLAPPERTON* (1830), 9 Sh. (Ct. of Sess.) 9.—*SCOT.*

**3472. Effect of subsequent negotiations for purchase.]—**LYDE v. RUSSELL, No. 3370, *ante*.

*B. Where Tenant remains in Possession.*  
See Sub-sect. 2, B. (b), *ante*.

*C. When New Lease granted.*  
See Sub-sect. 4, *ante*.

#### SUB-SECT. 8.—COVENANT TO LEAVE FIXTURES.

##### *A. In General.*

**3473. What amounts to—Whether covenant to put in fixtures—& deliver up premises in good repair.]—**By the lease of an unfinished shop the lessees covenanted at their own expense to "complete & finish . . . all necessary fittings for the carrying on of the trade of a provision merchant" & also to deliver up the demised premises in good repair at the end of the term. In pursuance of their covenant the lessees affixed certain fittings to the premises which became "trade fixtures" & they removed them shortly before the end of the term:—*Held*: the covenants in the lease did not take away the right of the lessees during the term to remove the fittings as trade fixtures.—MOWATS, LTD. v. HUDSON BROTHERS, LTD. (1911), 105 L. T. 400, C. A.

**3474. Effect of—Rights of underlessee.]—**In an underlease of a nursery ground reserving the last three days of the term, the sub-lessee covenanted to deliver up to the sub-lessor the premises & all landlord's fixtures. The sub-lessee was not aware that his immediate lessors held under a superior lease by which they were bound to deliver up all trade fixtures at the end of the term, & he placed on the ground greenhouses & other trade fixtures, which shortly before the end of the term he sold, whereupon the reversioners under the superior lease obtained an injunction to restrain their removal. The sub-lessee sued his immediate lessors for loss of his trade fixtures, & the costs incurred in reference to the injunction:—*Held*: the action was not maintainable, as it could not be implied that the sub-lessors had guaranteed that *pltf.* might remove his trade fixtures without interference from the superior landlord.—PORTER v. DREW (1880), 5 C. P. D. 143; 49 L. J. Q. B. 482; 42 L. T. 151; 44 J. P. 267; 28 W. R. 672.  
*Annotation*:—*Reid*. Thomas v. Jennings (1896), 66 L. J. Q. B. 5.

**3475. Breach of covenant—Whether right of re-entry arises.]—***Pltf.* covenanted to yield up the fixtures to *def.* at the end of his lease, & he has removed some; such removal gives no right of re-entry, for he may put them back during the term; but if he has removed them so recklessly as to commit damage, it would amount to want of repair. There must be reasonable repair, but there must also be a reasonable time for repair. As the rates were in arrear, *def.* was entitled to enter; he was therefore properly in possession (Jervis, C.J.).—DAVIS v. BURRELL & LANE (1851), 17 L. T. O. S. 56, N. P.; *subsequent proceedings*, 10 C. B. 821.

**3476. — Amounting to want of repair.]—**DAVIS v. BURRELL & LANE, No. 3475, *ante*.

##### *B. Construction of Covenant.* *(a) In General.*

**3477. Right to remove preserved—In absence of express provision.]—**Coal & iron-works were demised, together with lands, & mines under other lands not included in the demise, with liberty to

the lessees to make & use "roads & ways" over any of the lands, & to do all such other acts upon the lands as should be necessary for the purposes of the works, & the lessees covenanted to uphold & keep in good repair the furnaces & other works, houses & other buildings then standing, & which during the term should be erected & built on the demised land & all other the demised premises, & at the expiration of the term to deliver up the property & "all ways & roads in, upon or under the same lands" in such good order that the works might be continued by the lessor:—*Held*: this covenant did not extend to tram-plates fastened to sleepers not affixed to the freehold, which the tenant had placed upon roads for the purpose of using them as tramways, & the landlord therefore was not entitled to an injunction to restrain the tenant from disposing of them during the term.

A lease ought not, I think, to be construed so as to take away the ordinary legal right of a tenant to remove trade chattels unless such an intention is clearly expressed. . . . It appears to me material to consider the question whether these sleepers & trams [plates] were or were not affixed to the freehold; & I think it is perfectly clear upon the evidence that they were not so affixed. . . . What [the witnesses] mean by affixed to the freehold is merely that they are sunk in the soil by the pressure of the waggons passing over them (TURNER, L.J.).—BRAUFORT (DUKE) v. BATES (1862), 3 De G. F. & J. 381; 31 L. J. Ch. 481; 6 L. T. 82; 10 W. R. 200; 45 E. R. 926; *sub nom.* BATES v. BRAUFORT (DUKE), 8 Jur. N. S. 270, L. J.

*Annotations*:—*Reid*. *Re* Richards, *Ex p.* Astbury, *Ex p.* Lloyd's Banking Co. (1869), 4 Ch. App. 630; *Turner v. Cameron* (1870), L. R. 5 Q. B. 306; *Re* Armitage, *Ex p.* Moore & Robinson's Banking Co. (1880), 28 W. L. 924.

**3478. — — —.]—**A lease to a tenant, who was therein described as a boot & shoe manufacturer, contained a covenant by the tenant to yield up the demised premises on the determination of the term, together with all doors, locks, keys, etc., wainscots, hearths, stoves, marble & other chimney-pieces, etc., " & all other erections, buildings, improvements, fixtures, & things which are now or which at any time during the said term hereby granted shall be fixed, fastened, or belong to " the demised premises. The word "machinery" did not occur in this covenant. There was also a covenant by the tenant that he would not carry on in the demised premises any trade or business, except that of a boot & shoe manufacturer, without the licence of the lessor, & that the tenant would not erect on the premises any machinery other than that propelled by hand or foot without the consent of the lessor. The tenant placed in the premises for the purposes of his business various machines, which for their more convenient user were fastened by screws or nails to the floor or to the walls of the premises. The tenant having become *bkpt.*, the trustee in the *bkpcy.* desired to sell the machinery separately from the premises:—*Held*: the general words in the above covenant must be construed as applying only to things *ejusdem generis* with those described in the previous particular enumeration, which were of the nature of "landlord's fixtures," & the tenant was not deprived of his ordinary right to remove trade fixtures, such as the machinery in question, & consequently the trustee was entitled to sell the machinery.

When in such a covenant the things particularly enumerated belong to one *genus*—such as landlord's fixtures—general words which follow must be construed as applying only to things of the same *genus*.

*Sect. 7.—Removal of fixtures: Sub-sect. 8, B. (a), (b), (c) & (d).]*

If the landlord wishes to restrict his tenant's ordinary right to remove trade machinery or fixtures attached to the demised premises . . . the landlord must say so in plain language. If the language used leaves the matter doubtful, the ordinary right of the tenant to remove trade fixtures will not be affected (VAUGHAN WILLIAMS, L.J.).—*LAMBOURN v. McLELLAN*, [1903] 2 Ch. 268; 72 L. J. Ch. 617; 88 L. T. 748; 51 W. R. 594; 19 T. L. R. 529; 47 Sol. Jo. 582, C. A.

*Annotations:—Apld. Re British Red Ash Collieries*, [1920] 1 Ch. 326. *Reid. Slough Picture Hall Co. v. Wade, Wilson v. Neville, Reid* (1916), 32 T. L. R. 542.

*See, also*, No. 3473, *ante*.

(b) *Erections, Buildings, Improvements.*

**3479. "Buildings"—Includes trade buildings—If fixed to freehold.]—***NAYLOR v. COLLINGE*, No. 3177, *ante*.

**3480. ———.]—**Lessee, who has erected fixtures for the purpose of trade upon the demised premises, & afterwards takes a new lease to commence at the expiration of his former one, which new lease contains a covenant to repair, will be bound to repair those fixtures, unless strong circumstances exist to show that they were not intended to pass under the general words of the second demise. *Qu.*: whether any circumstances  *dehors*  the deed can be alleged to show that they were not intended to pass. *Q.*: whether limekilns, erected for the purposes of trade, are removable.

Buildings erected for the purpose of trade under a lease containing such a covenant cannot be removed by the lessee, the terms of the covenant being general, & containing no exception. This is highly reasonable, because the expectation of buildings to be erected during a term & left at its expiration, is often one of the inducements to the granting of a lease & forms a considerable ingredient in the estimate of the rent to be reserved (ABBOTT, C.J.).—*THRESHER v. EAST LONDON WATER WORKS CO.* (1824), 2 B. & C. 608; 4 Dow. & Ry. K. B. 62; 2 L. J. O. S. K. B. 100; 107 E. R. 510.

*Annotations:—Reid. Re Ogden, Ex p. Loyd* (1834), 3 Doac. & Ch. 765; *Whitehead v. Bennett* (1857), 5 W. R. 419; *Leschallas v. Woolf*, [1903] 1 Ch. 641.

**3481. ———.]—**New buildings erected by tenant—*Allowance in respect of.*—A tenant, by the terms of his lease, was bound to uphold & maintain the houses let in sufficient tenantable condition, during the lease, & to leave them so at his removal, subject to a special provision, that the timber in the sub-tenant's houses should be valued at the commencement, & at the expiration of the tack; & that the outgoing tenant should pay, or receive from the proprietor or incoming tenant, the difference in value at those respective times. The lease contained a further provision, that if the tenant should build an additional steading during the lease, the value thereof, at the expiration of the lease, to be ascertained by arbiters, at that time, should be allowed to him. Holding under this lease, the tenant pulled down the old buildings, & built a new steading:—*Held*: (1) he was not authorised to pull down the old buildings without rebuilding or substituting others in their place, the knowledge of such unauthorised acts without interference on the part of the land-

lord did not conclude him on the principle of acquiescence, which is not applicable to such a case; but the tenant was entitled to the value of so much of the new steading as ought to be considered as an additional steading, & not a substitution for the old buildings, subject to the provision in the lease, as to the timber in the sub-tenant's houses; (2) the tenant was entitled to be allowed for so much of the new buildings as consistently with the former finding he was entitled to have an allowance for, according to a valuation to be fixed at the time of removal, & not according to actual expenditure.—*SINCLAIR v. MANSON* (1821), 3 Bli. 21; 4 E. R. 513, H. L.

**3482. "Erections"—Wider term than "buildings"—May include trade fixtures.]—***BIDDER v. TRINIDAD PETROLEUM CO.*, No. 3497, *post*.

**3483. "Erections & improvements"—Includes greenhouse.]—**A covenant to yield up at the expiration of the term all erections & improvements erected, made, or set up during the term is broken by the removal of the sashes & framework of a greenhouse erected during the term, the framework of which was laid upon walls built for the purpose of receiving it, & embedded in mortar thereon. A plea to such a breach, that it was agreed between the lessor & the termor, & that the lessor promised the termor, that if the latter would erect, make, & set up a certain erection & improvement, to wit, a greenhouse in & upon the premises during the continuance of the term, he should be at liberty to pull down & remove such greenhouse at the expiration of the term, provided no injury were done to the premises, that the termor confiding in the agreement & promise did erect, etc., & did at the expiration of the term remove such greenhouse, & that no injury or damage was done to the premises, was held to be a bad plea, upon which pltf. was entitled to judgment *non obstante veredicto*.—*WEST v. BLAKEWAY* (1841), 2 Man. & G. 729; 9 Dowl. 846; *Drinkwater*, 179; 3 Scott, N. R. 199; 10 L. J. C. P. 173; 5 J. P. 435; 5 Jur. 630; 133 E. R. 940.

*Annotations:—Reid. Cort v. Ambergate, etc.*, Ry. (1851), 17 Q. B. 127; *Burt v. Haslett* (1856), 2 Jur. N. S. 974; *Lambourn v. McLellan*, [1903] 2 Ch. 268.

**3484. "Erections, buildings & improvements"—Includes verandah.]—**A tenant of a house, covenanting to keep in repair the premises & all erections, buildings, & improvements erected on the same during the term, & to yield up the same at the end of the term, cannot remove a verandah erected during the term, the lower part of which is affixed to the ground by means of posts.—*PENRY'S ADMINISTRATRIX v. BROWN* (1818), 2 Stark. 403, N. P.

*Annotation:—Reid. Doe d. Burrell v. Davis* (1851), 15 Jur. 155.

**3485. "Erections, buildings, improvements & alterations"—Includes anything "in the nature of building or support of building"—Though made of iron.]—**The lease contained a covenant to repair & yield up in repair the furnaces, fire engine, ironworks, dwelling-houses, & all other erections, buildings, improvements, & alterations, to be thereafter erected, built, or set up, except the ironwork castings, railways, wimseys, gins, machines, & the movable implements & materials used in or about the said furnaces, fire engine, ironworks, stone pits, & premises; & there was a power given to the lessors to purchase those articles, giving a certain notice before the expira-

tion of the lease:—*Held*: defts. had a right to remove whatever was in the nature of a machine or part of a machine, but not what was in the nature of building or support of building, although made of iron; & in such removal defts. might disturb some brickwork as was necessary, & were not bound to restore it to a perfect state, as if the article it was intended to support or cover were still there; but defts. were liable for any unnecessary disturbance of brickwork.—*FOLEY v. ADDENBROOKE* (1844), 13 M. & W. 174; 14 L. J. Ex. 169; 153 E. R. 72.

**3486. "Erections, fences & fixed machinery"—Includes trade fixtures.]—***Re BRITISH RED ASH COLLIERIES, LTD.*, No. 3321, *ante*.

**3487. "Improvements"—Includes plate glass front.]—**By indenture, A. demised to B. a messuage & premises for twenty-one years. The lease contained a covenant to repair, & a covenant that B., his exors., administrators, & assigns should at the determination of the term yield up the premises to ptff., his exors., etc., "together with all wainscots, windows, shutters, fastenings, etc., & other things which then were or at any time thereafter should be thereunto affixed or belonging, looking glasses & furniture excepted; & together also with all sheds & other erections, & improvements which should be erected, built, or made upon the demised premises, in good repair & condition." An assignee of the lease, during the term, removed an old shop-window, & put up in its place a plate glass front, but without in any manner fastening it, except by means of wedges, to the premises:—*Held*: this plate glass front was either a "window" or an "improvement" within the true meaning of the covenant, & therefore irremovable by the tenant at the end of the term, although erected for the purposes of trade.—*HASLETT v. BURT* (1856), 18 C. B. 893; 4 W. R. 679; 139 E. R. 1624; *sub nom.* *BURT v. HASLETT*, 25 L. J. C. P. 295; 27 L. T. O. S. 300; 20 J. P. 533; 2 Jur. N. S. 974, Ex. Ch.

*Annotation*:—*Consd.* Lambourn v. McLellan, [1903] 2 Ch. 268.

**3488. — Does not include glasshouses.]—**A landlord in 1887 demised a farm to deft. for a term expiring in 1901. The lease provided, clause 13, that in the last year the landlord might enter & sow certain seeds, & that the tenant should also leave gratis for the landlord "all the roots remaining unconsumed in the ground, & also all improvements made by the tenant, & all cultivations, dressings, & manures, in consideration of no claim being made by the landlord for similar matters on the tenant now entering." Deft. erected ten glasshouses. One had concrete sides, & its glass span-roof substantially rested on the sides & could be removed without damaging the walls. In the case of the other houses the glass span-roofs were supported by & nailed to wide sills which in turn were nailed to & supported by wooden piles driven into the ground. In these houses deft. grew grapes, peaches, nectarines, tomatoes, & strawberries, which he sold in Reading & Covent Garden, carrying on the trade of a market-gardener with his landlord's knowledge:—*Held*: (1) at common law deft. could lawfully remove the glasshouses unless precluded by clause 13 of the lease; (2) clause 13 did not preclude him, as on the construction of it "improvements" did not include glasshouses.—*MEARS v. CALLENDER*, [1901] 2 Ch. 388; 70 L. J. Ch. 621; 84 L. T. 618; 65 J. P. 615; 49 W. R. 584; 17 L. R. 518.

*Annotations*:—*Generally*, *Reid*. *Morse v. Dixon* (1917), 117 L. T. 590; *Premier Dairies v. Garlick*, [1920] 2 Ch. 17.

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**3489. "Water mill, with all fixtures, fastenings & improvements"—Includes new mill-stones—Though removable by custom of country.]—**Covenant to leave, at the end of a term, a water mill, with all fixtures, fastenings, & improvements, during the demise, fixed, fastened, or set up in or upon the premises, in good plight & condition, reasonable use & wear only excepted:—*Held*: included a pair of new mill-stones set up by the lessee during the term, although the custom of the country authorised him to remove them.—*MARTYR v. BRADLEY* (1832), 9 Bing. 24; 2 Moo. & S. 25; 1 L. J. C. P. 147; 131 E. R. 523.

*Annotation*:—*Reid*. *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97.

(c) "Works."

**3490. Includes salt pans.]—**A lessor demised to his lessee certain premises & salt mines, with liberty to make & erect warehouses & quays, & to make salt pits & other works, & reserving, amongst other rents, a certain sum *per annum* for each & every salt pan which had been or thereafter should be erected, worked, & made use of by the lessee in making salt; & the lessee covenanted to leave all such buildings, quays, & works in good repair at the end of the term:—*Held*: he could not, within the meaning of the covenant, remove salt pans which had been set up by him during the term.—*MANSFIELD (EARL) v. BLACKBURN* (1840), 6 Bing. N. C. 426; 8 Scott, 720; 10 L. J. C. P. 178; 133 E. R. 165.

*Annotations*:—*Reid*. *Elliott v. Bishop* (1854), 10 Exch. 496; *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97.

**3491. Does not include tram-plates fastened to sleepers.]—***BEAUFORT (DUKE) v. BATES*, No. 3477, *ante*.

(d) General Words.

*See, generally*, *DEEDS*, Vol. XVII., pp. 273–276, Nos. 882–903.

**3492. Application of ejusdem generis rule.]—***BISHOP v. ELLIOTT*, No. 3494, *post*.

**3493. —.]—***LAMBOURN v. McLELLAN*, No. 3478, *ante*.

**3494. Whether restricted to landlord's fixtures.]—**The right of a tenant to remove during his term chimney pieces, whether marble or not, & fixtures of the like sort, depends essentially on their being of an ornamental nature. The words "marble & other chimney-pieces" found in a covenant of a lease of a public-house between "locks, keys, bars, bolts" & "foot-paces & slabs," do not imply anything of an ornamental nature, but refer to such fixtures only as those with which they are classed, & commonly called landlord's fixtures. In such a lease, a covenant by the lessee to yield up the premises at the end of the term, "together with all locks, keys, bars, bolts, marble & other chimney-pieces, foot-paces, & slabs, & other fixtures & articles in the nature of fixtures, which should at any time during the said term be fixed or fastened to the said demised premises or be thereto belonging," extends to landlord's fixtures only.

With respect to locks & keys, bolts & bars, there can be no question, whether properly called fixtures or not, that the tenant cannot remove them; they are as much part of the house, & go with it, as the doors or windows to which they may be attached or belong; nor will there be any question as to the foot-paces or slabs, if upon examination it shall appear that the marble & other chimney-pieces to which they are appendages are also of the same class (*COLERIDGE, J.*).—

*Sect. 7.—Removal of fixtures: Sub-sect. 8, B. (d).  
Sect. 8: Sub-sect. 1.]*

**BISHOP v. ELLIOTT** (1855), 11 Exch. 113; 3 C. L. R. 1337; 24 L. J. Ex. 229; 19 J. P. 501; 1 Jur. N. S. 962; 3 W. R. 454; 156 E. R. 766; *sub nom.* **ELLIOTT v. BISHOP**, 25 L. T. O. S. 150, Ex. Ch.

*Annotations:—***Consd.** **Sumner v. Bromfiow** (1865), 34 L. J. Q. B. 130; *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523. **Expld.** **Lambourn v. McLellan**, [1903] 2 Ch. 268. **Consd.** *Re British Red Ash Collieries*, [1920] 1 Ch. 326. **Refd.** **Wilde v. Waters** (1855), 24 L. J. C. P. 193; **Burt v. Haslett** (1856), 2 Jur. N. S. 974; **Dumergue v. Rumsey** (1863), 2 H. & C. 777; **Pugh v. Arton** (1869), 20 L. T. 865; **Leschallas v. Woolf**, [1908] 1 Ch. 641. **Mentd.** *Re Gawan, Ex p. Barclay* (1855), 5 De G. M. & G. 403.

**3495.** —.]—By an agreement for a lease, it was provided that the tenant should at all times during the term keep sufficient & suitable fixtures & effects on the premises for the purposes desired, & that none of the movable furniture & effects should be removed therefrom, except for the purposes of repair or of being replaced by others; & also that in case the term should be determined by effluxion of time, but in no other case, it should be lawful for the tenant, within twenty-one days after the expiration of the term, but not during any other period, to remove such fixtures, if any, as he might have affixed to the premises, unless the landlord should elect to purchase same, which it should be lawful for him to do at a price to be settled by arbitration. It was further agreed, that in case the tenant became bkpt. or insolvent, "or if any distress or writ of extent or execution shall be lawfully levied or executed by seizure on the premises," etc., then in any of the said cases the landlord might re-enter & put out the tenant, " & also seize & retain for her own use, & as her own, all fixtures whatsoever, whether tenant's or trade fixtures," etc. After this agreement had been entered into, the tenant put up some fixtures on the premises, which were tenant's fixtures. These fixtures & the tenant's goods were seized by the sheriff, under a *fi. fa.* on a judgment against the tenant, at the suit of a creditor. The landlord thereupon put in a claim to the fixtures:—**Held**: by the agreement the tenant had renounced the ordinary tenant's right of removing fixtures during the term, & consequently the sheriff had no right to take the tenant's fixtures in execution.—**DUMERGUE v. RUMSAY** (1863), 2 H. & C. 777; 33 L. J. Ex. 88; 9 L. T. 775; 10 Jur. N. S. 155; 12 W. R. 205; 159 E. R. 322, Ex. Ch.

*Annotations:—***Apld.** **Lambourn v. McLellan**, [1903] 2 Ch. 268. **Refd.** **Leschallas v. Woolf**, [1908] 1 Ch. 641; *Re British Red Ash Collieries*, [1920] 1 Ch. 326.

**3496.** —.]—By a lease of land intended to be used for salt-works, the lessees covenanted that they would erect certain buildings & works, & that they would at the determination of the term "leave at the disposal of the lessors all the fixed materials of what nature or kind soever that should be in or about the said intended wychhouses or salt-works, or any ways relating thereto, save & except all the salt-pans & other movable articles made use of at all or at any of the said wychhouses or salt works," which they the lessees were to take away for their own use & benefit. The interest of the lessees became afterwards vested in defts., who took upon themselves the performance of the above covenant, & also covenanted that they would yield up possession of the premises, with all erections, buildings & improvements, together with the cisterns, doors, etc., & "also all other fixtures & appurtenances of what kind or nature soever which should be used in or about the buildings," "but as to the salt-pans & other

articles made use of at all or any of the said wychhouses, etc., & belonging to defts. & their assigns, they should be at liberty to take & carry away from off the said premises, upon making good all such injury or damage as the said wychhouses, etc., might sustain in consequence of such removal," with an option to the lessors of purchasing any part of the salt-pans or other movable articles. Defts. sunk a brine-shaft & erected an apparatus for working it. They underlet the premises on Dec. 13, 1861. Pltfs., on June 23, 1862, wrote a letter demanding possession, as the underletting gave them a right of re-entry on the land; & an action of ejectment was brought on July 7, 1862. Between Jan. 18 & Mar. 17, 1863 defts. sold & removed a number of fixtures, etc., & on the last-mentioned day they confessed judgment in the action of ejectment:—**Held**: under the above covenants, defts. had a right to take away such fixtures as could properly be called tenant's fixtures; & they were entitled to a reasonable time after the receipt of the letter of June 23, 1862, within which they might remove them.—**SUMNER v. BROMFIOW** (1865), 34 L. J. Q. B. 130; 29 J. P. 564; 11 Jur. N. S. 481.

*Annotations:—***Distd.** **Pugh v. Arton** (1869), L. R. 8 Eq. 626. **Refd.** **Williams v. Earle** (1868), 9 B. & S. 740.

**3497.** —.]—(1) A lease was made to an oil refiner of some land " & also the erections & buildings then already erected & built or to be erected & built " thereon, & the lessee covenanted to lay out £2,500 in such buildings, which were to be of a permanent character, & to keep them in repair, & deliver them up at the end of the term together with all the doors, wainscots, etc. "pumps, pipes, cisterns, & other things which now are or at any time during the term shall be fixed or fastened to the freehold of the premises or belong thereto":—**Held**: the general words included the trade fixtures of the oil refinery, & they were, consequently, irremovable by the lessee.

(2) An agreement was made with a co. to grant them a lease of certain land as soon as they had spent £3,000 "in the erection of permanent & substantial buildings & works such as are usually erected for the distillation of oil," & there was a covenant to cover in the "erections" & buildings when necessary:—**Held**: "erections" was a wider term than buildings, & might include trade fixtures.—**BIDDER v. TRINIDAD PETROLEUM CO** (1868), 17 W. R. 153.

*Annotations:—***As to** (1) **Folld.** **Lambourn v. McLellan** [1903] 1 Ch. 806. **Refd.** **Lambourn v. McLellan**, [1903] 2 Ch. 268.

**3498.** —.]—A lease of houses made in 185 for a term of seventy years contained a lessee's covenant at the expiration or determination of the term to deliver up the demised premises "with all & singular the fixtures & articles belonging thereto." In 1907 the lease was vested in A. & the premises were occupied & used as a common lodging-house by W., who held as a weekly tenant from A. In June, 1907, the lessors served on A. a notice to repair the premises, & A. in writing made an offer to surrender the premises at once & to pay £100 towards the repairs, & this offer was accepted by the lessors. W., who had affixed to the premises things alleged to be tenant's or trade fixtures, was aware of what was going on, but the lessors did not know of his sub-tenancy until July 1, 1907. The lessors & A. wished to get rid of the sub-tenancy, & W. knew that this was their intention, & early in Aug. A. gave, & W. accepted, a notice to quit on Aug. 19. By an agreement in writing dated Aug. 7 between the lessors & W., the latter became the weekly tenant

of the lessors as from Aug. 12, but no agreement was entered into with reference to W.'s fixtures. By a surrender by deed executed on Aug. 9, but dated Aug. 6 so as to make it precede the agreement with W., A., as beneficial owner, surrendered & assigned the demised premises to the lessors, "to the intent that the residue . . . unexpired of the term of years" therein might merge & be extinguished in the freehold & inheritance. On Sept. 12, 1907, the lessors served W. with a notice to quit on Sept. 23 :—*Held* : (1) the lessee's covenant to deliver was binding on W., & was not confined to landlord's fixtures, but extended to tenant's & trade fixtures ; (2) an agreement to surrender precluded the lessee from removing fixtures then upon the demised premises, although they were tenant's or trade fixtures, but would not affect his sub-tenant's right of removal without the consent of the latter, although the exercise of that right might make the lessee unable to complete his contract with the lessor ; (3) a contract to surrender a lease was a contract to surrender in possession free from sub-tenancies ; (4) if W. consented to the surrender, his tenancy was thereby surrendered & his right to remove fixtures was gone ; (5) if W. did not consent to the surrender, he was between Aug. 9 & 12 the tenant of the lessors under the sub-tenancy granted by A., & even a rightful removal during this period by W. would have been a breach of the covenants for title implied by A.'s surrender ; (6) by accepting the tenancy commencing on Aug. 12 W. surrendered such tenancy as he already had & with it any right to remove fixtures. *Semble* : if a tenant, on surrendering his lease in order that a new lease be granted, makes no stipulation to the contrary, he loses his right to remove fixtures, inasmuch as the surrender *primâ facie* includes fixtures, & the subject of the new lease is *primâ facie* what is surrendered in order to be redemised ; although in exceptional cases a termor remaining in possession after the expiration of his term under circumstances showing that there is merely a prolongation of the term is allowed to remove fixtures after the term is ended.

In my opinion, however, if the tenant upon the surrender of his lease in order that a new lease may be granted makes no stipulation to the contrary, he does lose his right to remove tenant's fixtures, for the surrender of the demised premises *primâ facie* includes fixtures, & the subject of the new lease is *primâ facie* what is surrendered in order to be redemised (PARKER, J.).—LESCHALLAS v. WOOLF, [1908] 1 Ch. 641 ; 77 L. J. Ch. 345 ; 98 L. T. 558.

*Annotations* :—As to (1) *Reid. Re British Red Ash Collieries*, [1920] 1 Ch. 326. As to (2) *Reid. Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97. As to (4) *Fold. Slough Picture Hall Co. v. Wade, Wilson v. Neville, Reid* (1916), 32 T. L. R. 542. As to (5) *Fold. Slough Picture Hall Co. v. Wade, Wilson v. Neville, Reid* (1916), 32 T. L. R. 542.

**3499. — Specific words not assignable to one genus.**—A lease contained a covenant to yield up certain scheduled articles, together with all doors, wainscots, shelves, presses, dressers, drawers, locks, keys, bolts, bars, staples, hinges, hearths, chimney-pieces, mantelpieces, chimney-jams, foot-paces, slabs, coverings, window shutters, partitions, sinks, water closets, cisterns, pumps & rails, water tanks, " & other additions, improvements, fixtures & things " which were & should be anyways fixed or fastened upon the premises :—*Held* : the lessee could not make a marketable title even to articles in the nature of tenant's fixtures.

*Semble* : the general words could not be re-

stricted, there being no assignable genus to which the enumerated articles belonged.—WILSON v. WHATELEY (1860), 1 John. & H. 436 ; 30 L. J. Ch. 673 ; 8 L. T. 617 ; 25 J. P. 356 ; 7 Jur. N. S. 908 ; 9 W. R. 331 ; 70 E. R. 817. *Annotations* :—*Reid. Lambourn v. McLellan*, [1903] 2 Ch. 268 ; *Leschallas v. Woolf*, [1908] 1 Ch. 641.

## SECT. 8.—REMEDIES.

### SUB-SECT. 1.—OF LANDLORD.

**Action for waste.]—See Part XIX., Sect. 4, sub-sect. 2, A., *post*.**

**3500. Action on covenant.]—Case, in nature of waste, will lie against a tenant for years after the expiration of his term, as well as covenant, for the breach of those contained in his lease.—KINLYSIDE v. THORNTON (1776), 2 Wm. Bl. 1111 ; 96 E. R. 657.**

*Annotations* :—*Consd. Torriano v. Young* (1833), 6 C. & P. 8. *Fold. Marker v. Kenrick* (1853), 13 C. B. 188. *Reid. Jones v. Hill* (1817), 1 Moore, C. P. 100 ; *Burnett v. Lynch* (1826), 5 B. & C. 589 ; *Muskett v. Hill* (1839), 5 Bing. N. C. 694 ; *Defries v. Milne*, [1913] 1 Ch. 98.

**3501. — Pleading.]—SPILLER v. MASON (1845), 4 L. T. O. S. 115, 338.**

**3502. Trover—During continuance of term.]—Where certain mill machinery, together with a mill, had been demised for a term to a tenant, & he, without permission of his landlord, severed the machinery from the mill ; & it was afterwards seized under a *fi. fa.* by the sheriff, & sold by him :—*Held* : no property passed to the vendee, & the landlord was entitled to bring trover for the machinery, even during the continuance of the term.—FARRANT v. THOMPSON (1822), 5 B. & Ald. 826 ; 2 Dow. & Ry. K. B. 1 ; 106 E. R. 1392.**

*Annotations* :—*Consd. Bland v. Lynam* (1827), 5 L. J. O. S. C. P. 87. *Reid. Garland v. Carlisle* (1837), 4 Scott, 587 ; *Wiltshire v. Cottrell* (1853), 1 E. & B. 674 ; *Petre v. Ferrers* (1891), 61 L. J. Ch. 426.

**3503. — Or detinue.]—PETRE v. FERRERS, No. 3185, *ante*.**

*See, generally, TROVER.*

**3504. Proceeding for malicious injury—During continuance of term.]—Where a tenant, during his term, removed a copper, which was a fixture & was let with the house, & put it up in his own house :—*Held* : this was not a wilful & malicious trespass within 7 & 8 Geo. 4, c. 30, s. 24.**

[The tenant] had a right to keep the copper during the term, which has not yet expired ; the removal of it during the term is not a wilful & malicious trespass ; it was his own property for the term, & deft. could not even have obtained possession of it (TAIFORD, J.).—WERNECK v. JACOBS (1850), 15 L. T. O. S. 166.

**3505. Measure of damages—Value in severed state.]—Under a count for conversion of fixtures by severing & removing them, the value of the fixtures in their severed state can only be recovered & not the value of them, when annexed to the freehold.—MCGREGOR v. HIGH (1870), 21 L. T. 803.**

**3506. — — —.]—BARFF v. PROBYN, No. 3433, *ante*.**

**3507. Injunction—To restrain threatened removal.]—GEAST v. BELFAST (LORD) (1796), 3 Anst. 749, n. ; 145 E. R. 1027, n.**

**3508. — — —.]—A lessee of a mill & steam-engine covenanted to repair, reasonable wear & tear excepted. During the lease he added both to the height & extent of the mill, & removed all the works of the engine, except the fly-wheel, fly-wheel shaft & boiler, & attached to them a new engine of greater power. Injunction granted to restrain the assignees of the lessee, who had**

**Sect. 8.—Remedies: Sub-sects. 1 & 2. Sects. 9, 10, 11, 12, 13, 14 & 15. Part XV. Sect. 1: Sub-sect. 1.]**

become bkpt., from removing the parts of the new building & the new parts of the engine, subject to an action to be brought by the lessors to try the right.

The substituted engine is, in my opinion, subject to the stipulation, in the lease, as to the old engine. . . . I am therefore of opinion that I cannot allow the assignees to remove either the engine or the new building & consequently I shall grant the injunction (SHADWELL, V.-C.).—**SUNDERLAND v. NEWTON** (1830), 3 Sim. 450; 57 E. R. 1067.

*Annotation:—***Reid. Smith v. Mills** (1899), 18 T. L. R. 59.

**3509. — To prevent threatened sale—By sheriff.]—**Demurrer. A landlord filed a bill alleging that under an execution against his tenant, the sheriff was about to sell all the property on the demised premises, & that it appeared by the handbills that it was intended to sell the fixtures on the premises:—Demurrer overruled.

Supposing the sheriff is intending to sell all the grates & mantelpieces in the house, the damage would be very serious, & the landlord, I am of opinion, would be entitled to prevent the sale of that which was clearly not to be included in the execution (ROMILLY, M.R.).—**RICHARDSON v. ARDLEY** (1869), 38 L. J. 508.

*See, generally, INJUNCTION.*

#### SUB-SECT. 2.—OF TENANT.

*See, generally, TROVER.*

**3510. Whether trover maintainable—Unsevered fixtures.]—****MACKINTOSH v. TROTTER**, No. 3434, *ante*.

**3511. — — —.]—****ROFFEY v. HENDERSON**, No. 3465, *ante*.

**3512. — — —.]—****WILDE v. WATERS**, No. 3371, *ante*.

**3513. — — —.]—**Even a tenant who has a right as against his landlord to remove trade fixtures during the term cannot maintain trover for them while annexed to a part of the realty (KAY, L.J.).—**GOUGH v. WOOD & Co.**, [1894] 1 Q. B. 713; 63 L. J. Q. B. 564; 70 L. T. 297; 42 W. R. 469; 10 T. L. R. 318; 9 R. 509, C. A.

*Annotations:—***Refd. Huddersfield Banking Co. v. Lister**, [1895] 2 Ch. 273; **Thomas v. Jennings** (1896), 66 L. J. Q. B. 5; **Hobson v. Gorringe**, [1897] 1 Ch. 182; **Reynolds v. Ashby**, [1904] A. C. 466; *Re Allen*, [1907] 1 Ch. 575; **Ellis v. Glover & Hobson**, [1908] 1 K. B. 388; *Re Morrison, Jones & Taylor, Cooke v. Morrison, Jones & Taylor*, [1914] 1 Ch. 50; *Re Rogerstone Brick & Stone Co., Southall v. Wescomb*, [1919] 1 Ch. 110.

**3514. — Fixed chattels—Machinery parts.]—**Certain parts of a machine had been put up by the tenant during his term, & were capable of being removed without either injuring the other parts of the machine or the building, & had been usually valued between the outgoing & incoming tenant:—**Held: (1)** these were the goods & chattels of the outgoing tenant.

(2) If the jibs are to be considered as annexed to & parcel of the freehold, then admitting that plf's. might have removed them during the term, as being erections for the benefit of trade, yet they could not after the term maintain trover for them; because the action of trover is maintainable in respect of personal chattels only. Upon the matters stated, we think the proper conclusion of fact is, that these things were personal chattels (ABBOTT, C.J.).—**DAVIS v. JONES** (1818), 2 B. & Ald. 165; 106 E. R. 327.

*Annotations:—***As to (1) Distl. Lyde v. Russell** (1830), 9

L. J. O. S. K. B. 26. **Dbtd. Wilde v. Waters** (1855), 24 L. J. C. P. 193. *As to (2) Refd. Minshall v. Lloyd* (1837), 2 M. & W. 450; **Leader v. Homewood** (1858), 27 L. J. C. P. 316; **Gough v. Wood**, [1894] 1 Q. B. 713.

**3515. — — —.]—**In trover against four defts. by the assignees of an insolvent, the first count alleged that the insolvent, before his insolvency, was possessed of certain goods, etc.; that the same afterwards, & before the insolvency, came to the possession of two of defts. by finding; that these two defts. would not deliver them; & that said defts., after the insolvency, converted them. The second count was on the possession of the assignees, & alleged a conversion by said defts.:—**Held: the declaration alleged in each count a sufficient breach as against the four defts.**

On a declaration in trover for goods, chattels, & fixtures, enumerating, among other merely movable articles, stoves, shelves, closets, cupboards, etc., general damages having been assessed on the whole declaration:—**Held: the word "fixtures" would not necessarily be taken to mean things affixed to the freehold, & therefore the judgment ought not to be arrested.**

It does not necessarily follow that the word "fixtures" must import things affixed to the freehold, nor has the word necessarily acquired that legal sense. . . . Every article enumerated in this declaration may be a purely movable chattel, & the fit subject of an action of trover. For instance, they might be affixed to a barn or other structure, so supported as that it might itself be the subject of this form of action (PARKE, B.).—**SHEEN v. RICKIE** (1839), 7 Dowl. 335; 5 M. & W. 178; 8 L. J. Ex. 217; 3 J. P. 531; 3 Jur. 607; 151 E. R. 76.

*Annotations:—***Refd. Wiltshear v. Cottrell** (1853), 1 E. & B. 674; **Elliott v. Bishop** (1854), 10 Exch. 496. **Mentd. Chadwick v. Trower** (1839), 8 Scott, 1.

**3516. — Barn resting by own weight.]—****WANSBROUGH v. MATON**, No. 3180, *ante*.

*See, also, No. 3515, ante.*

**3517. — During tenancy—Removal by third party.]—**A tenant has, during the term, a sufficient interest in the fixtures to entitle him to maintain trover against a third party who wrongfully removes them, although at the end of the term he may be bound to leave them for the use of the landlord (PARKE, B.).—**HITCHMAN v. WALTON** (1838), 4 M. & W. 409; 1 Horn & H. 374; 8 L. J. Ex. 31; 150 E. R. 1489.

*Annotations:—***Refd. Walmsley v. Milne** (1859), 7 C. B. N. S. 115. **Mentd. Weaton v. Woodcock** (1839), 5 M. & W. 143; **Doe d. Higginbotham v. Barton** (1840), 11 Ad. & El. 307.

**After expiration of tenancy.]—***See Nos. 3370, 3409, 3418, ante.*

**Fixed chattels.]—***See No. 3514, ante.*

**3518. — Severance & disposal by landlord—Under distress.]—**If a landlord, under a distress for rent arriere, sever fixtures from the freehold, & dispose of them, he is liable in trover.—**DALTON v. WHITEM** (1842), 3 Q. B. 961; 3 Gal. & Dav. 260; 12 L. J. Q. B. 55; 6 Jur. 1063; 114 E. R. 777.

*Annotations:—***Refd. Walmsley v. Milne** (1859), 7 C. B. N. S. 115; **Beck v. Denbigh** (1860), 29 L. J. C. P. 273.

**3519. — Against assignee of term—Taking forcible possession.]—**The forcible taking possession of a house & fixtures by the assignee of a term in the house, is not a conversion of such fixtures.—**LONGSTAFF v. MEAGOE** (1834), 2 Ad. & El. 167; 4 Nev. & M. K. B. 211; 4 L. J. K. B. 28; 111 E. R. 65.

*Annotations:—***Refd. Hitchman v. Walton** (1838), 4 M. & W. 409; *Re Brooke, Ex p. Scott* (1857), 29 L. T. O. S. 314.

**3520. Recovery of value—Fixtures unsevered during tenancy.]—**An outgoing tenant cannot recover the value of manure which he is bound to

leave on the farm, nor the value of fixtures which were not severed by him during his occupation.—*TYLER v. HOOKE* (1855), 25 L. T. O. S. 69, 100; 19 J. P. 326.

3521. —[As between landlord & tenant an agreement by the landlord that the tenant shall be at liberty to leave tenant's fixtures on the premises after the expiration of the tenancy, & to sever & remove them after they have thus become part of the freehold, may, in the event of the landlord's subsequent refusal to permit severance & removal, give the tenant a right of action for the value of the fixtures. But such an agreement gives the tenant no such right of action against the landlord's mtgees. who have in the meantime entered into possession under a prior mtge.

If the contract found by the jury was sought to be treated as a grant of a licence to enter upon the premises at a future time, & to sever the fixtures from the freehold, it would be invalid as not being in writing & under seal (*HAWKINS, J.*).—*THOMAS v. JENNINGS* (1896), 66 L. J. Q. B. 5; 75 L. T. 274; 45 W. R. 93; 12 T. L. R. 637; 40 Sol. Jo. 731.

Measure of damages—Wrongful distress of fixtures.]—*See DISTRESS*, Vol. XVIII., pp. 387, 388, Nos. 1277, 1278.

#### SECT. 9.—RIGHTS OF PARTIES IN BANKRUPTCY PROCEEDINGS.

Right of trustee in bankruptcy — "Reputed ownership."—*See BANKRUPTCY*, Vol. V., pp. 743 *et seq.*

Disclaimer by trustee.]—*See BANKRUPTCY*, Vol. V., pp. 938–953.

#### SECT. 10.—COVENANTS TO REPAIR FIXTURES.

*See Part XVIII.*, Sect. 3, sub-sect. 2, C. (a).

#### SECT. 11.—CONTRACTS FOR SALE OF FIXTURES.

Whether sale of "interest in land"—Within Statute of Frauds, s. 4.]—*See SALE OF LAND.*

Whether sale of "goods, wares or merchandise"—Within Stamp Act.]—*See REVENUE; SALE OF GOODS.*

Whether sale of "goods & chattels"—Within Statute of Frauds, s. 17.]—*See SALE OF GOODS.*

3522. Whether contract to purchase implied—On acceptance of demise.]—The acceptance of a demise of a house containing fixtures, does not raise an implied contract to pay for such fixtures. In debt for rent on a demise for years, with a count for fixtures sold, *pltf.* claimed by his particulars £5 5s. for rent, & £12 for fixtures. *Deft.* paid £11 5s. into *ct.*:—*Held*: no admission of *deft.*'s liability in respect of fixtures, to a greater amount than had been paid into *ct.*—*GOFF v. HARRIS* (1843), 5 Man. & G. 573; 12 L. J. C. P. 273; 1 L. T. O. S. 109; 134 E. R. 689.

#### SECT. 12.—LARCENY OF FIXTURES.

*See CRIMINAL LAW*, Vol. XV., pp. 900, 910, Nos. 9872, 9873, 10,001–10,015.

#### SECT. 13.—FIXTURES AS SUBJECT-MATTER OF BILLS OF SALE.

*See BILLS OF SALE*, Vol. VII., pp. 33 *et seq.*

#### SECT. 14.—FIXTURES AS SUBJECT-MATTER OF DISTRESS.

*See DISTRESS*, Vol. XVIII., pp. 295 *et seq.*

#### SECT. 15.—SEIZURE OF FIXTURES IN EXECUTION.

Under writ of *fi. fa.*]—*See EXECUTION*, Vol. XXI., pp. 484–486.

## Part XV.—Rent.

### SECT. 1.—NATURE OF RENT.

#### SUB-SECT. 1.—IN GENERAL.

#### 3523. Grant & reservation of rent distinguished.]

—There are two ways of creating a rent; the owner of the lands either grants a rent out of it; or grants the lands & reserves a rent (*per cur.*).—*COOPER* (1768), 2 Wils. 375; 95 E. R. 870.

*Annotations*:—*Reid. Langford v. Selmes* (1857), 3 K. & J. 220. *Mentl. Parmenter v. Webber* (1818), 2 Moore, C. P. 656; *Preece v. Corrie* (1828), 2 Moo. & P. 57; *Pluck v. Digges* (1831), 5 Bl. N. S. 31; *Lecoy v. Mogford* (1856), 2 Jur. N. S. 1084; *Jolly v. Arbuthnot* (1859), 4 De G. & J. 224.

#### 3524. Distinguished from payment under licence.]

—*HANCOCK v. AUSTIN*, No. 3532, *post*.

—*Royalties.*—*See Sub-sect. 4, post.*

Distinction between lease & licence.]—*See, generally, Part VI.*, Sect. 2, sub-sect. 2, *ante*.

#### 3525. Rent service—Conversion into rent seek—

By severance from reversion.]—*VIGERS v. ST. PAUL'S (DEAN)* (1849), 14 Q. B. 909; 18 L. J. Q. B. 97; 13 Jur. 256; 117 E. R. 349; *reversd.* without affecting this point, 14 Q. B. 920, Ex. Ch.

#### 3526. "Nominal rent"—Within Finance (1909–

1910) Act, 1910 (c. 8)—Meaning of.]—The fact that the rent reserved under a lease is only a ground rent & does not represent the full value of the land & the buildings on it does not constitute it a "nominal rent" within above Act, s. 13 (2). That expression as there used means a sum paid by way only of an acknowledgment of the lessor's title without any relation to the value of the premises demised.—*STEPNEY & BOW EDUCATIONAL FOUNDATION (GOVERNORS) v. INLAND REVENUE COMRS.*, [1913] 3 K. B. 570; 82 L. J. K. B. 1300;

### PART XIV. SECT. 11.

*h. Buildings & improvements—Includes fixtures.*—*Re McCONKEY'S ARBITRATION* (1920), 47 O. L. R. 411; 54 D. L. R. 127; 18 O. W. N. 171.—CAN.

*k. At expiration of term—Effect*

*of forfeiture.*—*CALGARY BREWING & MALTING CO. LTD. v. WILLIAMS*, [1919] 1 W. W. R. 653.—CAN.

### PART XV. SECT. 1, SUB-SECT. 1.

*1. Not a chose in action.*—Rent to accrue due is not a chose in action.—

*HARRIS v. MEYERS* (1867), 2 Ch. Ch. 121.—CAN.

*m. Whether assignable—Or distraintable.*—A landlord may assign rent, recharge or rent seek may be distrained for, & by one who has not the reversion, as, for instance, the

**Sect. 1.—Nature of rent: Sub-sects. 1, 2, 3 & 4.]**

109 I. T. 165; 29 T. L. R. 631; *reversd.* by consent, [1915] W. N. 217, C. A.

**Annotation:—Mentd.** *Camden v. I. R. Comrs.*, [1914] 1 K. B. 641.

**3527. Three years "Improved or rack rent"—Recoverable by landlord—On failure of tenant to give notice of writ of ejectment.]—Demise by lease of certain lands, together with the mines under them, with liberty to dig for ore in other mines under the surface of other lands not demised; the tenant fraudulently concealed a declaration in ejectment delivered to him, & suffered judgment to go by default. The declaration in ejectment did not mention mines at all, but the sheriff, in executing the writ of possession, by the concurrence of the tenant, delivered possession of the premises demised to the tenant, & also of those mines in which he had liberty to dig:—*Held*: although the latter could not be recovered under the declaration in ejectment, still the tenant by his own act had estopped himself from taking that objection, & in an action for the value of three years' improved rent, under Distress for Rent Act, 1737 (c. 19), the landlord might recover the treble rent, in respect not only of the demised premises, but of the mines in which the tenant had only a liberty to dig. The improved or rack rent mentioned in Distress for Rent Act, 1737 (c. 19), s. 12, is not the rent reserved, but such a rent as the landlord & tenant might fairly agree on at the time of delivering the declaration in ejectment, in case the premises were then to be let.—*CROCKER v. FOTHERGILL* (1819), 2 B. & Ald. 652; 106 E. R. 503.**

*See, now*, Law of Property Act, 1925 (c. 20), s. 145; & *generally*, REAL PROPERTY.

**"Rack rent"—Within Solicitors' Remuneration Act, 1881 (c. 44).—See SOLICITORS.**

*See, also*, DISTRESS, Vol. XVIII., p. 262, Nos. 16-23.

**Dead rent.]—See MINES.**

**SUB-SECT. 2.—MUST ISSUE OUT OF LAND.**

**3528. Not out of fair.]—A fair is but a franchise or liberty, not manurable, out of which a rent cannot be reserved (*per CUR.*).—*JEWELL'S CASE* (1588), 5 Co. Rep. 3 a; 77 E. R. 51.**

**Annotations:—Refd.** *Bally v. Wells* (1769), Willm. 341; *British Mutoscope & Biograph Co. v. Homer*, [1901] 1 Ch. 671. **Mentd.** *Salisbury's (Bp.) Case* (1614), 10 Co. Rep. 58 b.

**3529. Not out of incorporeal hereditament.]—WINDSOR (DEAN & CHAPTER) v. GOVER**, No. 3584, *post*.

**3530. —.]—If the meaning be that the use & enjoyment of this land passed as appurtenant, that would be a mere privilege or easement & the rent would not issue out of that (LORD TENTERDEN, C.J.).—*BUSZARD v. CAPEL* (1828), 8 B. & C. 141; 2 Man. & Ry. K. B. 197; 6 L. J. O. S. K. B. 267; 108 E. R. 996; *affd. sub nom. CAPEL v. BUSZARD* (1829), 6 Bing. 150, Ex. Ch.**

**Annotations:—Refd.** *Cuthbert v. Robinson* (1882), 51 L. J. Ch. 238; *Perring v. Emerson* (1905), 75 L. J. K. B. 12. **Mentd.** *Hancock v. Austin* (1863), 14 C. B. N. S. 634.

**3531. —.]—Rent cannot issue out upon incorporeal hereditament (LITTLEDALE, J.).—**

*assignee of the landlord.*—*WHITE v. HOPE* (1866), 17 C. P. 52.—**CAN.**

**PART XV. SECT. 1, SUB-SECT. 3.**

**3534.1. Ranks with specialty debt.]—WETMORE v. KETCHUM** (1862), 5 All.

**408.—CAN.**

*n. Rent falling due after lessee's death.*—Rent falling due after the death of the lessee, under a covenant for himself, his heirs, etc., to pay it, is not such a debt as can be enforced against his real estate in the hands of

*GARDINER v. WILLIAMSON* (1831), as reported in 2 B. & Ad. 336; 109 E. R. 1168.

**Annotations:—Mentd.** *Neale v. Mackenzie* (1836), 1 M. & W. 747; *R. v. Hockworthy* (1838), 7 Ad. & El. 492; *Harris v. Morris* (1842), 10 M. & W. 260; *Evans v. Robins* (1862), 6 L. T. 897.

**3532. Payment for use of room & steam power.]—A., had the use of a room in a factory belonging to B. in which A., kept some machines, which were worked by steam power supplied by B., from an engine in another room; B. had a right to enter A.'s room to oil the machinery. A. had to pay a sum of money weekly for the use of the room & the steam power. Several weekly payments were in arrear. B., in A.'s absence, entered A.'s room by means of a window, which A. had left unfastened, he having also locked the door, & then distrained the machines:—*Held*: if there were a demise at all, it was of the exclusive possession of the room, & if there were such a demise, B. had no right to enter by the window for the purpose of distraining. *Semble*: the money payable for the use of the room & steam power was not a rent issuing out of the ground on which the machines stood.—*HANCOCK v. AUSTIN* (1863), 14 C. B. N. S. 634; 2 New Rep. 243; 8 L. T. 429; 10 Jur. N. S. 77; 11 W. R. 833; 143 E. R. 593; *sub nom. HANCOCK v. AUSTIN*, 32 L. J. C. P. 252.**

**Annotations:—Distd.** *Marshall v. Schofield* (1882), 52 L. J. Q. B. 58. **Refd.** *Solby v. Greaves* (1868), L. R. 3 C. P. 594. **Mentd.** *Nash v. Lucas* (1867), L. R. 2 Q. B. 590.

**3533. — Effect of destruction of premises.]—Pltfs., by an agreement in writing, let to defts. "all the room & power" in a certain mill, together with the warehouse room in connection therewith, in consideration of which defts. agreed to pay £500, subsequently increased by parol agreement to £700 *per annum*, by quarterly instalments after the first year:—*Held*: the agreement amounted to a demise of a tenement; the consideration to be paid by defts. was rent issuing out of the land; & defts. were liable in respect of three quarters' rent which had become due after the mill had been destroyed by fire.—*MARSHALL v. SCHOFIELD & CO.* (1882), 52 L. J. Q. B. 58; 47 L. T. 406; 31 W. R. 134, C. A.**

**Annotation:—Refd.** *Matthey v. Curling*, [1922] 2 A. C. 180.

**Land & chattels comprised in one rent.]—See Sect. 3, sub-sect. 5, *post*.**

**SUB-SECT. 3.—CHARACTER OF RENT AS DEBT.**

*See, now*, Administration of Estates Act, 1925 (c. 23), s. 34 (1); sched. I., Part I.

**3534. Ranks with specialty debt.]—A bond given by a man to a woman, in consideration of their intermarriage, conditioned, that if she survived him he would leave her such a sum of money, & no assets *ultra* may be pleaded in bar to an action against the obligor, as administratrix, for rent arrear on a demise by deed; for they are in equal degree.—*CAGE v. ACTON* (1699), 12 Mod. Rep. 288; 1 Ld. Raym. 515; Holt. K. B. 309; 88 E. R. 1327; *sub nom. GAGE (OR GRAY) v. ACTON*, 1 Com. 67; Carth. 511; 1 Freem. K. B. 512; 1 Salk. 325.**

**Annotations:—Folld.** *Stonehouse v. Ilford* (1706), 1 Com. 145. **Apld.** *Davis v. Gyde* (1835), 2 Ad. & El. 623. **Mentd.** *Milbourn v. Ewart* (1793), 5 Term Rep. 381; *Purdew v.*

*his devisee.*—*MACNAMARA v. VINCENT* (1852), 2 I. Ch. R. 481; 4 Ir. Jur. 197.—**IR.**

*o. Two years' rent—Each year separate debt.]—WALLACE v. WHELAN* (1842), Ir. Cir. Rep. 682.—**IR.**

Jackson (1824), 1 Russ. 1; Honner v. Morton (1823), 3 Russ. 65; Paine v. Emery (1835), 4 L. J. Ex. 250; Hartley v. Manton (1843), 13 L. J. Q. B. 61; Rogers v. Acaster (1851), 14 Beav. 445; Duberley v. Day (1852), 16 Beav. 33; Jones v. Davies (1860), 5 H. & N. 760; Fitzgerald v. Fitzgerald (1868), L. R. 2 P. C. 83.

**3535. — Whether demise by deed or parol.]—**Rent incurred in the lifetime of testator, though reserved upon a parol lease, shall be paid before bond debts.—*WILLETT v. EARLE* (1687), 1 Vern. 490; 23 E. R. 613.

**3536. —**—[—Rent arrear for land demised whether by deed or parol, is of equal degree with specialty debts.—*THOMPSON v. THOMPSON* (1821), 9 Price, 464; 147 E. R. 152.

*Annotations:—**Apld.* Clough v. French (1845), 2 Coll. 277. *Refd.* Talbot v. Shrewsbury (1873), L. R. 16 Eq. 26. *Mentd.* *Re* Hayward, Tweedie v. Hayward, [1901] 1 Ch. 221.

**3537. —**—[—Debt for rent & upon specialty are in equal degree (*per cur.*).—*STONEHOUSE v. IRFORD* (1706), 1 Com. 145; 92 E. R. 1005.

**3538. —**—[—In the administration of assets, a debt due for rent of land occupied by a tenant from year to year is of a higher class than simple contract debts.—*CLOUGH v. FRENCH* (1845), 2 Coll. 277; 15 L. J. Ch. 24; 6 L. T. O. S. 215; 9 Jur. 1029; 63 E. R. 733.

*Annotations:—**Distd.* Vincent v. Godson (1853), 1 Sm. & G. 384. *Refd.* Talbot v. Shrewsbury (1873), L. R. 16 Eq. 26.

**3539. — Whether lease in writing or constructive—Unless land out of jurisdiction.]—**(1) Rent due ranks as a specialty debt where the relation of landlord & tenant exists in respect of lands within the jurisdiction whether that relation exists upon a lease or a constructive tenancy from year to year. But where there had only been an agreement for a lease, & an entering into possession & the master found, following an affidavit in the same words, that testator, after the first half year's rent had accrued due from time to time admitted the claim in respect of the rent, & by the agreement the rent was made payable annually:—*Held*: the relation of landlord & tenant did not exist so as to make rent due rank as a specialty debt.

(2) The land, the subject of the agreement, being land in Jamaica:—*Held*: the above doctrine being founded upon privity of estate, rent in arrear could have no priority in the administration of assets in England, even had the land been actually demised.—*VINCENT v. GODSON* (1854), 4 De G. M. & G. 546; 2 Eq. Rep. 834; 24 L. J. Ch. 121; 23 L. T. O. S. 85; 2 W. R. 408; 43 E. R. 620, L. C.

**3540. — Only where relationship of landlord & tenant exists.]—***VINCENT v. GODSON*, No. 3539, *ante*.

**3541. — Under agreement for lease—Agreement under seal.]—**By an agreement under seal, E. covenanted with B., his exors. & administrators, that he would at any time thereafter, at the request of B., his exors., administrators or assigns, execute a demise of certain freeholds for the term of twenty-one years, at the yearly rent of £180, which lease should contain a covenant to keep the premises in good & substantial repair, & all other usual covenants; & B. thereby, for himself, his exors., or administrators, covenanted with E., whenever thereto requested by E., to accept such lease, & execute a counterpart thereof. Under this agreement B. entered & paid rent until his death, which took place before Jan. 1, 1870, & after his death his widow & legal personal representative entered & paid rent. No lease was ever executed, & no such request, as above-mentioned, was ever made by either party. Since B.'s death rent had accrued due, & a sum was required for repairs:—*Held*: the liability under the deed was from the

first, & still was, a specialty; hence, a claim by E. for the sums due for arrears of rent & dilapidations under the covenants agreed to be entered into by B. were debts by specialty against his estate. *Qu.*: whether an arrear of rent accruing due after the death of a lessee by lease or parol, dying before Jan. 1, 1870, ranks as a specialty debt against his estate.—*KIDD v. BOONE* (1871), L. R. 12 Eq. 89; 40 L. J. Ch. 531; 24 L. T. 356.

*Annotation:—**Refd.* Talbot v. Shrewsbury (1873), L. R. 16 Eq. 26.

**3542. — If claim for rent only.]—***TALBOT v. SHREWSBURY* (EARL), No. 3575, *post*.

**3543. — No priority in administration of estate.]—**Rent is a specialty debt within the meaning of Administration of Estates Act, 1869 (c. 46), & therefore a landlord has no preferential claim against the estate of a deceased tenant for rent in arrear at the death of the tenant as against the simple contract creditors.—*Re HASTINGS, SHIRREFF v. HASTINGS* (1877), 6 Ch. D. 610; 47 L. J. Ch. 137; 25 W. R. 842.

—[—*See, also*, No. 4081, *post*.

*See, generally*, EXECUTORS, Vol. XXIII., p. 351.

#### SUB-SECT. 4.—ROYALTIES.

*See, generally*, MINES.

**3544. On brick field.]—**Payments agreed to be made by an occupier of the soil under a parol licence to dig earth & make bricks are in the nature of rent, & as such a mtgee. of the premises is entitled, after notice in the usual manner, to all sums in arrear from such occupier at the time of the notice, or which may become due afterwards.—*Re BRINDLEY, Ex p. HANKRY* (1829), Mont. & M. 247.

**3545. — Number of bricks burnt & quantity of clay dug.]—**A. took of B. a house at a certain yearly rent, & it was also agreed that A. should take a certain marl & slack pit, & pay yearly, on the usual quarter days, 8d. per cubic yard for all the marl & slack gotten by him, & that he should also work a certain mine, paying 1s. per thousand for all bricks made & burnt by him from the mine:—*Held*: the marl pits & brick mine were demised to A. at a rent sufficient certain, & a distress would lie for it.—*DANIEL v. GRACIE* (1844), 6 Q. B. 145; 13 L. J. Q. B. 309; 8 Jur. 708; 115 E. R. 56.

*Annotations:—**Refd.* Pollett v. Forest (1847), 8 J. T. O. S. 534; L. v. Westbrook, H. v. Everist (1847), 10 Q. B. 178; Edmonds v. Eastwood (1858), 2 L. & N. 511; *Re* Roundwood Colliery Co., Lee v. Roundwood Colliery Co., [1897] 1 Ch. 373; Holwell Iron Co. v. Mid. Ry., [1910] 1 K. B. 296. *Mentd.* Turner v. Cameron (1870), 22 L. T. 525.

**3546. —**—[—On appeal against a poor rate, by the occupier of a brick field, a case was stated showing: that applt. held the land, ten acres, for the purpose of getting from it clay to make bricks, under a lease for seven or fourteen years, or till the earth should be all dug out; that he paid £2 per acre, without reference to the use made of the land, & a royalty of 1s. 6d. for every thousand of bricks moulded in any one year; that the value of land in the parish, let for general agricultural purposes, was £2 6s. a year; that applt. had on the field four brickmaking "stools," each stool capable of producing 750,000 bricks; that the field originally contained sufficient clay for thirty-one millions of bricks; that in the year before the rate was laid applt. had made nearly three millions; & that there remained clay enough for twelve millions. The sessions also found that the rent which a tenant would have been willing to pay on taking a lease of the premises with liberty to consume the brick earth, & without being liable to

*Sect. 1.—Nature of rent: Sub-sects. 4 & 5.]*

royalty, was £10 per acre; & they confirmed the rate, by which applt. was assessed at £2 6s. per acre, & for royalty at 1s. 6d. per thousand on as many bricks as the stools were capable of producing in a year:—*Held*: (1) the rent, estimated according to Parochial Assessments Act, 1836 (c. 96), s. 1, was the proper criterion of the rate on this property; & assuming the above facts to have appeared, without any specific finding as to the rent which a tenant would be willing to pay; the royalty, together with the fixed annual charge, was properly considered as the rent; the payment in respect of the brick earth was not the less a rent because the subject matter of the renting was in a course of being wholly consumed; in absence of proof to the contrary, the sessions were right in assuming the number of bricks which the stools could make to have been actually made within the year of rating; the rate was properly assessed on the number supposed to be made in the particular year; & no deduction was to be made for the breeze, ashes, & other materials used in making the bricks, it being presumable that these were allowed for in fixing the royalty; (2) the sessions having found specifically the sum which a tenant in their opinion would give on taking a lease with liberty to consume the earth, & without royalty, namely £10 a year per acre, that sum, from which tenant's rates & taxes were to be deducted, must be considered as the rent within the meaning of Parochial Assessments Act, 1836 (c. 96), s. 1; & no inference from other facts was admissible; & this ct. ordered the rate to be amended accordingly.

(3) In another case not materially differing, but in which the sessions neither expressly stated the rent which, in their opinion, a tenant might reasonably be expected to pay, nor gave data for estimating it, except by stating the number of stools at work, & the amount of royalty actually paid, under an agreement still subsisting, in the five years immediately before that for which the rate was made; & the question propounded was "What is the net annual value of the land?":—*Held*: the fixed sum paid for occupation, & the royalty, constituted the rent: but this ct. could not determine the amount which, at the time of making the rate, a tenant about to take a lease might reasonably be expected to pay. Nor, in the absence of materials for such estimate, could the assessment be grounded on the ordinary amount of rent paid for land in the parish used for agricultural purposes, or the amount paid for the best garden in the parish. The ct. sent the rate back to the sessions, to be amended according to the principles laid down in the preceding case.—*R. v. WESTBROOK*, *R. v. EVERIST* (1847), 10 Q. B. 178; 2 New Mag. Cas. 131; 2 New Sess. Cas. 599; 16 L. J. M. C. 87; 9 L. T. O. S. 21; 11 J. P. 277; 11 Jur. 515; 116 E. R. 69.

*Annotations*:—*As to* (1) *Reid*. Ward v. A.-G. for New Zealand (1907), 96 L. T. 280. *As to* (2) *Apld.* Farnham Flint, Gravel & Sand Co. v. Farnham Union, [1901] 1 Q. B. 272. *As to* (3) *Apld.* R. v. Abney Park Cemetery Co. (1873), L. R. 8 Q. B. 515.

**3547. On coal raised—Rent passing with reversion—Though described as "consideration."**—In a mining lease, besides an annual surface rent, certain sums, payable half-yearly, described as "further consideration-money" & depending upon the rate of working the mines, were reserved

to the lessor, his heirs & assigns:—*Held*: on the death of the lessor intestate, these sums were, not purchase-money passing to the personal representative of the lessor, but in the nature of rent, & therefore passed to the heir as incident to the reversion.—*BARRS v. LEA* (1864), 3 New Rep. 635; 33 L. J. Ch. 437; 10 L. T. 567; 10 Jur. N. S. 996; 12 W. R. 525.

**3548.** —[An express power, in the ordinary form, in a mining lease which reserves rents & royalties, to distrain for rent in arrear on goods & chattels of the lessee on premises other than those demised, is not a "licence to take possession of personal chattels as security for a debt," within the meaning of Bills of Sale Act, 1878 (c. 31), s. 4, & is not therefore invalidated by that Act when unregistered.

Although these rents were in the nature of royalties payable for the coal won, they were rents which could be distrained for at common law on the property demised without any express power of distress (*LINDLEY, L.J.*).—*Re ROUNWOOD COLLIERY CO., LEE v. ROUNWOOD COLLIERY CO.*, [1897] 1 Ch. 373; 66 L. J. Ch. 186; 75 L. T. 641; 45 W. R. 324; 13 T. L. R. 175; 41 Sol. Jo. 240, C. A.

*Annotation*:—*Menfd.* Venner's Electrical Cooking & Heating Appliances v. Thorpe, [1915] 2 Ch. 404.

**3549. On minerals raised—Provision for minimum annual payment.**—W., lessee of certain mines of ironstone, coal & other minerals, for a term of thirty years, to be computed from Mar. 1839, demised same, in Nov. 1840, to deft. for twenty-three years, reserving a royalty upon the ore & coal raised by deft., or the annual sum of £100 in lieu thereof, if the royalties in any year should not amount to that sum; with power to W. to distrain for the rents, reservations, etc.; & with liberty to deft., during the demise, to use, jointly with W., a railway then on the land demised; deft. covenanting to repair same, or to do so jointly with others who might use it: he having leave to divert it at his own expense if he thought fit. W., during the demise, assigned to pltf. "the rents, reservations & royalties, & all other the estate, right, title," etc., of W., "of, in, or in respect of the demised premises; & the benefit of the covenants in the said lease contained." In an action by pltf. to recover arrears in lieu of royalties, accrued since the assignment:—*Held*: (1) by the deed of W. in 1840, a rent was created, & not a mere covenant in gross; such rent was assignable, & pltf., as assignee of W., could sue deft. for such rent; (2) the fact, that deft. had been prevented by pltf. from using the railway, did not constitute an eviction, so as to disentitle pltf. to the rent: the use of the railway being an easement, & not part of the demise.—*WILLIAMS v. HAYWARD* (1859), 1 E. & E. 1040; 28 L. J. Q. B. 374; 33 L. T. O. S. 344; 5 Jur. N. S. 1417; 7 W. R. 563; 120 E. R. 1200.

*Annotations*:—*As to* (1) *Reid*. Evans v. Robins (1863), 11 L. T. 211; Wedd v. Porter, [1916] 2 K. B. 91. *As to* (2) *Reid*. Evans v. Robins (1863), 12 W. R. 604; Chappell v. Mason (1894), 10 T. L. R. 404.

*As to royalties generally, see MINES.*

## SUB-SECT. 5.—SUMS PAYABLE IN GROSS.

**3550. Fine.**—Under 37 Hen. 8, c. 12, the payment of a large fine, provided it be attended by no diminution of the accustomed rent, is not fraudulent.

## PART XV. SECT. 1, SUB-SECT. 4.

**35481. On coal raised.**—Royalties on coal & amounts due for wayleave with

respect to coal mined on adjoining lands are rent within Bkpy. Act, s. 52.—*Re HUMBERSTONE COAL CO., LTD., Ex p. NAT. TRUST CO., LTD.*, [1925] 3

D. L. R. 154; 2 W. W. R. 68; 5 C. B. R. 719; *revgg.*, [1925] 1 W. W. R. 964; 5 C. B. R. 639.—*CAN.*

lent or covinous within the statute ; & the 2s. 6d. in the pound will be decreed upon the rent only.—*ST. PAUL'S (MINOR CANONS) v. CRICKETT* (1817), 5 Price, 14 ; Dan. 37 ; 146 E. R. 521.  
*Annotation*.—*Consd.* Vivian v. Cochrane (1855), 4 De G. M. & G. 818.

**3551. — Payable by annual instalments.]—***DUNN v. BURRELL & GOFFE*, No. 3555, *post*.

**3552. Sum payable annually.]—**D. let certain lands for a term of years, the lessees covenanting that they or one of them, their exors. & assigns should pay or cause to be paid to D. & his wife their heirs & assigns during the term the sum of £100 on the usual feasts in the year, & should also pay to the lessor's daughter another sum at certain days for her advancement in marriage. On his death intestate, his heir being under age a question arose whether the annual sum during the heir's minority went to the crown or not :—*Held* : it was not a rent reserved but a sum in gross & due to the exors. or administrators of the lessor & of his wife, viz. the second husband of the wife, she having married again.—*DACRES' (LORD) CASE* (1568), 3 Dyer, 275 b ; 73 E. R. 616.

*Annotations*.—*Refd.* Delacherois v. Delacherois (1864), 11 H. L. Cas. 62. *Mentd.* Myght's Case (1609), 8 Co. Rep. 163 b.

**3553. —.]—***WENTWORTH v. ABRAHAM* (1627), Litt. 61 ; 124 E. R. 137.

**3554. —.]—**Lessee for a term of years under-leased for a term longer than his own, the under-lessee covenanting to pay rent to lessee :—*Held* : the exor. of lessee might sue the underlessee for rent accruing during the continuance of lessee's term.

It is asked whether this is a covenant for the payment of a gross sum or for the payment of rent. Upon all the authorities, I consider it a payment in the nature of rent. The cases of *Newcomb v. Hardy*, No. 3561, *post*, & *Lloyd v. Langford*, No. 3559, *post*, both show that where the whole of a term is assigned, a gross sum reserved periodically to the assignor is a payment in the nature of rent. If it were held otherwise, great injustice might be occasioned, as the tenant, if evicted, would have no answer to an action on his covenant, for payment of the sum in question ; whereas if it be considered as rent, eviction would be answer to the lessor's claim. As to the case of *Thorn v. Woolcombe*, No. 6798, *post*, it amounts to no more than a decision, that when the term is merged in the inheritance, the rent reserved is extinguished ; little more than had before been decided in *Webb v. Russell*, No. 3585, *post*, which excited so much attention at the time, but which has long been recognised as undoubted law. It is a fallacy to say *plf's. sue as assignees of the reversion* ; they sue on privity of contract ; & the contract is one on which they are entitled to recover (*TINDAL, C.J.*)—*BAKER v. GOSTLING* (1834), 1 Bing. N. C. 19 ; 4 Moo. & S. 539 ; 3 L. J. C. P. 292 ; 131 E. R. 1024.

*Annotations*.—*Consd.* Williams v. Hayward (1859), 1 E. & E. 1040. *Refd.* Pollock v. Stacy (1847), 9 Q. B. 1033 ; Baynton v. Morgan (1888), 21 Q. B. D. 101.

**3555. — Fine or premium payable by instalments.]—***DUNN v. BURRELL & GOFFE* (1817), Calth. 54 ; 1 Gwill. 299 ; 1 Eag. & Y. 270 ; 80 E. R. 672.

*Annotations*.—*Apld.* St. Paul's v. Crickett (1817), Dan. 37. *Consd.* Vivian v. Cochrane (1855), 4 De G. M. & G. 818.

**3556. —.]—**A lease was granted by the owners of the fee, for ninety-nine years, of certain lands, with the mines under them, & a sum of £16,000 was made payable by instalments, with power to the lessors of re-entry on non-payment. The lease also contained a covenant by the lessees to pay a rent of £110 the lessors having power to

distrain upon non-payment :—*Held* : the instalments could not be considered as rent, but, in fact, constituted the purchase-money, & were in the nature of a personal debt, owing by the lessees.—*HATHERTON (LORD) v. BRADBURN* (1843), 13 Sim. 599 ; 13 L. J. Ch. 171 ; 7 Jur. 1100 ; 60 E. R. 233.

**3557. — Instalments variable.]—**By deed T., in consideration of £1,380 to be paid by instalments, granted, bargained, sold, assigned & transferred to E. a coal mine for fifty years, E. covenanting to pay T. £1,380 " being the purchase money for the mine, by the following instalments ; £150 on the execution of the deed, & £150 per year after that time, whether a quantity of coal equal to that amount at the rate of £100 per Lancashire acre, should be got & worked out of the mine in the same year or not & when in any year so many coals should be got & worked out of the mine, etc. as would, at the rate of £100 per Lancashire acre, amount to more than £150 per year, then to pay £100 for every such acre until the £1,380 should be paid ; it being the intention of the parties that, until such payment T. should not receive a less sum than £150 per year, the same yearly rents or sums to be paid half-yearly on every June 24 & Dec. 24 in each year." E. having been assessed to the income tax, in respect of the coal mine :—*Held* : he was not entitled under any of the provisions of Income Tax Act, 1842 (c. 35), to deduct the income tax out of the half-yearly payments to T.—*TAYLOR v. EVANS* (1856), 1 H. & N. 101 ; 25 L. J. Ex. 269 ; 27 L. T. O. S. 110 ; 20 J. P. 711 ; 156 E. R. 1134.

*Annotation*.—*Mentd.* Foley v. Fletcher (1858), 3 H. & N. 769.

**3558. — Minimum payable in respect of royalties.]—***WILLIAMS v. HAYWARD*, No. 3549, *ante*.

**3559. — Reserved as rent—Consideration for assignment.]—**If a lessee assign his whole term to a stranger he may bring debt for the rent reserved in the contract against him or his personal representatives.—*LOYD v. LANGFORD* (1677), 2 Mod. Rep. 174 ; 86 E. R. 1008 ; *sub nom.* FLOYD v. LANGFIELD, Freem. K. B. 218.

*Annotation*.—*Apld.* Baker v. Gostling (1834), 1 Bing. N. C. 19.

**3560. —.]—**The doctrine of estoppel between landlord & tenant is founded upon the principle, that a lessee, having accepted a lease, may not plead to the action of his lessor *nil habuit in tenementis*. But the lessee may plead to such an action, that the lessor had an interest at the date of the lease, but that such interest had determined before the alleged cause of action arose. Therefore, if a termor affect to grant a lease for term exceeding his own term in duration, & to reserve an annual rent, that would operate as an assignment of his term, & there would be no estoppel between him & the person to whom he made such assignment ; & accordingly, it would be doubtful whether the assignor would have any remedies for recovering the rent. 4 Geo. 2, c. 28, does not give power to distrain for such a rent.—*LANGFORD v. SELMES* (1857), 3 K. & J. 220 ; 3 Jur. N. S. 859 ; 60 E. R. 1089.

*Annotation*.—*Refd.* Bryant v. Hancock, [1898] 1 Q. B. 716.

**3561. — Consideration for surrender.]—***NEWCOMB v. HARVEY* (1690), Carth. 161 ; 90 E. R. 699.

*Annotations*.—*Apld.* Baker v. Gostling (1834), 1 Bing. N. C. 19 ; Williams v. Hayward (1859), 1 E. & E. 1040.

**3562. — Price of goodwill.]—**Where a lease came into the hands of the original lessor by an agreement entered into between him & the assignee of the original lessee, " that the lessor should have

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the premises as mentioned in the lease, & should pay a particular sum over & above the rent annually towards the goodwill already paid by such assignee;” such agreement operates as a surrender of the whole term. The sum in the agreement is considered as a sum to be paid annually in gross, not as rent; & the assignee cannot distrain either for that or for the original rent; but he has a remedy by *assumpsit* for the sum reserved for the goodwill.

Pltf. was to hold on the terms mentioned in the lease, & to pay £8 10s. over & above the rent annually reserved towards the goodwill; that in my apprehension does not mean a sum to be paid as a rent, but a sum in gross (ASHURST, J.).—SMITH v. MAPLEBACK (1786), 1 Term Rep. 441; 99 E. R. 1180.

**Annotations:—**Consd. Pollock v. Stacey (1847), 9 Q. B. 1033. *Refd.* It. v. Fauntleroy (1824), 2 Bing. 413; Precco v. Corrie (1828), 5 Bing. 24; Doe d. Courtail v. Thomas (1829), 9 B. & C. 288; Ford v. Beech (1848), 11 Q. B. 352. *Mentd.* Charles v. Alton (1854), 2 C. L. R. 1764.

**3563.** ———.]—In 1896 a brewery co. who were lessees of a public-house granted an under-lease of same to I., who mortgaged his interest to pltf., & gave a second mtge. to the co. In 1901 I. became bkpt., & deft. was appointed his trustee in bkpcy. In 1902 the co. went into possession as second mtgees. & let the public-house to a tenant who agreed to pay a rent of £150 a year for the premises & an additional yearly sum of £1,250 in lieu of premium for goodwill. On Mar. 8, 1909, the co. obtained judgment against their tenant for £900 & gave him a month's notice to determine his tenancy. On Mar. 9, 1909, before the tenancy expired, pltf. commenced a fore-closure action against deft. & the co., & on Mar. 12 a receiver & manager was appointed, to whom the co. was directed to give up possession. Later on the same day the sheriff levied execution in respect of the co.'s judgment debt:—*Held*: (1) the receiver was “landlord” of the premises within Landlord & Tenant Act, 1709 (c. 18), s. 1, & as such was entitled to be paid by the execution creditor one year's arrears of the rent; (2) the rent comprised the £150 only, the £1,250 not being rent within the statute.—COX v. HARPER, [1910] 1 Ch. 480; 79 L. J. Ch. 307; 102 L. T. 438; 26 T. L. R. 264; 54 Sol. Jo. 305, C. A.

**Annotation:—***Refd.* Wood v. Wallace (1920), 90 L. J. K. B. 319.

**3564.** ——— **Cost of Improvements—Erection of new buildings.]**—HOBY v. ROEBUCK & PALMER, No. 3065, *post*.

**3565.** ———.]—A landlord who had demised premises for a term of years at £50 a year, agreed with his tenant to lay out £50 in making certain improvements upon them, the tenant undertaking to pay him an increased rent of £5 a year during the remainder of the term, of which several years were unexpired, to commence from the quarter preceding the completion of the work:—*Held*: the landlord, having done the work, might recover arrears of the £5 a year against the tenant, though the agreement had not been signed by either party; for that it was not a contract for any interest in or concerning lands within Stat. Frauds; nor was it, according to that statute, an agreement “not to be performed within one year from the making thereof,” no time being fixed for the performance on the part of the landlord.

Is there any additional interest in the land given to the landlord? It is said to be a purchase of a rent of £5 a year for the sum of £50, & therefore an interest in or concerning the land; but

though it be called a rent in the present contract, & also a rent in the declaration, yet we are of opinion that it is not rent in the legal sense & understanding of the word rent (LITLEDAL, J.).

—DONELLAN v. READ (1832), 3 B. & Ad. 899; 1 L. J. K. B. 269; 110 E. R. 330.

**Annotations:—***Apld.* Lambert v. Norris (1837), 2 M. & W. 333. *Refd.* Cherry v. Heming (1849), 4 Exch. 631; Maples v. Pepper (1856), 18 C. B. 177. *Mentd.* Roberts v. Tucker (1849), 3 Exch. 632; Smith v. Neale (1857), 2 C. B. N. S. 67; Miles v. New Zealand Alford Estate Co. (1886), 32 Ch. D. 266; Reeve v. Jennings, [1910] 2 K. B. 523.

**3566.** ——— **Garden rent.]**—Pltf. purchased at a sale by auction certain property described in the particulars & conditions of sale as follows: “Four freehold ground rents of £19 4s. each, viz., £15 ground rent & £4 4s. garden rent, amounting to £76 16s. per year, arising from the four capital residences of the annual value of £384, held by four leases granted to W. R. for a term of ninety-five years each (wanting ten days from Sept. 29, 1844, with reversion to the property in about eighty years.” In accordance with the conditions of sale, pltf. paid deft., the auctioneer, the sum of £282 as a deposit & in part payment of the purchase-money. The vendors in making out this title produced a counterpart of a lease granted by one R. R. to one W. R., the other three leases being similar. This lease demised a piece of land, with a messuage erected thereon, at “the yearly rent of £15 of lawful money payable,” etc., & thereby “for the considerations agreed, & also in consideration of the further rent thereafter reserved, & of the covenants & agreements of W.R.,” R. R. covenanted & agreed with W. R. that for the term of ninety-five years W. R. should “have the right to enter in & upon & use & enjoy as a pleasure ground or garden the piece of land adjoining,” etc. The deed contained a covenant by W. R. to pay to R. R. the yearly sum of £15 & that he would also “pay the further yearly rent of £4 4s. for & in respect of the right of user thereinbefore granted of the garden or pleasure ground”:—*Held*: the garden rent of £4 4s. was not a freehold ground rent within the meaning of the particulars of sale; & pltf., therefore, had a right to rescind the contract & recover back the deposit.—ROBINS v. EVANS (1863), 2 H. & C. 410; 159 E. R. 169; *sub nom.* EVANS v. ROBINS, 33 L. J. Ex. 68; 11 L. T. 211; 10 Jur. N. S. 473; 12 W. R. 604, Ex. Ch.

**Annotation:—***Refd.* Camberwell & South London Bldg. Soc. v. Holloway (1879), 13 Ch. D. 754.

**Heriot service.]**—See COPYHOLDS, Vol. XIII., p. 95, Nos. 1183, 1184.

**SUB-SECT. 6.—PAYMENT BY SUIT, SERVICE, OR IN KIND.**

**3567. Suit to the lord's mill.]**—A. being seised in fee of a mill & of certain lands, granted a lease of the latter for years, the lessee yielding & paying to the lessor, his heirs & assigns, certain rents, & doing certain suits & services; & also doing suit to the mill of the lessor, his heirs & assigns, by grinding all such corn there as should grow upon the demised premises. The lessor afterwards devised the mill & the reversion of the demised premises to the same person:—*Held*: the reservation of the suit to the mill was in the nature of a rent, & the implied covenant to render it resulting from the *reddendum*, was a covenant that ran with the land as long as the ownership of the mill & the demised premises belonged to the same person, & consequently the assignee of the

lessor might take advantage of it.—*VYVYAN v. ARTHUR* (1823), 1 B. & C. 410; 2 Dow. & Ry. K. B. 670; 107 E. R. 152; *sub nom. VIVYAN v. ARTHUR*, 1 L. J. O. S. K. B. 138.

*Annotations*.—*Reld*. Doe d. Calvert v. Reld (1830), 10 B. & C. 849; Koppell v. Bailey (1834), Coop. temp. Brough, 298; Standen v. Christmas (1847), 16 L. J. Q. B. 265; Norval v. Pascoe (1864), 4 New Rep. 390; Dewar v. Goodman, [1909] A. C. 72; Dyson v. Forster, Dyson v. Seed, Quinn, Morgan, [1909] A. C. 98; Ricketts v. Enfield, [1909] 1 Ch. 544. *Mentd.* Rogers v. Hosegood, [1900] 2 Ch. 388.

**3568. Service.—In return for wages & right of pasture.**—In 1809 a master agreed to give his servant certain wages, & the right of feeding his cow in his master's pasture. The servant was to serve as waggoner, & it was a part of the agreement that he should board his mate. Subsequently in 1810 by another agreement, the servant was to have the right of feeding another cow on his master's pasture. The cows were fed alike under these two agreements, for eighteen months. The value of the feeding exceeded £10 *per annum*.—*Held*: the servant thereby gained a settlement, by renting a "tenement" of the value of £10 a year.—*R. v. NEWINGTON NEXT PYTHIE (INHABITANTS)* (1828), 7 L. J. O. S. M. C. 25.

**3569. —Ringing church bell.**—A tenant who occupies a house on the terms of his ringing the church bell, is a tenant paying "rent," within Real Property Limitation Act, 1833 (c. 27), ss. 1, 8.—*DOE d. EDNEY v. BILLETT* (1845), 7 Q. B. 976; 14 L. J. Q. B. 343; 5 L. T. O. S. 408; 10 J. P. 39; 9 Jur. 662; 115 E. R. 756.

*Annotations*.—*Reld*. Rumball v. Munt (1846), 10 Jur. 539; St. Nicholas, Deptford v. Skotchley (1847), 17 L. J. M. C. 17.

**3570. —Sweeping parish church.**—A tenant who occupies a house on the terms of his sweeping the parish church, is a tenant who pays a "rent" within Real Property Limitation Act, 1833 (c. 27), ss. 1, 8.—*DOE d. EDNEY v. BENHAM* (1845), 7 Q. B. 976; 14 L. J. Q. B. 342; 5 L. T. O. S. 408; 10 J. P. 39; 9 Jur. 662; 115 E. R. 756.

*See, further*, Sect. 3, sub-sect. 4, *post*.

#### SUB-SECT. 7.—OTHER CASES.

**3571. Payment reserved on lease of warren.**—*ANON.* (1597), No. 3888, *post*.

**3572. Payment for privilege of using demised premises as canteen.**—A canteen in barracks demised to B. by the barrack board for a year, at the rent of £15 for the canteen & buildings, & also the further sum of £510 for the privilege of using the same as a canteen, & selling therein provisions & liquors, etc., usually sold by sutlers, with power of distress for the aggregate sum, was held to be one entire rent for the canteen; & therefore B. was held ratable to the relief of the poor as occupier of the canteen, in respect of the £525 aggregate rent, & not merely in respect of the £15.—*R. v. BRADFORD* (1815), 4 M. & S. 317; 105 E. R. 852.

*Annotations*.—*Mentd.* R. v. Coke (1826), 5 B. & C. 797; R. v. Mersey & Irwell Navigation Co. (1829), 4 Man. & Ry. K. B. 84; R. v. Liverpool Exchange (1834), 1 Ad. & El. 465; R. v. L. & S. W. Ry. (1842), 1 Q. B. 558; Bedfordshire JJ. v. St. Paul Overseers (1852), 21 L. J. M. C. 228; R. v. Morrison (1852), 22 L. J. M. C. 14; Allison v. Monkwearmouth Shore Overseers (1854), 4 E. & B. 13; R. v. Thurlstone (1859), 5 Jur. N. S. 820; R. v. L. & N. W. Ry. (1874), 29 L. T. 910; Pearson v. Holborn Assmt., Com. [1893] 1 Q. B. 389; Cartwright v. Sealecoates Union Grdms. (1900), 82 L. T. 157.

**3573. Lessee keeping down interest on mortgage.**—Comrs. of a navigation, having borrowed £28,000, on mtge., & being still in want of funds, agreed to let the navigation & tolls for ninety-nine years, the lessee undertaking to make certain

advances, which he did, & to pay the interest of the £28,000. Part of the term having expired, & the validity of the agreement being doubted, an Act was passed, reciting that that agreement had been entered into *bonâ fide*, had been beneficial to the public, & would be so if continued; it therefore empowered the comrs. to lease the navigation & tolls, which, however, were lowered, for the remainder of the term, to the persons entitled under the former agreement; & enacted, that they should pay the interest of the £28,000 yearly to the mtgees.; in default of which the comrs. might require the toll collector to pay such interest to the mtgees. out of the moneys in his hands. On appeal against a rate laid upon the lessees in respect of the navigation:—*Held*: the interest paid by the lessees was in substance a rent, & the rate ought to be calculated upon it; & the lessees were not occupiers under a beneficial lease, though the interest was only £1,400 a year, & his annual earnings at the time of making the rate were £3,418., from which, however, about £1,000 was to be deducted for repairs, etc.; one year's value being no criterion, & there being no proof that the rent was unduly small.—*R. v. CHAPLIN* (1831), 1 B. & Ad. 926; 9 L. J. O. S. M. C. 121; 109 E. R. 1030.

*Annotation*.—*Mentd.* G. E. Ry. v. Haughley (1866), L. R. 1 Q. B. 666.

**3574. Payment of sum certain for occupation.**—An agreement between the administrator of the covenantee & the covenantor, not to enforce performance of the covenants in the deed provided the latter would pay certain rent, may be a good consideration for a parol promise to pay such rent; & the enforcement of such promise is not open to the objection that it is seeking to vary by parol the terms of an instrument under seal.—*NASH (ADMINISTRATOR OF BEATSON) v. ARMSTRONG* (1861), 10 C. B. N. S. 259; 30 L. J. C. P. 286; 7 Jur. N. S. 1060; 9 W. R. 782; 142 E. R. 451.

*Annotation*.—*Mentd.* Parker v. Briggs (1893), 37 Sol. Jo. 452.

**3575. Damages awarded on rescission of agreement for lease.**—In 1862, A. agreed to lease a mine to B. Disputes arose between the parties, & A. brought an action against B. under the agreement, & B. filed a bill against A. to have the agreement set aside. The parties then referred all the matters in dispute between them, to arbitration, & the arbitrator awarded that the agreement for a lease was valid; that it should be cancelled, & that B. should pay to A. the sum of £5,513; B. died, & a suit was instituted to administer his estate, under which A. carried in a claim to rank as a specialty creditor in respect of the sum awarded:—*Held*: the sum was awarded by way of damages & not for rent, & therefore was not entitled to rank as a specialty debt.

Rent is a specialty debt, but . . . it must be distinctly shown that the claim is for rent only before it would rank as a specialty debt in priority of payment (MALINS, V.-C.).—*TALBOT v. SHREWSBURY (EARL)* (1873), L. R. 16 Eq. 26; 42 L. J. Ch. 877; 21 W. R. 473.

*Annotation*.—*Mentd.* Re Hastings, Shirreff v. Hastings (1877), 6 Ch. D. 610.

**3576. Warehouse charges.**—Under a mtge. of wharves & warehouses occupied by the mtgors. for their business of wharfingers & warehousemen:—*Held*: the mtgees. going into possession were not entitled to receive debts due to the mtgors. for warehousing goods, though the charges out of which the debts arose were termed rents, & were by Act of Parliament recoverable, amongst other

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charges by distraint & sale of the goods in respect of which they were incurred. *Semble*: a mtgee. going into possession is entitled to receive all unpaid rents properly so called.—**ANDERSON v. BUTLER'S WHARF CO., LTD.** (1879), 48 L. J. Ch. 824.

**Annotation**:—*Mentd. Shillito v. Biggart*, [1903] 1 K. B. 683.  
**3577. Tenancy in consideration of payment of rates & taxes.**—*Re AN ORDER OF RICHMOND, SURREY J.J., UNDER SMALL TENEMENTS ACT* (1893), 10 T. L. R. 68, D. C.

**SECT. 2.—COVENANT FOR PAYMENT—COVENANT RUNNING WITH LAND.**

*See Law of Property Act, 1925 (c. 20), s. 141.*

**3578. General rule.**—**PARKER v. WEBB** (1693), Holt, K. B. 75; 3 Salk. 5; 90 E. R. 939.

**3579. Application of rule—Penal rent.**—**TURNER v. METCALFE** (1708), 2 Eq. Cas. Abr. 16; 22 E. R. 13, L. C.

**3580. — Part of rent.**—**STEVENSON v. LAM-BARD**, No. 4051, *post*.

**3581. — Service rent—Duration of liability.**—**VYVYAN v. ARTHUR**, No. 3567, *ante*.

**3582. — Rent during existence of mortgage.**—**WHITAKER v. HARROLD**, No. 4184, *post*.

**3583. — Wayleave.**—The owner in fee of land demised to a railway co. for a term of years a wayleave over his land, with right to make & use a railway thereover, reserving to himself, his heirs & assigns, a periodical payment on coals, etc. carried over any part of the railways comprehended in the co.'s special Act to Port B. These included the one in respect of which the wayleave was granted. Subsequently coal was carried to Port B. over a part of one of the railways comprehended in the Act which was not on land of lessor:—*Held*: the amount was payable in respect of the hereditaments demised & on lessor's death was payable to the reversioner.—**HASTINGS (LORD) v. NORTH EASTERN RY. CO.**, [1898] 2 Ch. 674; 67 L. J. Ch. 590; 78 L. T. 812; 63 J. P. 36; 47 W. R. 59; 14 T. L. R. 505; *affd.*, [1899] 1 Ch. 656, C. A.; *affd. sub nom.* **NORTH EASTERN RY. CO. v. HASTINGS (LORD)**, [1900] A. C. 260, H. L.

**Annotations**:—*Reid. Brown v. Peto*, [1900] 2 Q. B. 653.  
*Mentd. A.-G. v. Tamworth R. D. C.* (1901), 85 L. T. 190;  
*Van Diemen's Land Co. v. Table Cape Marine Board*, [1906] A. C. 92;  
*Eckersley v. Wigan Coal & Iron Co.* (1910), 102 L. T. 264;  
*Hong-Kong & China Gas Co. v. Glen* (1914), 110 L. T. 859;  
*Watcham v. East Africa Protectorate*, [1919] A. C. 633.

**3584. Exceptions to rule—Rent relating to incorporeal hereditaments—Tithes.**—(1) *Qu.*: whether rent, reserved on a lease of tithes only, runs with the tithes to the assignee, or lies only in privity of contract, so that the assignee is not chargeable with it; & consequently whether by acceptance of such rent from the assignee, the first lessee is discharged from the rent in future, or not.

(2) *Qu.*: whether rent may be reserved out of any incorporeal hereditaments.—**WINDSOR (DEAN**

**& CHAPTER) v. GOVER** (1671), 2 Saund. 302; 85 E. R. 1096.

**Annotations**:—*As to* (1) *Reid. Bally v. Wells* (1769), 3 Wils. 25;  
*Gardiner v. Williamson* (1831), 2 B. & Ad. 336;  
*Evans v. Robbins* (1863), 11 L. T. 211.  
*Generally, Mentd. Salmon v. Matthews* (1841), 8 M. & W. 827.

**3585. — Collateral covenant.**—If mtgor. & mtgee. make a lease in which the covenants for the rent & repairs are only with the mtgor. & his assigns, the assignee of the mtgee. cannot maintain an action for the breach of these covenants, because they are collateral to his grantor's interest in the land, & therefore do not run with it.—**WEBB v. RUSSELL** (1789), 3 Term Rep. 393; 100 E. R. 639.

**Annotations**:—*Reid. Baker v. Gostling* (1834), 1 Bing. N. C. 19;  
*Koppell v. Bailey* (1834), 2 My. & K. 517;  
*Sturgeon v. Wingfield* (1846), 15 L. J. Ex. 212;  
*Wakefield v. Brown* (1846), 9 Q. B. 208;  
*Bickford v. Parson* (1848), 5 C. B. 920;  
*Magnay v. Edwards* (1853), 1 C. L. R. 141;  
*London & Westminster Loan & Discount Co. v. Drake* (1859), 6 C. B. N. S. 798;  
*Rogers v. Hosegood*, [1900] 2 Ch. 388;  
*Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608.  
*Mentd. Gibson & Johnson v. Minet & Fector* (1791), 1 Hy. Bl. 569;  
*Vernon v. Smith* (1821), 5 B. & Ald. 1;  
*Ecl. Comrs. of England & Wales v. Howe* (1880), 5 App. Cas. 736.

**3586. — Covenant personal to lessor.**—Where B., being seised in fee, conveyed to deft. & J., their heirs & assigns, to the use that B., his heirs & assigns, might have & take to his use a rent certain to be issuing out of the premises, & subject to the rent, to the use of deft. his heirs & assigns, & deft. covenanted with B., his heirs & assigns, to pay to him, his heirs & assigns the rent, & to build, within one year, one or more messuages on the premises, for better securing the rent, & B. within one year demised the rent to plti.'s for one thousand years:—*Held*: covenant would not lie for plti's. for non-payment of the rent, or for not building the messuages, for the covenant was personal to B.—**MILNES v. BRANCH** (1816), 5 M. & S. 411; 105 E. R. 1101.

**Annotations**:—*Consd. Haywood v. Brunswick Bldg. Soc.* (1881), 8 Q. B. D. 403.  
*Reid. Randall v. Rigby* (1838), 4 M. & W. 130;  
*Doe d. Egremont v. Hellings* (1842), 6 Jur. 821;  
*Magnay v. Edwards* (1853), 1 W. R. 331.

**3587. — Services in nature of rent.**—A local Act provided that, upon auxiliary railroads made by private individuals under the authority of the Act, the tolls should not exceed the rate charged by the canal co., which, for the articles of limestone & iron-stone, was restricted to 2½d. a ton per mile; & it also empowered the canal co., by agreement with the landowners, itself to construct auxiliary railroads, on which tolls not exceeding 5d. a ton per mile might be charged. Certain landowners & owners of iron works, & among others, the lessees of the Beaufort Works, formed a joint stock co., & under the powers given by the Act, constructed a railroad connecting a lime quarry, called the Trevil Quarry, with the several ironworks & with the railroads of the canal co. In the partnership deed of the railroad co., the lessees of the Beaufort Works covenanted for themselves, their heirs, exors., administrators, & assigns, with the other shareholders, their exors., administrators, & assigns, so long as the covenantors, their exors. administrators, or assigns should occupy the Beaufort Works, to procure all the limestone used in the

**PART XV. SECT. 1, SUB-SECT. 7.**

**3577 i. Tenancy in consideration of payment of rates & taxes.**—Where a lessee paid no rent but agreed to pay all civic taxes & he & his assignee paid such taxes:—*Held*: such payments amounted to payment of rent.—**SULLIVAN v. SWEENEY** (1908), 4 E. L. R. 492.—**CAN.**

**3577 ii.**—**EAST v. CLARKE** (1915),

7 O. W. N. 586; 8 O. W. N. 342; 33 O. L. R. 624; 23 D. L. R. 74.—**CAN.**

**p. Insurance premiums—Included in rent—Where insurance compulsory.**—In valuing the tithes of farm lands let on lease where the tenant was taken bound to keep the buildings insured against fire, the premiums of insurance fell to be added to the rent payable under the lease in order to arrive at the

constant rent.—**M'EWEN v. WATT** [1922] S. C. 203.—**SCOT.**

**PART XV. SECT. 2.**

**3578 i. General rule.**—**KELLY v. SHAW** (1849), 1 I. C. L. R. 225; 1 Ir Jur. 292.—**IR.**

**q. Application of rule.**—**HUTCHISO. v. RIPEKA TE PEEHI**, [1919] N. Z. L. R. 373.—**N.Z.**

works from the Trevil Quarry, & to convey all such limestone, & also all the iron-stone from the mines to the works along the Trevil railroad, & to pay a toll of 5*d.* a ton per mile for the same. Upon a bill filed by the shareholders of the railroad to enforce this covenant against a person who had purchased the Beaufort Works, with notice of the partnership deed:—*Held*: the covenant did not run with the land so as to bind assignees at law.—*KEPPELL v. BAILEY* (1834), 2 My. & K. 517; *Coop. temp.* Brough 298; 39 E. R. 1042, L. C.

*Annotations*:—*Reid*. Tulk v. Moxhay (1848), 11 Beav. 571; Ackroyd v. Smith (1850), 10 C. B. 164; Aspden v. Seddon, Preston v. Seddon (1876), 34 L. T. 906; Luker v. Dennis (1877), 7 Ch. D. 227; Haywood v. Brunswick Permanent Benefit Bldg. Soc. (1881), 45 L. T. 699. *Mentd.* Rowbotham v. Wilson (1857), 8 E. & B. 123; Bailey v. Stevens (1862), 31 L. J. C. P. 226; Hill v. Tupper (1863), 2 H. & C. 121; Norval v. Pascoe (1864), 4 New Rep. 390; Stockport Waterworks Co. v. Potter (1864), 3 H. & C. 300; Richards v. Harper (1866), 35 L. J. Ex. 130; Limmer Asphalt Paving Co. v. I. R. Comrs. (1872), L. R. 7 Exch. 211; Werderman v. Soc. Générale d'Electricité (1881), 19 Ch. D. 246; Zetland v. Hislop (1882), 7 App. Cas. 427; G. N. Ry. v. I. R. Comrs., [1901] 1 K. B. 416; Whitmores (Edenbridge) v. Stamford, [1909] 1 Ch. 427; L. C. C. v. Allen, [1914] 3 K. B. 642; *Re* Woking Urban Council (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300; Barker v. Stickney, [1919] 1 K. B. 121; Lord Strathcona S.S. Co. v. Dominion Coal Co. (1925), 42 T. L. R. 86.

*See, also*, Sect. 4, sub-sect. 2, C. (a), & Nos. 3616–3623, *post*.

### SECT. 3.—RESERVATION OF RENT.

#### SUB-SECT. 1.—IN GENERAL.

**3588. Who may reserve—Whether equitable owner.]**—B. being mtgee. in fee simple of certain lands, & the equity of redemption in fee belonging to A., by indenture of lease & release dated Oct. 1838, between A. of the first part, B. of the second part, T. of the third part, & H. of the fourth part, A. did limit & appoint, & B. conveyed to H., & A. confirmed the lands, to have & to hold the same to H., his heirs & assigns, to the use of H., his heirs & assigns, for ever, subject to a proviso for redemption by A., his heirs, etc., on payment of £5,000. Amongst other provisos there was one, that if default should be made in payment of the £5,000, it should be lawful for H., his heirs & assigns, to sell. This deed contained a proviso for quiet enjoyment by A. until default. Also the following:—"Provided always, & it is hereby expressly agreed & declared between & by the parties hereto, that if at any time hereafter, when & so soon as H. & every other person claiming, or to claim by, from, through or under him, shall, under or by virtue of any power or authority herein contained, enter into or upon or otherwise become possessed of the premises, or any part thereof, the same shall from thenceforth be subjected & be charged to & with the payment to A. & his assigns of the annual sum of £40; & the same shall thenceforth be recovered or recoverable by distress or otherwise upon or out of the mtged. premises." This conveyance was executed by B. & A., but not by H. Default having been made in payment, H. entered into possession for the purpose of exercising the power of sale, & by indenture, dated in 1847, he conveyed to one C., who entered into possession of the lands & duly paid the £40 rent:—*Held*: the charge of the

rent of £40 a year was not a good reservation of a rent, inasmuch as it was in favour of a person not having a legal estate in the land.

By law a good reservation of rent can only be made to the legal owner (*MARTIN, B.*)—*GILBERTSON v. RICHARDS* (1859), 4 H. & N. 277; 28 L. J. Ex. 158; 33 L. T. O. S. 107; *affd.* (1860), 5 H. & N. 453, Ex. Ch.

*Annotations*:—*Reid*. Birmingham Canal Co. v. Cartwright (1879), 11 Ch. D. 421; L. & S. W. Ry. v. Gomm (1882), 20 Ch. D. 562; Morgan v. Davey (1883), Cab & El. 114. *Mentd.* Nash v. Ash (1862), 1 H. & C. 160; Blight v. Hartnoll (1881), 19 Ch. D. 294.

**3589. Mode of reservation—By will.]**—If land be devised upon condition, or reserving rent, it is void, for the reservation of rent or re-entry cannot be good but in respect that the resorvor may by possibility take advantage of it, & the heir cannot have that which his ancestor himself could never have.—*ANON.* (undated), Plowd. Queries 3; 75 E. R. 860.

**3590. — Whether contract under seal necessary.]**—*WILSTON v. PILKNEY* (1672), 1 Vent. 242; 86 E. R. 162.

**3591. What amounts to reservation—Proviso for payment.]**—Articles by which "it is covenanted & agreed that A. doth let the said lands, etc." amount to an immediate lease, & a proviso that the lessee "shall pay to the said A. annually," etc. is a good reservation of rent, & not a condition.—*HARRINGTON v. WISE* (1596), Cro. Eliz. 480; Noy, 57; 78 E. R. 737.

*Annotations*:—*Reid*. Tisdall v. Essex (1616), 1 Roll. Rep. 397; Drake v. Munday (1631), W. Jo. 231; Copley v. Hopworth (1690), 12 Mod. Rep. 1; Doe d. Henniker v. Watt (1828), 8 B. & C. 308; Warman v. Faithfull (1834), 5 B. & Ad. 1042. *Mentd.* Doe d. Jackson v. Ashburner (1793), 5 Term Rep. 163.

**3592. — Covenant for payment.]**—Lease for twenty years by indenture, by which the lessee covenants & grants to pay annually for the tenements, during the term, a rent at another place, & that if the rent or farm be in arrear, although it be not demanded, the lease shall be void, & the lessor may re-enter; the lessor after default of payment, & before entry, leases the same to another:—*Qu.*: whether this covenant & grant amounts to a reservation of rent, & a condition, & if the lease before entry be good.—*BROWNING v. BESTON* (1555), 1 Plowd. 131; 75 E. R. 202.

*Annotations*:—*Reid*. Pennant's Case, (1596), 3 Co. Rep. 64 a; Cholmley's Case, (1597), 2 Co. Rep. 50 a; Portington's Case (1613), 10 Co. Rep. 35 b; Attoe v. Hemmings (1614), 2 Bulst. 281; Whitecot v. Fox (1616), Cro. Jac. 398; Attree v. Scutt (1805), 6 East, 476. *Mentd.* Gosnal v. Kindlemarsh (1588), Cro. Eliz. 88; Windham's Case (1589), 5 Co. Rep. 7 a; Wood v. Hamstead (1591), Cro. Eliz. 262; Bank of England v. Morice (1734), Kel. W. 165; Garland v. Jekyll (1824), 2 Bing. 273; Palmer v. Sparshott (1842), 4 Scott, N. R. 743; Cotesworth v. Spokes (1861), 10 C. B. N. S. 103; Ward v. Day (1863), 2 New Rep. 444.

**3593. — —.]**—*ATTOE v. HEMMINGS* (1614), 2 Bulst. 281; 80 E. R. 1123; *sub nom.* *ATHOWE v. HEMING*, 1 Roll. Rep. 80.

*Annotations*:—*Reid*. Robins v. Evans (1863), 2 H. & C. 410; Delacherols v. Delacherols (1864), 11 H. L. Cas. 62.

**3594. — —.]**—If a person covenants, grants, & agrees, that another shall have & enjoy such a house for a certain time, & the other agrees to pay a sum annually, it amounts to a lease with a reservation of rent.

As the words of the covenant & grant, that "he shall enjoy the land for six years," amount to a lease, & shall bind the heir, so the words of the covenant & grant of the lessee, that "he shall

**Sect. 3.—Reservation of rent: Sub-sects. 1, 2 & 3.]**

pay such a rent annually," amount to a reservation (*per cur.*).—**DRAKE v. MUNDAY** (1631), Cro. Car. 207; W. Jo. 231; 79 E. R. 781.

**Annotations:—***Refd.* Doe d. Jackson v. Ashburner (1793), 5 Term Rep. 163; Pinero v. Judson (1829), 3 Moo. & P. 497; Delacherols v. Delacherols (1864), 11 H. L. Cas. 62.

**3595.** ————]—A rent may be reserved on words of covenant.—**ANON.** (1695), 12 Mod. Rep. 73; 88 E. R. 1173.

**3596.** ———— "Yielding & paying."—**HELLIER v. CASBARD** (1665), 1 Sid. 266; 82 E. R. 1090.

**Annotations:—***Refd.* Steward v. Wolveridge (1832), 9 Bing. 60. *Mentd.* Pitcher v. Tovey (1691), 4 Mod. Rep. 71.

**3597.** ———— **Agreement to take premises "at & under" named rent.**]—If, by a written agreement, A. agrees to let, & B. to take a messuage from a day past, for a term of ten days, "at & under the rent of £80," this is an agreement by B. to pay a rent of £80; & therefore if there be a power of re-entry in case of a breach of "any of the agreements therein contained." A. has a power of re-entry for non-payment of rent, although there is no express agreement to pay the rent.—**DOE d. RAINS v. KNELLER** (1829), 4 L. & P. 3, N. P.

**3598.** **Separate rents may be reserved.**]—On one lease several yearly rents by apt words may be reserved.—**KNIGHT'S CASE** (1588), 5 Co. Rep. 54 b; 77 E. R. 137.

**Annotations:—***Refd.* Stukoley v. Butler (1615), Hob. 168; Havergill v. Hare (1616), 3 Bulst. 250; Field v. Boethsby (1658), 2 Sid. 137; Ward v. Everet (1699), 1 Ld. Raym. 422. *Mentd.* James v. Landon (1585), Cro. Eliz. 36; Beare v. Woodley (1629), Cro. Car. 154; Hornbee's Petn. (1691), Frocin. K. B. 331; Orby v. Mohun (1706), Freem. Ch. 291; R. v. Cotton (1751), Park. 112; Twynam v. Pickard (1818), 2 B. & Ald. 105; Hyde v. Warden (1877), 3 Ex. D. 72.

**3599.** ———— **Separate estates created by same lease.**]—**ANON.** (undated), Keil. 134; 72 E. R. 304.

**3600.** ———— **Rents payable at different times.**]—**COOMBER v. HOWARD**, No. 3711, *post*.

**3601.** **Reservation of entire rent on several properties—Demises for several terms—Effect of termination of one.]—TURNER'S CASE** (1623), Benl. 139; 73 E. R. 995.

*See, also,* DISTRESS, Vol. XVIII., p. 315, Nos. 502-504.

**3602.** **Reservation to stranger—Effect of.]—DEERING v. FARRINGTON**, No. 3653, *post*.

**3603.** **Reservation of smaller rent than agreed—Mistake—Whether rectification allowed.]—**A lessor, in filling up the draft of a lease, inserted a less sum for the rent than was agreed to be paid. The lease & counterpart were engrossed & executed. Upon a bill filed by the lessor to rectify the mistake:—**Held:** (1) *deft.* was entitled to retain or reject the lease; if retained, the lease must be reformed by the insertion of the higher rent; if rejected the higher rent must be paid for the use & occupation, with a set-off for repairs, but not for the expenses of establishing *deft.* in business there; (2) if the lease was given up, *pltf.* must repay the money which had been advanced on its security, or the house must stand as security to the *mtgee.* for the amount, with costs; but *pltf.* was entitled to repayment; & if the lease was rectified, he had a right to retain it as security.—**GARRARD v. FRANKEL** (1862), 30 Beav. 445; 31 L. J. Ch.

604; 26 J. P. 727; 8 Jur. N. S. 985; 54 E. R. 961.

**Annotations:—***As to* (1) *Consd.* Harris v. Pepperoll (1867), L. R. 5 Eq. 1. *Refd.* Bloomer v. Spittle (1872), L. R. 13 Eq. 427; May v. Platt, [1900] 1 Ch. 616.

**3604.** **Reservation to joint tenants—Lease executed by one only—Whether reservation good for both.]—CARTWRIGHT'S CASE** (undated), cited 1 Vent. 136; 86 E. R. 93; *sub nom.* BOND v. CARTWRIGHT, 2 Roll. Abr. 453, pl. 21.

**Annotations:—***Refd.* Putt v. Nosworthy (1671), 1 Vent. 135; Sacheverel v. Frogate (1671), 1 Vent. 161.

**SUB-SECT. 2.—MUST BE CERTAIN.**

**3605.** **General rule.]—PARKER v. HARRIS** (1692), 1 Salk. 262; Carth. 234; Holt, K. B. 411; 4 Mod. Rep. 76; Skin. 307; 91 E. R. 230; *revers.* S. C. *sub nom.* HARRIS v. PARKER (1690), 2 Vent. 270.

**Annotations:—***Consd.* Thomkins v. Pincent (1702), 7 Mod. Rep. 96. *Refd.* Reynolds v. Thorp (1728), 1 Barn. K. B. 46. *Mentd.* Selwood v. Methlyn (1729), 1 Barn. K. B. 254; R. v. Bourne (1837), 7 Ad. & El. 58; Gregory v. Brunswick (1846), 3 C. B. 481; Politt v. Forrest (1848), 11 Q. B. 962.

**3606.** ————]—A rent, the amount of which may fluctuate according to the happening of certain events, is not an uncertain rent.

A member of a building society borrowed £7,500 from the society, which was to be repaid in a series of monthly instalments of £71 17s. 6d. each, including interest at 7 per cent. The instalments were payable at the monthly meetings of the society, & if the member neglected to pay them, when due he became liable to a fine, at the rate of 5 per cent. per month on the total amount in arrear & unpaid at each meeting. To secure the loan he executed to the trustees of the society a mtge. of real estate. The deed contained a proviso that if the member should fail for three monthly meetings to pay his subscriptions, interest, fines, or other moneys, or to observe the regulations of the society, or in the event of his becoming bkpt., the mtgees. might enter into possession or receipt of the rents of the mtged. property. & "for the better securing the payments which by the rules of the society ought to be made by the mtgor." it was agreed that, if the mtgees. should at any time become entitled to enter into possession or receipt of the rents, & the mtgor. should then or afterwards be in the occupation of the whole or part of the property, he should during such occupation be tenant thereof from month to month to the mtgees., at a monthly rent equal in amount to the moneys which ought to be paid monthly by the mtgor. from time to time for subscriptions, interest, fines, & other moneys under the rules, & that the tenancy should commence on the day up to which he should have fully paid all & every part of such subscriptions, interest, fines, & other moneys, & the rent for the period intervening between the commencement of the tenancy & the day on which the trustees should be entitled to enter into possession or receipt of rents should be payable & paid on that day, & the monthly rent due upon & subsequently to that day should become due monthly in advance, & be payable at the monthly meetings, the first payment of rent becoming due on the day on which the mtgees. should first become entitled to enter into possession. Power was given to the mtgees. to determine the tenancy by fourteen

**PART XV. SECT. 3, SUB-SECT. 2.**

**a. Fluctuating rent.]—JACKSON'S CHARITIES (LESSEE OF TRUSTEES) v. JACKSON** (1833), Hayes & Jo. 442; 2 Ir. L. Rec. N. S. 36.—**IR.**

days' notice. The deed was not executed by the mtgees., nor was it registered under Bills of Sale Act. The mtgor. committed default in his payments, & was afterwards adjudicated a bkpt.:—*Held*: the attornment clause, & distresses levied under it for rent which accrued due both before & after the commencement of the bkpcy., were valid as against the trustee in the bkpcy. It was no objection to the attornment clause that the monthly rent was fluctuating in amount.

It is true that, if that which is agreed upon as the payment is uncertain, it is not a rent. It must be certain. But the rent is certain if, by calculation & upon the happening of certain events, it becomes certain, & . . . the mere fact of rent being fluctuating does not make it uncertain (BRETT, L.J.).—*Re KNIGHT, Ex p. VOISEY* (1882), 21 Ch. D. 442; 52 L. J. Ch. 121; 47 L. T. 362; 31 W. R. 19, C. A.

*Annotation*:—*Mentd.* *Re Middlesbrough Bldg. Soc.* (1884), 54 L. J. Ch. 592.

**3607. Rent capable of ascertainment**—So much as premises reasonably worth.]—An *assumpsit* will lie on express promise to pay so much rent yearly as the house & mills enjoyed by deft. should be reasonably worth.—*MASON v. BELDHAM* (1685), 3 Mod. Rep. 73; 87 E. R. 47.

**3608.** — By reference to subsequent agreement.]—*M'LEISH v. TATE* (1778), 2 Cowp. 781; 98 E. R. 1359.

**3609.** — Number of bricks burnt & quantity of clay dug.]—*DANIEL v. GRACIE*, No. 3545, *ante*.

**3610.** — “*Id certum est quod certum reddi potest.*”]—It was objected that the rent here was uncertain, by reason of the provision for deductions in respect of possible failure in the supply of working power. But it is new to me that a rent is uncertain because it cannot be ascertained at the time of the demise what rent will become payable on a future contingency. If that were so, a reservation of rent at so much per ton of hay or per boll of wheat would be open to the same objection. So also in the case of an additional rent to be paid in the event of the tenant using the land in a particular manner. There the amount of rent must necessarily be uncertain, because you cannot tell beforehand whether or not the land will be so used. These payments are sometimes called penalties; but in truth they are rents payable by reason of the additional use of the land, at per acre, or so forth. Such a rent may clearly be distrained for. The maxim, *id certum est quod certum reddi potest*, applies (WILLES, J.).—*SELBY v. GREAVES* (1868), L. R. 3 C. P. 594; 37 L. J. C. P. 251; 19 L. T. 186; 16 W. R. 1127.

*Annotations*:—*Refd.* *Marshall v. Schofield* (1882), 52 L. J. Q. B. 58; *British Electric Traction Co. v. I. It. Comrs.*, [1902] 1 K. B. 441. *Mentd.* *Re Douglas, Ex p. Ryder* (1871), 6 Ch. App. 413; *Re Wilson, Ex p. Watkins* (1887), 57 L. T. 201; *Rendell v. Roman* (1893), 9 T. L. R. 192.

**3611.** — By calculation.]—*Re KNIGHT, Ex p. VOISEY*, No. 3606, *ante*.

— Arbitration.]—*See* No. 780, *ante*.

*See, generally*, DEEDS, Vol. XVII., pp. 286, 287.

**3612. Fluctuating rent**—Whether necessarily uncertain.]—*Re KNIGHT, Ex p. VOISEY*, No. 3606, *ante*.

— Rent ascertained by average price of wheat.]—*See* No. 3634, *post*.

—]—*See, also*, DISTRESS, Vol. XVIII., pp. 272, 273, Nos. 103–107.

**3613. Effect of uncertainty**—On attornment clause.]—*Re KNIGHT, Ex p. VOISEY*, No. 3606, *ante*.

— On landlord's power of distress.]—*See* DISTRESS, Vol. XVIII., pp. 272, 273.

**Leases under powers.**]—*See* POWERS; SETTLEMENTS.

## SUB-SECT. 3.—CONSTRUCTION.

**3614. According to intention of parties.**]—(1) D. by indenture, in consideration of rent reserved, demised to Q. a cellar, to have & hold to him, his exors., etc., for one year, & if at the end of the one year both parties should agree that the present demise should be renewed & continued for a longer time, then to have & to hold the premises for three years more, rendering annually during the said term £40 at the four usual feasts:—*Held*: the reservation of the rent shall extend to the first year, for the proper place of a reservation is to come after the limitation of all the estates.

(2) A reservation shall be expounded according to the reasonable intention of the parties, to be collected by the words of their deed.—*LOMFELD'S CASE* (1612), 10 Co. Rep. 106 a; 77 E. R. 1086; *sub nom.* *YOUNG v. MELTON*, 1 Brownl. 61.

*Annotations*:—*Generally*, *Mentd.* *Fawkeners v. Bellingham* (1627), Cro. Car. 80; *Selbye v. Booke* (1627), Litt. 27; *Poison v. Warren* (1628), Palm. 490; *R. v. London (Bp.)* (1694), 1 Ld. Raym. 23; *Riddell v. White* (1793), 1 Anst. 281.

**3615. In accordance with lessor's estate.**]—*SACHEVERELL v. FROGGATT*, No. 3622, *post*.

**3616. Right to rent reserved**—Whether passing with reversion—Person to whom reserved not stated.]—If a man makes a lease, rendering rent to the lessor, he shall only have it during his life, because he does not reserve it longer, for if he had reserved it during forty years he should not have had it any longer. But if he makes a lease, reserving rent, & does not say to whom, it shall be to the lessor & to his heirs, because there it is left to the construction of the law (DYER, J.).—*ANON.* (*circa* 1570), Plowd. Queries 3 a; 75 E. R. 860.

**3617.** — Reservation to lessor.]—*ANON.* (*circa* 1570), No. 3616, *ante*.

**3618.** — Reservation to lessor “his executors & assigns.”]—Tenant in fee makes a lease for years rendering rent during the term to him, his exors. & assigns the heir shall not have the rent.—*RICHMOND v. BUTCHER* (1591), Cro. Eliz. 217; 78 E. R. 473; *sub nom.* *RICHMOND'S CASE*, Owen, 9.

*Annotations*:—*Dbtd.* *Sacheverel v. Frogate* (1671), 1 Vent. 161. *Refd.* *Wotton v. Edwin* (1607), Lat. 274; *Bland v. Inman* (1632), Cro. Car. 288.

**3619.** — Reservation to lessor “or his successors.”]—*MALLOY'S CASE*, No. 3771, *post*.

**3620.** — Reservation to lessor “& his assigns.”]—One seised in fee by indenture demised rendering annually to himself & his assigns a certain rent payable half-yearly; the lessor died:—*Held*: the rent was determined, & should not go to the heir.—*WOOTON v. EDWIN* (1607), 12 Co. Rep. 36; 77 E. R. 1317; *sub nom.* *WOOTON v. EDWIN*, Lat. 274.

*Annotations*:—*Distd.* *Sacheverel v. Frogate* (1671), 1 Vent. 161. *Refd.* *Bland's Case* (1632), Godb. 448.

**3621.** — Reservation to lessor & his son.]—*OATES v. FRITH*, No. 3651, *post*.

**3622.** — Reservation to lessor “his executors, administrators & assigns.”]—Whether devisee included.]—One seised in fee lets for years, reserving rent during the term to the lessor, his exors., administrators & assigns, & lessee covenants to pay it accordingly, & the lessor devises the reversion & dies; the reservation is good to continue the rent during the whole term, & the devisee shall have an action of covenant for the non-payment of it.

The law uses all industry imaginable to conform the reservation to the estate (*per* CUR.).—*SACHEVERELL v. FROGGATT* (1671), 1 Vent. 367; 2 Keb. 798, 839; 2 Lev. 13; T. Raym. 213; 1

**Sect. 3.—Reservation of rent: Sub-sects. 3, 4, 5 & 6.]**

**Vent. 161; 85 E. R. 1155; sub nom. SACHEVERELL v. WALKER, Freem. K. B. 16.**

**Annotations:—***Refd.* Tankerville v. Wingfield & Pritchard (1773), 7 Price, 343, n.; Bowers v. Nixon (1848), 13 Jur. 334; Greenaway v. Hart (1854), 14 C. B. 340; Yellowly v. Gower (1855), 24 L. J. Ex. 289; Dollen v. Batt (1858), 27 L. J. C. P. 281. *Mentd.* Bullythorp v. Turner (1744), Willes, 475.

**3623. — Words of reservation immaterial.**—Whatever may be the words of the reservation the rent goes with the reversion (WILLIAMS, J.).—*WELD v. BAXTER* (1856), as reported in 1 H. & N. 568; 156 E. R. 1328.

**Annotation:—***Mentd.* Hickman v. Machin (1859), 4 H. & N. 716.

—*]*—*See, now, Law of Property Act, 1925 (c. 20), s. 141, & generally, Sect. 2, ante.*

**3624. Commencement of rent—Lease for a year with option to renew.**—*LOFIELD'S CASE*, No. 3614, *ante*.

**3625. — Running powers over railway—“Begin to break ground.”**—The S. co. having obtained power to make the C. railway from Y. to W., transfers the powers to the B. co., which is at the same time authorised to run through & use the station W. of the S. co., so as to have free communication with the E. S. R. The consideration to be paid for these rights was fixed at £400 *per annum*. This agreement to pay was to take effect from the time that the B. co. should begin to break ground within 6 feet of any of the sidings in the W. yard. Ground was broken in 1870.—*Held*: (1) the words “to break the ground” mean “to commence work,” & do not include preparation for the execution of work; (2) inasmuch as the payment of the rent was made to depend upon the happening of a certain event, there was no room to modify the agreement to pay, by a reference to considerations upon which payment was not dependent.—*BRISTOL & EXETER RY. CO. v. SOMERSET & DORSET RY. CO.* (1875), 32 L. T. 339; 2 Ry. & Can. Tr. Cas. 82.

**3626. Duration of rent—Omission of “yearly.”**—*ANON.* (1667), 1 Sid. 316; 82 E. R. 1129.

**3627. Time for payment—Rent reserved for whole year—Payable at certain days.**—*SMITH v. NUSAM* (1610), 1 Bulst. 48; 1 Brownl. 108; Yelv. 189; 80 E. R. 751.

**3628. — Days of payment differing in reddendum & habendum.**—*TOMPKINS v. PINCENT*, No. 3690, *post*.

*See, generally, DEEDS, Vol. XVII., pp. 389 et seq.*

**3629. Rent in kind—Keep of lessor—Lessor an unmarried woman—Effect of marriage.**—*ANON.* (1562), Dal. 44; 123 E. R. 259.

**3630. — Rent to be taken by lessor—Distinguished from rent to be delivered by lessee.**—*SOUTHWELL v. WARD* (1595), Poph. 91; 79 E. R. 1202.

**3631. — Corn rent—Reservation by “quarters.”**—If the *reddendum* in a hospital renewed lease be “so many quarters of corn,” it will be understood to mean legal quarters, reckoning the bushel at 8 gallons, although the old leases before the stat. 22 & 23 Car. 2, c. 12, contained the same *reddendum*, & although till lately the lessees paid by composition, reckoning the bushel at 9 gallons.—*ST. CROSS HOSPITAL*

(MASTER, ETC.) *v.* HOWARD DE WALDEN (LORD) (1795), 6 Term Rep. 338; 101 E. R. 583.

**Annotation:—***Mentd.* *Giles v. Jones* (1855), 11 Exch. 393.

**3632. Rent by service—Team work—For what purpose claimable.**—An agreement for an agricultural lease contained a stipulation that the tenant should perform each year for the landlord, “at the rate of one day’s team work with two horses & one proper person for every £50 of rent when required, except at hay & corn harvest, without being paid for the same.” In ejectment for a forfeiture:—*Held*: (1) the work thus to be performed meant any work for which teams are generally used, & therefore included drawing coals to Blenheim Palace; (2) the tenant was not bound to supply a cart or other vehicle for the purpose of the work.—*MARLBOROUGH (DUKE) v. OSBORN* (1864), 5 B. & S. 67; 3 New Rep. 568; 33 L. J. Q. B. 148; 10 L. T. 28; 28 J. P. 532; 12 W. R. 418; 122 E. R. 758.

**3633. — Whether tenant must supply vehicle.**—*MARLBOROUGH (DUKE) v. OSBORN*, No. 3632, *ante*.

**3634. Fluctuating rent—Calculated by average price of wheat—How average price ascertained.**—An annual rent of £620 was reserved on a lease, subject to a proviso for reducing or increasing the same, according to the average price of wheat in any one year of the lease, such average price to be ascertained from the then current year’s averages, which are taken in the month of Jan. every year, under Tithe Commutation Act:—*Held*: the average price of wheat intended by such agreement was the septennial average published annually in pursuance of the Act.—*KENDALL v. BAKER* (1852), 11 C. B. 842; 21 L. J. C. P. 110; 18 L. T. O. S. 242; 16 Jur. 479; 138 E. R. 706.

**3635. — Calculated by electric horse power generated.**—By agreement in 1899, supplemental to an agreement in 1892, resp. co. agreed to pay a specified fixed rental for a strip of land lying by the water’s edge in a public park, together with the use of a portion of the flow of the river as it passes, which had been placed at their disposal for the purpose of constructing works & generating electricity; & also additional rentals varying in amount by reference to the electrical horse power generated & used & sold or disposed of by the co., “such additional rentals as shall be payable for & from such generation & sale or other disposition” to be paid half-yearly:—*Held*: the basis of calculation, according to the true construction of the clause relating to additional rentals, was the highest amount or quantity of electrical horse power generated & used & sold or disposed of at any one time, & so remained until a higher point was reached.—*A.-G. FOR ONTARIO v. CANADIAN NIAGARA POWER CO.*, [1912] A. C. 852; 82 L. J. P. C. 18; 107 L. T. 629, P. C.

**SUB-SECT. 4.—RESERVATION IN KIND OR BY SERVICE.**

**3636. Rent in kind—Corn rent—Reservation of bushels.**—A reservation of 8 bushels of wheat instead of one quarter is good.—*MOUNTJOY’S (LORD) CASE* (1580), 5 Co. Rep. 3 b; Moore, K. B. 197; 77 E. R. 52.

**Annotations:—***Mentd.* Worcester’s (Dean & Chapter) Case (1605), 6 Co. Rep. 37 a; *Gee v. Freedland* (1626), Cro.

**PART XV. SECT. 3, SUB-SECT. 4.**

**b. Rent in kind—One-third crop.**—*RICHARDSON v. TRINDER* (1861), 11

**C. P. 130.—CAN.**

**c. —**—*Held*: the rent was one-third of the crop, & was reducible to a certainty.—*FOSTER v.*

*MOSS* (1911), 17 W. L. R. 174; 4 Sask. L. R. 421.—**CAN.**

**d. — Two-thirds crop.**—*PARADIS*

Car. 47; Orby v. Mohun (1706), Freem. Ch. 291; Scott v. A'Chez (1743), Park. 21; Taylor d. Atkyns v. Horde (1757), 1 Burr. 60; Doe d. Vaughan v. Meyler (1814), 2 M. & S. 276; Doe d. Bartlett v. Rendle (1814), 3 M. & S. 99; Doe d. Shrewsbury v. Wilson (1822), 5 B. & Ald. 363; Doe d. Douglas v. Lock (1835), 2 Ad. & El. 705; Delacherois v. Delacherois (1864), 4 New Rep. 501; *It. Aldam's S. E.*, [1902] 2 Ch. 46.

**3637. — Wine.**—On a covenant for the lessee & his assigns to pay so many bottles of wine & so much money as a rent; if the lessee die, & his exor. assigns the term, the lessor cannot maintain covenant against such assignee, for arrears due after his assignment of the term to another, although the lessor had no notice of the assignment made by the first assignee.—*PITCHER v. TOVEY* (1892), as reported in 4 Mod. Rep. 71; 87 E. R. 268; *sub-nom.* *RICHARDS v. TURVY*, Comb. 192; Holt, K. B. 73.

*Annotations:—Mentd.* Cook v. Harris (1697), 1 Ld. Raym. 367; Onslow v. Corrie (1817), 2 Madd. 329.

**3638. — Culm.**—Tenant for life granted a lease, rendering rent in money & a quantity of culm to be carried to the lord's house. After the death of the tenant for life, the remainderman sent his servant to the different tenants for the culm to be brought home. Culm was accordingly sent twice, at intervals, & received:—*Held*: even assuming the lease granted by the tenant for life to be invalid, the remainderman had adopted the tenant so far, that the latter was entitled to a notice to quit before ejectment could be maintained.—*DOE d. TUCKER v. MORSE* (1830), 1 B. & Ad. 365; 9 L. J. O. S. K. B. 77; 109 E. R. 822.

*Annotation:—Mentd.* Croft v. Blay (1919), 35 T. L. R. 556.

**3639. Reservation in money or kind.**—At option of lessor—What amounts to election.—*LETTEN v. WINNE* (1697), 1 Lut. 643; 125 E. R. 337.

Whether service or return in kind amounts to rent.—*See* Sect. 1, sub-sect. 6, *ante*.

Construction of reservation.—*See* Sub-sect. 3, *ante*.

#### SUB-SECT. 5.—SINGLE RENT RESERVED IN RESPECT OF LAND AND CHATTELS.

**3640. General rule.**—If a man demises a house & land for years, with a stock or sum of money rendering rent, & the lessee covenants for him, his exors., administrators, & assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant: for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only (*per* CUR.).—*SPENCER'S CASE*, No. 4536, *post*.

**3641. —.**—If a lease be made of land & goods, rendering rent, it is issuing only out of the land (*POPHAM, C.J.*).—*COLLINS v. HARDING* (1597), as reported in Cro. Eliz. 606; 78 E. R. 848.

**3642. —.**—It must occur constantly that the value of demised premises is increased by the goods upon the premises, & yet the rent reserved still continues to issue out of the house or land, & not out of the goods; for rent cannot issue out of goods (*MANSFIELD, C.J.*).—*NEWMAN v. ANDERSON* (1806), 2 Bos. & P. N. R. 224; 127 E. R. 611. *Annotation:—Mentd.* Cook v. Humber, Wilson v. Roberts (1862), 5 L. T. 838.

**3643. —.**—Declaration in debt for rent stated a demise of a messuage, land, & premises,

with the appurtenances. The proof was of a demise of a messuage, & land, together with the furniture, utensils, & implements.—*Held*: as the rent issued out of the real property, & not out of the furniture, it was sufficient for plff. to allege & prove a demise of the real property, & therefore there was no variance.—*FAREWELL v. DICKENSON* (1827), 6 B. & C. 251; 9 Dow. & Ry. K. B. 245; 5 L. J. O. S. K. B. 154; 108 E. R. 446. *Annotations:—Refd.* Brown v. Peto, [1900] 1 Q. B. 346.

*Mentd.* Evans v. Robins (1864), 12 W. R. 604.

**3644. —.**—There is no doubt in my mind that this lease is a lease of part of the land mortgaged. It is none the less such a lease because it comprises in addition certain chattels; nor were the mtgees. in any way injured by the addition, for, in my opinion, the whole rent must be taken as issuing out of the land, & as being therefore recoverable by the mtgees. when they come to take possession (*BIGHAM, J.*).—*BROWN v. PETO*, [1900] 1 Q. B. 346; 69 L. J. Q. B. 141; 82 L. T. 264; 16 T. L. R. 131; *on appeal*, [1900] 2 Q. B. 653.

*Annotations:—Mentd.* King v. Bird, [1909] 1 K. B. 837; *It. Knight & Hubbard's Underlease*, Hubbard v. Highton, [1923] 1 Ch. 130.

**3645. Effect of sale of land.**—The lessor of land & implements with it entered on his lessee & made a feoffment thereof, & the lessee re-entered upon him. The feoffee may now bring debt for the whole rent, & there shall be no apportionment.—*HEAD v. LAWNSE* (1561), 2 Dyer, 212 b; 73 E. R. 469.

*Annotations:—Refd.* Emott v. Cole (1591), Cro. Eliz. 255; *It. Hall v. Howles* (1750), 1 Ves. Sen. 348; Brown v. Peto, [1900] 1 Q. B. 346.

**3646. Land & chattels in separate ownership.**—

Whether rent severable.—The owner of a house, having mortgaged it in fee, & continuing in possession let it as a ready furnished house to debt. He afterwards became bkpt. & then, with the assent of his assignees, let the house ready furnished to debt., by the week, who, after three weeks' occupation, received notice from the mtgee. to pay rent to him. In an action brought by the assignees for use & occupation of the house & furniture:—*Held*: they were entitled to recover for the use of the furniture; the rent of the house & furniture might be apportioned, or if not, upon the entry of the mtgee. claiming the house, & having no interest in the furniture a new agreement might be inferred by the jury to take the house at a reasonable rent from the mtgee., & to pay a reasonable amount as a compensation for the use of the furniture to the assignees.—*SALMON v. MATTHEWS* (1841), 8 M. & W. 827; 11 L. J. Ex. 59; 151 E. R. 1275.

*Annotation:—Fold.* Hoare v. Hoare Bungalows (1912), 56 Sol. Jo. 686.

**3647. —.**—*HOARE & CO. v. HOARE BUNGALOWS, LTD.*, No. 4072, *post*.

Apportionment & severance of rent generally.—*See* Sect. 9, *post*.

#### SUB-SECT. 6.—CONDITIONAL RENT.

**3648. Whether rent conditional.**—Question of fact for jury.—M. agreed verbally with W.'s agent to take a house of W., furnished, at £170 a year rent, for the house & furniture, payable quarterly, & in advance. The house was furnished only in part, but the agent said that it should be completely furnished; not, however, specifying any

*J. HUTTON* (1904), 3 W. L. R. 317; *Terr. L. R.* 319.—*CAN.*

*e. — One-half crop.*—*RICHIEY v. REAR* (1907), 5 W. L. R. 420.—*CAN.*

*f. —.*—*GILHAM v. ULM*, [1923] 3 W. W. R. 853.—*CAN.*

**Sect. 3.—Reservation of rent: Sub-sects. 6, 7, 8 & 9, A.]**

time. M. was let into possession within a month from the above treaty. After the expiration of a quarter, W. distrained for rent, the furniture not having been sent in as promised. M. brought trespass:—*Held*: it was a question for the jury whether the agreement to pay rent was absolute, or on condition only of the furniture being sent in: there was evidence upon which they might find it to have been conditional: &, therefore, the distress was not justified.—*MECHELEN v. WALLACE* (1836), 7 Ad. & El. 54, n.; 6 Nev. & M. K. B. 316; 112 E. R. 391.

**3649. Rent conditional on execution of repairs by lessor.—Whether binding on lessor's assignees.]—***GRAHAM v. ERWOOD* (1851), 17 L. T. O. S. 65.

**3650. Breach of condition by lessee—Failure of consideration.]—***BEDEL'S CASE* (1590), 3 Leon. 159; 74 E. R. 605.

**Conditional increase of rent.]—***See* Sub-sect. 9, B., *post*.

**SUB-SECT. 7.—RESERVATION TO STRANGER.**

**3651. Whether valid.]—**Rent reserved to a son & heir apparent but not by name of heir upon a lease made by the father:—*Held*: void.—*OATES v. FRITH* (1815), Hob. 180; 80 E. R. 280.

*Annotation*:—*Mentd. Marks v. Marks* (1718), 10 Mod. Rep. 419.

**3652. —.]—***GILBERTSON v. RICHARDS*, No. 3588, *ante*.

**3653. Enforceable by action on covenant.]—**If I make a lease for years reserving rent to a stranger, an action of covenant will lie by the party to pay the rent to the stranger (*HALE, C.J.*).—*DEERING v. FARRINGTON* (1674), 1 Mod. Rep. 113; 3 Keb. 304; 88 E. R. 772; *sub nom. DERING v. FARRINGTON*, Freem. K. B. 308.

*Annotations*:—*Reid. Steward v. Wolveridge* (1832), 9 Bing. 60. *Mentd. Acton v. Role* (1696), 2 Salk. 662; *Caister Parish v. Eccles Parish* (1700), 1 Ld. Raym. 682; *R. v. Aickles* (1701), 12 Mod. Rep. 553; *Seignoret v. Noguire* (1706), 2 Ld. Raym. 1241; *Moulds v. Birchall* (1772), 2 Wm. Bl. 820; *Barnett v. Wheeler* (1841), 7 M. & W. 364; *Ward v. Audland* (1847), 16 M. & W. 862; *Morley v. Attenborough* (1849), 3 Exch. 500; *Aulton v. Atkins* (1856), 18 C. B. 240.

**SUB-SECT. 8.—AGREEMENT TO REDUCE RENT.**

**3654. What amounts to—Agreement for allowance distinguished.]—**If a lease of the tithes of a rectory be made at a certain rent, with a covenant that the lessee shall bring the rent to the rectory & that the lessor shall thereupon abate him so much on each payment, this is no defalcation of the original rent, but a mere covenant for allowance.—*MASON v. CHAMBERS* (1804), Cro. Jac. 34; 79 E. R. 27; *sub nom. CHAMBERS v. MASON*, Yelv. 42, 47.

*Annotations*:—*Apld. Davies v. Stacey* (1840), 12 Ad. & El. 506. *Mentd. Holland v. Fisher* (1662), O. Bridg. 181; *R. v. Kempe* (1695), 1 Ld. Raym. 49; *Winter v. Loveday* (1697), 1 Com. 37; *A.-G. v. Windsor* (Dean & Canons) (1860), 30 L. J. Ch. 599.

**PART XV. SECT. 3, SUB-SECT. 8.**

**3657 i. Whether operating as new demise.]—**Before the expiry of the lease an arrangement was made between the co. & the landlord for a reduction of the rent after the expiry of the lease, nothing being said as to the other terms:—*Held*: the arrangement made imported the terms of the old lease, so far as applicable.—*Re CANADA COAL CO., DALTON'S CLAIM* (1895), 27 O. R. 151.—*CAN.*

**3657 ii. —.]—**A verbal agreement to accept a lesser rent than that mentioned in an agreement to grant a lease, followed by acceptance thereof, is not, *per se*, an abandonment of the former contract; nor does it operate as a substitution of a new agreement for the former one; or as the creation of a new tenancy, in which the old tenancy merged.—*CLARKE v. MOORE* (1844), 1 Jo. & Lat. 723.—*IR.*

*g. Lease of licensed premises —*

**§ 3655. —.]—**Avowry for rent due on a demise of £40 *per annum*. Pleas in bar, (a) *non tenuit modo et formā*; (b) as to a part of the rent, that it was not due. Pltf. held under a lease, reserving £40 *per annum* in the body thereof; but, before the lease was executed, the following words were added, between which & the body of the lease the signatures were written. "The allowance of the road to the Six Bells' yard to be made as usual." It had been usual for the lessor to allow the lessee £5 *per annum* for so much annually paid by the lessee to a third party for the use of such road to the demised premises:—*Held*: this did not reduce the reservation to £35 *per annum*, so as to entitle pltf. to a verdict on the plea of *non tenuit*.

*Qu.*: whether a payment made under this memorandum would have been evidence under the plea of *riens in arrears*.—*DAVIES v. STACEY* (1840), 12 Ad. & El. 506; 4 Per. & Dav. 157; 9 L. J. Q. B. 393; 113 E. R. 904.

**3656. —.]—****Partial occupation by lessor.]—**If there be a written agreement between landlord & tenant, that for certain premises the tenant shall pay £170 a year & afterwards an arrangement is made by parol that £30 a year shall be allowed out of it, because the landlord is to occupy a certain part for a time, such parol arrangement does not vary the agreement so as to reduce the rent payable under it; & therefore an allegation is correct which states it to be £170.—*HILTON v. GOODHIND* (1827), 2 C. & P. 591, N. P.

**3657. Whether operating as new demise.]—**By a written agreement, pltf. let to deft. certain premises at a rent of 20s. a week, payable as demanded; four weeks' notice to quit from any day to be sufficient. During the continuance of this tenancy, pltf. verbally agreed with deft. to accept 16s. a week, which was accordingly paid, &, on two occasions, deft. submitted to a distress for that amount:—*Held*: no new demise was thereby created, & consequently the county ct. had no jurisdiction under 9 & 10 Vict. c. 95, s. 122, the rent being above £50.—*CROWLEY v. VITTY* (1852), 7 Exch. 319; Cox, M. & H. 582; 21 L. J. Ex. 135; 18 L. T. O. S. 270; 16 J. P. 360; 155 E. R. 968.

*Annotation*:—*Reid. Re Harrington v. Ramsay* (1853), 2 E. & B. 669.

**3658. —.]—****Reduction for limited period.]—**Deft. by agreement, demised to pltf. certain premises from May 15, 1851, at the yearly rent of £145 payable on Nov. 14 & May 14. These premises had been let to W., whose tenancy expired on May 13, 1851, & who had omitted to give a notice to quit to one of his undertenants who occupied a cottage at a yearly rent of £5; & in consequence, pltf. could not obtain possession of that part of the premises. It was then agreed that deft. should receive from the undertenant rent for two half years & deduct that £5 from the rent to be paid for the whole by pltf., & that pltf. should pay £70 to deft. on Nov. 14, 1851, & May 14, 1852:—*Held*: such agreement operated as a new

*Rent reduced if prohibitory law passed—Local option bye-law.]—*The lease contained a clause providing for a rebate in the rent, if any prohibitory law passed. A local option bye-law had been passed, & then 8 Edw. 7, c. 54, s. 11, was enacted:—*Held*: the tenant was entitled to a rebate.—*HESSEY v. QUINN* (1909), 13 O. W. R. 907; 18 O. L. R. 487.—*CAN.*

*h. In case of damage by fire—Binding on assignee of lessor.]—A., the*

demise; & deft. was entitled to distrain for £70 which became due on Nov. 14.

**Pltf.**, not having had all he bargained for, for which he was to pay his rent of £145, was not bound to pay it; & the law would not apportion the rent, & make him liable to pay a part proportioned to the part enjoyed, as it does in the case of eviction by title paramount (POLLOCK, C.B.).—**WATSON v. WAUD** (1853), 8 Exch. 335; 22 L. J. Ex. 161; 20 L. T. O. S. 261; 1 W. R. 133; 155 E. R. 1375.

**3659. By court—Lessor an infant.**—**LATEWARD v. SCHREIBER** (1817), Coop. Pr. Cas. 46; 47 E. R. 394.

**3660. ——— Principle on which court acts.**—**HENNIKER v. CHAFY** (1855), 3 W. R. 300.

**3661. ——— Lessors trustees—Estate being administered by court.**—**MILBANK v. STEVENS** (1838), Coop. Pr. Cas. 45; 47 E. R. 393.

**3662. Effect of non-payment of reduced rent—Reversion to old rate.**—Certain premises having been demised to a tenant, his assignees entered into an agreement with their landlord altering the terms on which the rent was to be paid under the demise. The rent was paid for a short period on the new basis, when on the assignees becoming bkpt. the landlord distrained after the bkpcy. for the rent then due according to the demise, & not on the altered basis. The trustee paid the rent claimed under protest:—**Held**: the landlord was entitled to distrain after the bkpcy. for the rent due according to the terms of the demise, as the effect of the agreement was merely to postpone the landlord's rights under the demise so long as the rent was paid on the altered basis according to the agreement, & as the rent had not been so paid, the landlord's rights under the demise could be enforced.—**Re SMITH & HARTOGS, Ex p. OFFICIAL RECEIVER** (1895), 73 L. T. 221; 44 W. R. 79; 39 Sol. Jo. 672; 2 Mans. 400; 15 R. 641.

**3663. Lease of licensed premises—Rent reduced if beer supplied by lessor—Right of lessee to purchase elsewhere.**—The lease of a public-house contained a covenant that the lessee & his assigns would, during the term, purchase all beer required for the business from the lessors, a proviso for re-entry on non-payment of rent, or non-performance of the covenants, & a provision for reduction of the rent so long as the lessee should purchase beer from the lessors:—**Held**: the covenant to purchase beer was an absolute one, & the lessee had not the alternative of dealing with a rival brewer & paying the unreduced rent.—**LIANBURY v. CUNDY** (1887), 58 L. T. 155.

**3664. ——— Effect of assignment.**—A covenant by the lessee contained in the lease of an hotel that he will not during the term created by the lease buy, receive, sell, or dispose of, in, upon, out of, or about the premises any wines or spirits other than shall have been *bona fide* supplied by or through the lessor, a wine & spirit merchant,

his successors or assigns, is a covenant which runs with the land, & is binding on the assigns of the lessee, even though such assigns are not mentioned; & where such covenant is coupled with a proviso for abatement from the rent so long as the lessee shall well & truly observe the covenant, the assigns of the lessee are entitled to the benefit of the proviso, & may claim the abatement, notwithstanding that the ownership of the business of the lessor & the ownership of the reversion have been severed by a sale of the business, while they continue to obtain wines & spirits from the purchasers of the business.—**WHITE v. SOUTHELD HOTEL CO.**, [1897] 1 Ch. 767; 66 L. J. Ch. 387; 76 L. T. 273; 45 W. R. 434; 13 T. L. R. 310; 41 Sol. Jo. 384, C. A.

**Annotations**:—**Mentd.** **Rogers v. Hosgood**, [1900] 2 Ch. 388; **Manchester Brewery Co. v. Coombs**, [1901] 2 Ch. 608; **Chapman v. Smith**, [1907] 2 Ch. 97; **Re Stephenson, Poole v. Stephenson**, [1915] 1 Ch. 802.

#### SUB-SECT. 9.—AGREEMENT TO INCREASE RENT.

##### A. In General.

**3665. Whether writing necessary.**—Where the lessee of a house, & his partner in trade, agreed to pay the lessor annually, during the residue of the lessee's term, 10 per cent. on the cost of new buildings, if the lessor would erect them:—**Held**: (1) this agreement was not required by Stat. Frauds to be in writing; (2) though the partner quitted the premises, he was liable on this collateral agreement during the residue of the term; only the original rent could be distrained for & this was merely a collateral agreement to pay so much more money during the residue of the term, if the lessor would make the desired expenditure.—**HOBY v. ROEBUCK & PALMER** (1816), 7 Taunt. 157; 2 Marsh. 433; 129 E. R. 63.

**Annotations**:—**As to** (1) **Reid. Donellan v. Read** (1832), 3 B. & Ad. 899; **Maples v. Pepper** (1856), 20 J. P. 279.

**3666. ———.**—**DONELLAN v. READ**, No. 3505, ante.

**3667. ———.**—Debt on an indenture for rent. Plea, that whilst deft. was in the occupation of the demised premises, & before the rent became due, it was agreed between pltf. & deft., that pltf. should make certain alterations, & in consideration thereof, deft. should relinquish his interest under the indenture, & accept a fresh lease for 7 years at an increased rent; & until such lease should be tendered to deft., he should hold the premises as tenant from year to year, at the increased rent; that pltf. executed the alterations; that deft. relinquished his interest under the indenture, & held the premises under the agreement; & that no new lease was executed; by means of which premises deft. became tenant from year to year, & all his interest under the indenture was surrendered to pltf. by act & operation of law. Replication, *de injuria*; &

assignee of the lessor, sued B. the lessee of a grist mill, in debt for rent. The lease contained the following covenant: "The lessor, for himself, his assigns, etc., covenants, that during all the time the grist mill shall be unfit for working, in consequence of damage or loss by fire, a fair reduction & allowance shall be made in the rent":—**Held**: the assignee as well as the original lessor was bound.—**McGILL v. PROUDFOOT** (1847), 4 U. C. R. 33.—**CAN.**

**k. Rent payable in advance—Contingent alteration in rent.**—A proviso in an hotel lease, under which rent was payable in advance, to the effect that upon the happening of a

named event a new rental shall be fixed, applied only to rent which by the terms of the lease should become payable after the happening of the event mentioned.—**Re LITTLE & BEATTIE** (1917), 38 O. L. R. 551; 34 D. L. R. 217.—**CAN.**

**l. Whether agreement presumed—Where reduced rent accepted—Want of consideration.**—**WESTERN TRANSFER CO. v. FRY** (1920), 55 D. L. R. 291.—**CAN.**

**m. ———.**—A bill will not lie by a tenant against his landlord for specific performance of a promise in writing signed by him to reduce the

rent of premises demised by indenture, in consideration of previous expenditure on them & a fall in the value of the land though there had been an acceptance of the reduced rent for 7 years.—**FITZGERALD v. PORTARLINGTON (LORD)** (1835), 1 Jo. Ex. Ir. 431.—**IR.**

**n. ———.**—**MORGAN v. RAINSFORD** (1845), 8 I. Eq. R. 299.—**IR.**

**o. ———.**—An agreement to reduce rent was presumed from the receipt of the reduced rent, which was consistent with the recital in a settlement.—**ENRAGHT v. HAUGHTON** (1845), 8 I. Eq. R. 274.—**IR.**

**Sect. 3.—Reservation of rent: Sub-sect. 9, A. & B. (a) & (b) i.]**

issue thereon:—*Held*: (1) the plea could only be proved by an agreement in writing, since the stipulation as to the yearly tenancy was part of the agreement for a future lease, & such agreement was required by Stat. Frauds to be in writing; (2) under such an agreement, there would be no surrender of the existing lease by operation of law, until the new lease was granted.—*FOQUET v. MOOR* (1852), 7 Exch. 870; 19 L. T. O. S. 205; 155 E. R. 1202; *sub nom.* *FORQUET v. MOORE*, 22 L. J. Ex. 35.

*Annotation*:—*As to* (1) *Consd.* *Young v. Austen* (1869), L. R. 4 C. P. 553.

*See, generally*, Part V., Sect. 1, *ante*.

**3668. Whether parol evidence admissible—Parol agreement inconsistent with written agreement.]**—Parol evidence is not admissible, to prove an additional rent payable by a tenant, beyond that expressed in the written agreement for a lease.—*PRESTON v. MERCEAU* (1779), 2 Wm. Bl. 1249; 96 E. R. 736.

*See, generally*, DEEDS, Vol. XVII., pp. 312–314.

**3669. Effect of agreement—Whether new tenancy created.]**—If, whilst a tenant from year to year is in possession of lands under an agreement reserving a certain rent, he agrees with his landlord to pay an increased rent, this will not have the effect of creating a new tenancy.—*DOE d. MONCK v. GEEKIE* (1844), 5 Q. B. 841; 13 L. J. Q. B. 239; 8 Jur. 360; 114 E. R. 1466; *sub nom.* *GEEKIE v. MONK*, *DOE d. MONK v. GEEKIE*, 1 Car. & Kir. 307, 555.

*Annotation*:—*Consd.* *Phillips v. Miller* (1875), L. R. 10 C. P. 420.

**3670. ——— Agreement acted upon.]**—A fire having occurred upon leasehold premises, the lessor entered. Subsequently an executory agreement was entered into between the parties for a new lease at an increased rent, as was evidenced by letters which passed between them, in one of which a suggestion was made that a memorandum should be indorsed upon the old lease referring to the increase of rent. This was not carried out, but payments of the increased rent were demanded & made, but under protest by the lessee's solr. Upon the bkpy. of the lessee the lessor distrained for rent at the increased rate. The county ct. judge held that the old lease was still subsisting, & that consequently the old rental alone could be distrained for:—*Held*: the old lease was surrendered by operation of law, & the agreement for an increased rent having been made & acted upon, the distress for such increased rent was lawful.—*Re YOUNG, Ex p. VITALE* (1882), 47 L. T. 480.

Creation of tenancy generally, *see* Parts I. & III., *ante*.

**Extra rent payable in respect of redeemed land tax.]**—*See* Part XVI., Sect. 1, sub-sect. 2, B., & LAND TAX, Vol. XXX., p. 313, No. 133.

**Fluctuating rent.]—See Nos. 3634, 3635, *ante*. Restriction on increase of rent.]—See Part XXVII., *post*.**

**B. Conditional Agreements.**

**(a) In General.**

**3671. On raising height of building—Rent payable until abatement of height.]**—*TURNER v. METCALFE* (1708), 2 Eq. Cas. Abr. 16; 22 E. R. 13, L. C.

**3672. On land occupied by tenant being increased.]**—Where deft. entered into a covenant to pay a certain rent for a piece of ground, & that the rent should be increased in case an adjoining piece of ground, then in dispute, should be adjudged to belong to pltf., or in case deft. should by any ways or means come to the possession thereof, & where deft. did obtain possession thereof from another person to whom he paid rent for the same:—*Held*: in order to entitle pltf. to the increased rent, it was not necessary that such adjoining ground should have been adjudged to pltf. or obtained by him.—*LEATH v. BAKER* (1736), *Loc temp. Hard.* 319; 95 E. R. 207.

**3673. If land occupied by others than lessee—Reasonableness a question of law.]**—In a lease of lands renewable for ever, the lessee covenants that he & his heirs shall, with all their family, live on the demised premises, during the continuance of that & every other lease; & that whenever he or they shall fail so to do, an additional rent shall become payable, with the usual remedies of distress & entry to compel the payment thereof. The reasonableness of this covenant is properly triable at law; & a ct. of equity ought not to interpose, or give relief against it.—*PONSONBY v. ADAMS* (1770), 2 Bro. Parl. Cas. 431; 1 E. R. 1044, H. L.

*Annotation*:—*Expld.* *Astley v. Weldon* (1801), 2 Bos. & P. 346.

**3674. ——— What amounts to occupation.]**—A lease contained a stipulation, that, for every acre, & so in proportion for a less quantity of the land which the lessee should suffer to be occupied by any other person without the consent of the landlord, an additional rent should be paid. The tenant undertook to use, occupy, dress, & manure the land according to the custom of the country. The tenant, without the consent of the landlord, suffered other persons to use small portions of the land for the purpose of raising a potato crop. It was proved to be the custom of the country for farmers to pursue that course:—*Held*: the landlord was entitled to the additional rent, this being an occupation of the land by other persons.—*GREENSLADE v. TAPSCOTT* (1834), 1 Cr. M. & R. 55; 4 Tyr. 566; 3 L. J. Ex. 328; 149 E. R. 991.

**3675. If additional brick earth dug—Additional earth dug by stranger.]**—T. demised land to pltf. at an annual rent for 21 years, with liberty to dig half an acre of brick earth annually: the lessee

**PART XV. SECT. 3, SUB-SECT. 9.—A.**

**3669 i. Effect of agreement—Whether new tenancy created.]**—*DELMERGE v. MULLINS* (1875), 1 R. 9 C. L. 209.—*IR. p. Necessity for agreement.]*—A landlord who was receiving £3 per month as rent from his tenant gave him the following notice in writing: "Please take notice from Sept. 1, 1924, your rent will be £5 10s. per month, & the rent must be paid in advance before Sept. 5." The tenant protested & stated that he could not agree to pay the increased rent:—*Held*: the landlord's letter set out above was a proposal that required the tenant's assent before it could be enforced.—

*DAYALJEE v. NAIDOO* (1915), 36 N. L. R. 66.—S. AF.

**q. Percentage of Government valuation—No valuation of particular property—Property included in general valuation.]**—*BEVAN v. BEVAN*, [1919] N. Z. L. R. 721.—N.Z.

**r. Particular terms—Construction of.]**—*Re GEDDES & GARDE, Re GEDDES & COCHRANE* (1900), 20 C. L. T. 455.—CAN.

**t. Date must be agreed upon.]**—Where a tenant in possession under an article impeached by his landlord, proposed to pay an increased rent, a bill by the landlord for a specific execution of the proposal dismissed,

the period when the increased rent should commence, not being agreed on.—*ORMOND (LORD) v. ANDERSON* (1813), 2 Ball. & B. 363.—IR.

**PART XV. SECT. 3, SUB-SECT. 9.—B. (a).**

**a. Occupation after term expired.]**—Pltf. allowed defts. to remain in occupation for two months after the expiration of their term, & made no demand for an increased rental, but they had notice that if they desired to remain on longer they must pay an increased rental:—*Held*: pltf. must be deemed to have agreed to allow defts. to remain for the two months

covenanted that he would not dig more, or if he did, that he would pay an increased rent of £375 per half acre, being after the same rate that the whole brick earth was sold for. A stranger dug & took away brick earth: the lessee recovered against him the full value of it:—*Held*: he was entitled to retain the whole damages.

It is common learning that every lessee of land whether for life or years is liable in an action of waste to his lessor for all waste done on the land in lease by whomsoever it may be committed (HEATH, J.).—*ATTERSOLL v. STEVENS* (1808), 1 Taunt. 183; 127 E. R. 802.

*Annotation*:—*Consd.* Toleman v. Portbury (1870), L. R. 5 Q. B. 288.

**3676. On improvements by lessor—Percentage on cost of new buildings.**—*HOBY v. ROEBUCK & PALMER*, No. 3665, *ante*.

**3677.** ———.—*A landlord demised certain premises by indenture at a specific rent, & afterwards the lessee agreed, that if the lessor would enlarge the buildings on the premises demised, he would pay a sum of £10 per cent. additional on the outlay. The additional erections were made, & the lessee subsequently became bkpt.:*—*Held*: this agreement was a collateral contract made by the bkpt. from which he was discharged by his certificate, & not one running with the land, for which the assignees, who retained the use of the premises, were liable.—*JAMBERT v. NORRIS* (1837), 2 M. & W. 333; Murp. & H. 29; 6 L. J. Ex. 109; 1 Jur. 24; 150 E. R. 784.

**3678.** ——— **Improvements executed by landlord.**—*DONELLAN v. READ*, No. 3565, *ante*.

**3679. On carrying on offensive trade—Right of lessees to carry on trade & pay extra rent.**—*Defts.* were assignees of the lease of certain premises which had been demised by plffs. for a term of years, the *reddendum* being as follows: "yielding & paying a yearly rent of £30 by equal quarterly payments" on the usual quarter days, " & a like yearly rent of £25 by like equal payments in case any of the trades, occupations, or things herein-after covenanted not to be carried on or done upon the premises shall be carried on or done." The lessees, among other usual covenants, covenanted not to carry on upon the premises certain specified trades or businesses, nor any offensive, noisome, or noisy trade or business whatsoever, nor do nor suffer to be done anything which might be or grow to the damage or annoyance of the lessors. The lease contained a condition of re-entry if the yearly rent of £30 or the further rent of £25, in case the same should become payable, were in arrear, or if & whenever there should be a breach of any of the covenants thereinbefore contained on the part of the lessees. *Defts.* having carried on upon the demised premises a business within the terms of the above-mentioned covenant, plffs. sued to recover the premises upon a forfeiture of the lease:—*Held*: the lease could not be construed as meaning that *defts.* were entitled to carry on the business in question upon payment of the additional rent mentioned in the *reddendum*, & plffs. were entitled to re-enter under the condition for re-entry should they choose to

exercise that option, instead of requiring the payment of the additional rent.—*WESTON v. METROPOLITAN ASYLUM DISTRICT MANAGERS* (1882), 9 Q. B. D. 404; 51 L. J. Q. B. 399; 46 L. T. 580; 30 W. R. 623, C. A.

**Penal rent.**—*Sec* Sub-sect. 9, B. (b), *post*.

#### (b) Penal Rent.

##### i. In General.

**3680. Character of penal rent—Whether liquidated damages or penalty—Words used immaterial.**—

—Since the case of *Kolfe v. Petersen*, [(1772), 2 Bro. Parl. Cas. 436] in the House of Lords, in all cases between the landlord & tenant, whether the term used has been "penalty" or "liquidated damages," or "additional rent," or any similar expression, it has always been considered, on the authority of that case, as the rule of the ct., that it should not be considered as a penalty, in order to protect *deft.* from answering, but as stipulated damages, or additional rent, & as entitling *plff.* to a discovery of the transaction. . . . I do not care whether the expression "penalty" or "stipulated damages" is used; it is the substance of the thing for which the payment is intended to be made, & it is a compensation stipulated to be paid for the mismanagement of the farm (*SIR WILLIAM ALEXANDER, C.B.*).—*JONES v. GREEN* (1829), 3 Y. & J. 298, Ex. Ch.  
*Annotation*:—*Refd.* Denton v. Richmond (1833), 3 Tyr 630.

— **Rent payable on ploughing up pasture.**—*See* AGRICULTURE, Vol. II., p. 19, Nos. 107–113. *Sec, generally*, BONDS, Vol. VII., pp. 219 *et seq.*; DAMAGES, Vol. XVII., pp. 136 *et seq.*

— **Mining leases.**—*See* MINES.

**3681. Whether lessor's right of re-entry excluded.**—*A lease contained a covenant, among others, that the tenant should not carry any hay, etc., off the premises, under a penalty of £5 per ton, & a clause followed which enumerated all the covenants except the above, & provided, that upon breach of any of the covenants the lessor might re-enter:*—*Held*: the penalty of £5 did not prevent the clause of re-entry from applying to the above covenant, the words of the proviso being large enough to comprehend it.—*DOE d. ANTROBUS v. JEPSON* (1832), 3 B. & Ad. 402; 1 L. J. K. B. 154; 110 E. R. 144.

**3682.** ———.—*W. by lease let premises to T., & T. covenanted not to carry on certain trades thereon, but if T. did so then he should pay an additional rent of £25, & there was a proviso that if rent be unpaid for 21 days, or covenants be broken, W. might re-enter & repossess:*—*Held*: the increased rent was merely part of an alternative remedy, but did not prevent the lessor re-entering on breach of the covenant if he chose to do so.—*WATSON v. METROPOLITAN ASYLUMS BOARD* (1882), 46 J. P. 564, C. A.

**3683. Whether proviso operates as licence to commit waste.**—*A lease granted by virtue of a power enabling tenant for life to make leases without impeachment of waste, contained a proviso that the tenant should pay a further rent of £10 per acre for ploughing up pasture land or for*

on the terms of paying the rent reserved by the lease, but thereafter only on paying the increased rent.—*HILLARD v. GEMMELL* (1885), 10 O. R. 504.—*CAN.*

#### PART XV. SECT. 3, SUB-SECT. 9.— B. (b) (i).

**3680 i. Character of penal rent—Whether liquidated damages or penalty—Words used immaterial.**—*GERRARD v.*

*O'REILLY* (1843), 3 Dr. & War. 414.—*IR.*

**3680 ii.** ———.—*SMITH v. RYAN* (1844), 9 I. L. R. 235.—*IR.*

**3680 iii.** ———.—*A tenant agreed, in case of the breach of all or any of the conditions contained in the contract of tenancy, to pay an additional or penal rent, to be recovered by distress or otherwise as the reserved*

rent was recoverable by law as between landlord & tenant:—*Held*: the additional rent was not a penalty.—*WRIGHT v. TRACY* (1873), 1 R. 7 C. L. 134.—*IR.*

**3681 i. Whether lessor's right of re-entry excluded.**—*CROSS v. MUIRHEAD* (1813), Hume, 860.—*SCOT.*

**3681 ii.** ———.—*CAMPBELL v. M'LAURIN* (1814), Hume, 864.—*SCOT.*

**Sect. 3.—Reservation of rent:** Sub-sect. 9, B. (b) i., ii., iii., iv. & v. **Sect. 4:** Sub-sect. 1, A. & B. (a), (b) & (c).]

managing the farm contrary to the covenants. In an action to recover the penalty, a motion in arrest of judgment on the ground that this amounted to a licence to commit waste, was disallowed.—**BRINGLOE v. GOODSON** (1839), 5 Bing. N. C. 738; 8 Scott, 71; 8 L. J. C. P. 364; 132 E. R. 1284.

**Annotation:**—**Mentd.** Doe d. Egremont v. Hellings (1842), 6 Jur. 821.

**3684. Whether supported by consideration.]**—**Count:** that deft. had become tenant to pltf. on certain terms & stipulations, & among others, that the rent should be payable half yearly, that deft. "should not sell any straw, etc., or manure, grown or produced upon the farm, without the written licence" of pltf., under certain penalties, & "that the penalties should be considered as additional rent, & should be recoverable by distress or otherwise as rent." **Averments:** that "in consideration thereof" deft. promised pltf. to pay all such penalties as he might be liable to pay pltf. according to the stipulations; & that deft., without licence, sold straw grown on the premises during his tenancy. **Breach:** non-payment of penalties in respect thereof. **Plea:** that the straw was sold after determination of the tenancy. **Demurrer:**—**Held:** the promise to observe the terms, one of which was payment of penalties, was supported by the bygone consideration of having become tenant on those terms, & the stipulation must be construed to be not at any time to sell straw grown during the tenancy.—**MASSEY v. GOODALL** (1851), 17 Q. B. 310; 20 L. J. Q. B. 526; 17 L. T. O. S. 181; 15 Jur. 991; 117 E. R. 1298.

#### ii. Ploughing up Pasture Land.

**See** No. 3683, *ante*, & generally, **AGRICULTURE**, Vol. II., pp. 19, 27, Nos. 107–113, 163.

#### iii. Removal of Hay, Straw and Manure.

**See** **AGRICULTURE**, Vol. II., pp. 24, 25, Nos. 141–146.

#### iv. Breach of Covenants as to Cropping.

**See** No. 3683, *ante*, & generally, **AGRICULTURE**, Vol. II., pp. 21, 22, Nos. 124–127.

#### v. Where Rent in Arrear.

**3685. Whether demand necessary.]**—**THYNE v. CHOLMELEY** (1595), Moore, K. B. 357; 72 E. R. 627; *sub nom.* THINN v. CHOMLEY, Cro. Eliz. 383.

**3686. —.]—Qu.:** in debt on a lease reserving a rent, with a *nomine poenæ* for every day it was in arrear, whether a demand is not necessary for every day's forfeiture.—**TRACEY v. DUTTON** (1621), Cro. Jac. 617; Palm. 206; 79 E. R. 531. **Annotations:**—**Mentd.** Manby v. Scott (1663), 1 Keb. 337; Tongue v. Pitcher (1690), 3 Lev. 295; Jones v. Meredith (1739), 2 Com. 661.

**3687. Liability of assignee.]**—**THYNE v. CHOLMELEY** (1595), Moore, K. B. 357; 72 E. R. 627; *sub nom.* THINN v. CHOMLEY, Cro. Eliz. 383.

## SECT. 4.—PAYMENT OF RENT.

### SUB-SECT. 1.—TIME OF PAYMENT.

#### A. In General.

**3688. Whether payable on Sunday.]**—**CHILD v. EDWARDS**, No. 3717, *post*.  
*See, generally,* **TIME**.

#### B. Ascertainment of Rent Day.

##### (a) In General.

**3689. Construction of lease—Construction most beneficial to lessee.]**—**ANON.** (1561), Dal. 27 (9); 2 Dyer, 142 a; 123 E. R. 246.

**3690. —Where habendum & reddendum inconsistent.]**—If in a lease special days of payment are limited by the *reddendum*, the rent must be computed according to that, & not the *habendum*.—**TOMPKINS v. PINCENT** (1702), 1 Salk. 141; 91 E. R. 131; *sub nom.* TOMKINS v. PINCENT, 2 Ld. Raym. 819; *sub nom.* Thomkins v. Pincen, 7 Mod. Rep. 96.

**Annotation:**—**Refd.** Doe d. Harries v. Morse (1834), 4 Tyr. 185.

**3691. Implied term—Tenant holding over—Rent paid on days other than those in original lease.]**—Where premises were let for three years at an annual rent, with a power of renewing upon the same terms at the end of the three years, & the tenant continued in possession after the three years, & paid the rent quarterly:—**Held:** notwithstanding the term of the original letting, this was evidence of an agreement to pay quarterly.—**DARNELL v. WITHERDEN** (1843), 2 L. T. O. S. 123.

**3692. Modification of agreement—By course of dealing—Change in days of payment.]**—After a tenant had signed a written agreement, not under seal, for hiring premises at an annual rent, he was asked by the landlord how he would like to pay his rent, & replied quarterly. Quarterly payments of rent were proved. The landlord having distrained for a quarter's rent, the distress was held illegal, as the original taking was not altered, & no new terms of letting had been agreed on between the parties.—**TURNER v. ALLDAY** (1836), Tyr. & Gr. 819.

**3693. ————Tenant holding over.]**—**DARNELL v. WITHERDEN**, No. 3691, *ante*.

**3694. ————.]**—**ALLEN v. WHARTON** (1887), 3 T. L. R. 459, C. A.

**3695. ————Delay in payment.]**—The rent of a certain holding was by the lease payable at Midsummer, but by the ordinary course of dealing between the landlord & tenant, payment was deferred until Sept. Between Midsummer, 1886, & the usual time for payment the landlord distrained for the rent for 1886, & also for the arrears of rent for 1885:—**Held:** the landlord was entitled so to distrain: **Agricultural Holdings Act, 1883** (c. 61), s. 44, does not say that a landlord shall not distrain for more than a year's rent at a time, but that such landlord shall not distrain for rent which is more than twelve months old; & by the proviso in the sect. the rent for 1885 must be deemed to have become due at the usual day of payment, & therefore not to have been due for more than a year before the distress, so that it could be distrained for as well as the rent for 1886.—**Re BEW, Ex p. BULL** (1887), 18 Q. B. D.

### PART XV. SECT. 4, SUB-SECT. 1.—A.

b. *Effect of non-payment at due time.]*—Rent falls due at certain periods & the failure to pay it becomes a recurring cause of action.—**PORSEH NARAIN ROY v. KASSI CHUNDER**

**TALUKDAR** (1878), I. L. R. 4 Calc. 661.—**IND.**

c. *Last day of payment on Sunday—Failure to pay—Cancellation of lease refused.]*—**NATIONAL BANK OF S. A., LTD. v. LEON LEVSON STUDIOS, LTD.** (1913), App. D. 213.—**S. AF.**

### PART XV. SECT. 4, SUB-SECT. 1.—B. (a).

d. *Provision for payment before rent day—On termination of occupation by tenant.]*—**VANCE v. RUTTAN** (1855), 12 U. C. R. 632.—**CAN.**

642; 56 L. J. Q. B. 270; 56 L. T. 571; 51 J. P. 710; 35 W. R. 455; 4 Morr. 94, D. C.

*Annotation*:—*Refd.* Crosse v. Welch (1892), 8 T. L. R. 401.

**3696.** ————.]—*BEAVIS v. CARMAN* (1920), 36 T. L. R. 396; 84 J. P. Jo. 197.

**3697. Usual day of payment—Under Agricultural Holdings Act, 1883 (c. 61), s. 44—Whether day on which rent due—Or day on which usually paid.]—***Re BEW, Ex p. BULL*, No. 3695, *ante*.

*See, now, Agricultural Holdings Act, 1923 (c. 9), s. 34.*

**3698. Effect of mistake in date inserted.]—**An agreement stated that A. should take premises, three months from the date, & pay £10 for the rent on Mar. 25 next, & give up possession on or before that day. A. took possession June 24, & it was admitted that Mar. 25 was a mistake for Sept. 25:—*Held*: the rent could not be sued for until Mar. 25.—*BURGESS v. BEARD* (1846), 8 L. T. O. S. 116; *sub nom.* *BURDESS v. BEARD*, 10 J. P. Jo. 738.

(b) *Admissibility of Evidence.*

**3699. Similar facts—Mode of payment by other tenants.]—**In a question between landlord & tenant whether rent was payable quarterly or half-yearly, evidence of the mode in which other tenants paid is not admissible.—*CARTER v. PRYKE* (1791), Peake, 130, N. P.

—.]—*See, generally, EVIDENCE*, Vol. XXII., pp. 71 *et seq.*

**3700. Extrinsic evidence—Construction of particular word.]—***Replevin.* Deft. avowed that the rent was payable at Martinmas, to wit, Nov. 23:—*Held*: this must be taken to mean New Martinmas; & plff. having shown that the rent was in fact payable at Old Martinmas, the ct. refused to set aside a verdict given for him.—*SMITH v. WALTON* (1832), 8 Bing. 235; 1 Moo. & S. 380; 1 L. J. C. P. 85; 131 E. R. 391.

—.]—*See, generally, DEEDS*, Vol. XVII., pp. 325 *et seq.*

**3701. — To vary written agreement—Custom of the country.]—***DOE d. MITCHELL v. WELLER*, No. 3713, *post*.

—.]—*See, generally, DEEDS*, Vol. XVII., pp. 305 *et seq.*

**3702. — Collateral agreement.]—**Deft. occupied premises under a written agreement:—*Held*: parol evidence was not admissible to show an understanding between the parties that the rent should commence from a later day than that named in the agreement.—*HENSON v. COOPE* (1841), 3 Scott, N. R. 48.

—.]—*See, generally, DEEDS*, Vol. XVII., pp. 344 *et seq.*

**3703. — Document ambiguous.]—**"Memorandum of an agreement entered into this Jan. 31, 1840, between R. B. of the one part, & T. J. of the other part. The said T. J. hereby agrees to become the tenant of the farm G. at the customary time of entry, under the following conditions:—viz. that the sum of £260, annual rent, shall be paid at the usual time, for the house, premises, & lands, as agreed upon; & the said R. B. agrees to lay out in improvements & alterations of the farm house & new sheds, a sum not exceeding £200, with the understanding that spars

for rafters should be found from the estate; cartage for all materials, except stones for walls, to be done or found by T. J. (Signed) R. B. & T. J." :—*Held*: the meaning of this agreement was not, as a matter of law, that the rent should become payable at the end of the year from the day of entry, but that the contemporaneous or subsequent conduct of the parties might be adduced, to show that they intended the rent to become payable at an earlier day.—*GORE v. LLOYD* (1844), 12 M. & W. 463; 13 L. J. Ex. 366; 152 E. R. 1279.

*Annotation*:—*Mentd.* *Doe d. Wood v. Clarke* (1845), 7 Q. B. 211.

—.]—*See, generally, DEEDS*, Vol. XVII., pp. 314 *et seq.*

— *Course of dealing—Acquiesced in over long period of time—As evidence of new agreement.]—**See Nos. 3694, 3696, post.*

**3704. Custom of the country—Parol demise—Demise ambiguous.]—**Upon a parol demise, rent to take place from the following Lady Day, evidence of the custom of the country is admissible to show that by Lady Day the parties meant "Old Lady Day."—*DOE d. HALL v. BENSON* (1821), 4 B. & Ald. 588; 106 E. R. 1051.

*Annotations*:—*Apld.* *Don d. Peters v. Hopkinson* (1823), 3 Dow. & Lty. R. B. 507. *Mentd.* *Spartall v. Benecke* (1850), 10 C. B. 212.

**3705. — To vary written agreement.]—***DOE d. MITCHELL v. WELLER*, No. 3713, *post*.

*Course of dealing.]—See Nos. 3694, 3696, post.*

(c) *Periodical Payments.*

**3706. Rent reserved by the year—Whether payable yearly.]—***Qu.*: where an avowry, stating plff. to have held under a demise, at the yearly rent of £317 without stating when the rent was payable, does not mean that the rent was payable yearly.—*LAYCOCK v. TUFNELL* (1787), 2 Chit. 531.

**3707. — Not until end of year.]—***TURNER v. ALLDAY*, No. 3692, *ante*.

**3708. —.]—***Assumpsit* on an agreement made on Sept. 21, 1840, by which deft. agreed to take premises at the rent of 100 guineas *per annum*. The declaration, after setting out the agreement, averred that a large sum of money, to wit £210, to wit, for two years' rent, had become & was due at the commencement of the suit (which was in Jan. 1842). Breach, non-payment. Plea, as to £105, parcel of the said rent in the declaration mentioned, that no part of the said rent in the declaration mentioned, except the said sum of £105, parcel, etc., had become & was due or payable, according to the tenor & effect of the said agreement, at any time before or at the commencement of the suit:—*Held*: good, inasmuch as the declaration showed, on the face of it, that not more than one year's rent could have become due at the commencement of the suit.—*BRIGHT v. BEARD* (1843), 4 Q. B. 832; *Dav. & Mer.* 35; 12 L. J. Q. B. 355; 7 Jur. 695; 114 E. R. 1111.

**3709. — Though lease terminable at quarter days.]—**Agreement to let & take premises "from Mar. 25, 1844, for a twelvemonth certain, & thence for the continuance of the term of the lessor's interest in the premises, so long as it shall continue, until determined by a six months' notice from the tenant, expiring at any quarter of

PART XV. SECT. 4, SUB-SECT. 1.—  
B. (b).

\* *Custom of the country.*—Deft. proved an occupation by plff. at an annual rent from May 1, & also by several witnesses, that rent was generally paid quarterly, & that on a general letting they thought the

custom was to pay quarterly:—*Held*: the judge was right in directing the jury to find for plff., because there was not sufficient evidence of an agreement to pay the rent quarterly. *Qu.*: if the evidence of custom was admissible.—*SMITH v. MILLIKEN* (1848), 6 N. B. R. (1 All.) 210.—*CAN.*

PART XV. SECT. 4, SUB-SECT. 1.—  
B. (c).

**3707 1. Rent reserved by the year—Not until end of year.]—***NEAL v. SCOTT* (1853), 10 U. C. R. 361.—*CAN.*

**1. Rent reserved monthly—Payable to end of month.]—***BURGOYNE v.*

**Sect. 4.—Payment of rent: Sub-sect. 1, B. (c) & (d), C. & D.]**

a year, at the rent of £120 a year":—*Held*: the rent was payable yearly, & rent for a quarter ending Dec. 25, 1845, could not be recovered in an action for use & occupation.—*COLLETT v. CURLING* (1847), 10 Q. B. 785; 16 L. J. Q. B. 390; 11 Jur. 890; 116 E. R. 298.

**3710. — Made payable half-yearly.—When right of re-entry for non-payment arises.]**—Where a lease contained two clauses for re-entry, the one, in case the yearly rent of £300 was in arrear thirty days after it became payable; & the other, in case the yearly rent were in arrear, which was stated to be payable half yearly at Lady day & Michaelmas:—*Held*: the landlord had a right to re-enter on non-payment of each half year's rent, as the former clause contained the description of the amount to be annually paid, & the latter the times of payment.—*DOE d. RUDD v. GOLDING* (1821), 6 Moore, C. P. 231.

**3711. — Made payable quarterly.—As to part of premises only.—Construction of lease.]**—By a memorandum in writing, A. agreed to let to B. a house "at a yearly rent of £50" with a proviso that A. should, "in consideration of the yearly rent as aforesaid being duly paid," give B. quiet possession of the said house: & B. agreed "to pay the aforesaid rent of £50, & all taxes," etc. The memorandum then concluded thus—"likewise the stable & loft over, now occupied by H., at a further rent of £25 *per annum*—to be paid on the usual quarter days"—*Held*: the reservation of quarterly payments applied only to the £25 rent, & not to the £50.—*COOMBER v. HOWARD* (1845), 1 C. B. 440; 135 E. R. 611.

*Annotation*.—*Refd.* *Evans v. Robins* (1864), 12 W. R. 604.

**3712. — Provision for "first payment" at end of six months.—Whether more than one quarter's rent due.]**—By agreement, dated Sept. 8, deft. agreed to let a house to pltf. for seven years, at an annual rent, payable quarterly, the first payment to be made on Mar. 25, following:—*Held*: a quarter's rent only became due on Mar. 25.—*HUTCHINS v. SCOTT* (1837), 2 M. & W. 809; *Murp. & H.* 194; 6 L. J. Ex. 180; 1 Jur. 205; 150 E. R. 985.

**3713. Rent reserved quarterly.]**—Under an agreement for the quarterly payment of rent, the first payment becomes due at the end of the first quarter, & the custom of the country to pay rent in advance cannot be imported into it.—*DOE d. MITCHELL v. WELLER* (1837), 1 Jur. 622.

**3714. Option of lessor to vary times of payment.—Necessity for notice.]**—Dft. reserved rent, payable quarterly, or half quarterly, if required. Dft. having received the rent quarterly for a twelvemonth:—*Held*: he could not, without notice, distrain for a half quarter's rent.—*MALLAM v. ARDEN* (1833), 10 Bing. 299; 3 Moo. & S. 793; 3 L. J. C. P. 48; 131 E. R. 919.

**3715. — Whether option exercised.]**—In an action of trover brought by assignees of a bkpt., it appeared that bkpt. held the premises in question, from Nov. 12, as yearly tenant to deft.,

but "if required, to pay the rent quarterly." On May 12, following, deft. demanded half a year's rent, which was paid, & in Aug. distrained for a quarter's rent, due on Aug. 12:—*Held*: deft. had not, either by the demand in May or the distress in Aug., exercised his option to make the rent payable quarterly; & therefore, the distress was wrongful, & pltf. were entitled to recover.

The rent was payable quarterly at the option of the landlord; & on one occasion he demanded half a year's rent, & it was paid; but that was by no means a decision that the rent was to be payable quarterly (*LORD DENMAN, C.J.*).—*BIRD v. LODGE* (1848), 11 L. T. O. S. 102.

**Modification of terms by agreement.]**—See Nos. 3691, 3692, 3694, 3696, *ante*.

**(d) When Rent becomes in Arrear.**

**3716. Day after due date.]**—A tenant on the morning of the quarter day fraudulently removed his goods with intent to avoid a distress for the rent which became due on that day. The landlord, after the rent had become in arrear, & within thirty days of the removal, followed & seized the goods as a distress:—*Held*: his seizure was justified under Distress for Rent Act, 1738 (c. 19), s. 1, the rent being due & payable, though not in arrear, at the time of the removal.—*DIBBLE v. BOWATER* (1853), 2 E. & B. 564; 1 C. L. R. 877; 22 L. J. Q. B. 396; 17 J. P. 792; 17 Jur. 1054; 1 W. R. 435; 118 E. R. 879; *sub nom.* *BIDDLE v. BOWATER*, 21 L. T. O. S. 165.

**3717. — Though due date Sunday.]**—At common law Sunday is not a *dies non*. Rent may lawfully be paid by a tenant on a Sunday. Therefore where it is due on that day, & is not paid, it will be in arrear on the following Monday, & the landlord may then lawfully levy a distress for it.—*CHILD v. EDWARDS*, [1909] 2 K. B. 753; 78 L. J. K. B. 1061; 101 L. T. 422; 25 T. L. R. 706; 73 J. P. Jo. 337.

**C. Time of Payment on Rent Day.**

**3718. General rule.—Any time up to end of day.]**—Demand, or tender of rent on the last moment of the day of payment is good.—*HILL v. GRANGE* (1556), 2 Dyer, 130 b; 1 Plowd. 164; 73 E. R. 284.

*Annotations*.—*Refd.* *Startup v. Macdonald* (1843), 6 Man. & G. 593. *Mentd.* *Anon.* (1561), Dal. 29; *Tyringham's Case* (1584), 4 Co. Rep. 36 b; *Wood v. Payne* (1590), Cro. Eliz. 186; *Luttrell's Case* (1601), 4 Co. Rep. 84 b; *Mallory's Case* (1601), 5 Co. Rep. 111 b; *Wade's Case* (1601), 5 Co. Rep. 114 a; *Finch's Case* (1606), 6 Co. Rep. 63 a; *Lowe's Case* (1609), 9 Co. Rep. 122 b; *Loffield's Case* (1612), 10 Co. Rep. 106 a; *Rowles v. Mason* (1612), 2 Brownl. 192; *Clay & Barnet's Case* (1613), Godb. 236; *Clun's Case* (1613), 10 Co. Rep. 127 a; *Attoc v. Hemmings* (1614), 2 Bulst. 281; *Stukeley v. Butler* (1615), Hob. 168; *Burton v. Browne* (1622), Palm. 319; *Crabbe v. Tooker* (1626), Poph. 204; *Hookingham v. Oxenden* (1711), 2 Salk. 578; *Pepoys v. Creceton* (1727), Gilb. Ch. 249; *Ongley v. Chambers* (1824), 1 Bing. 483; *Doe d. Meyrick v. Meyrick* (1832), 2 Cr. & J. 223; *Hinchliffe v. Kinnoul* (1838), 5 Bing. N. C. 1; *Hopkins v. Helmore* (1838), 3 Nov. & P. K. B. 453; *Doe d. Winter v. Ferratt* (1843), 7 Scott, N. R. 1; *Pannell v. Mill* (1846), 3 C. B. 625; *Waterpark v. Fennell* (1859), 7 W. R. 634; *Ferguson v. L. B. & S. C. Ry.* (1863), 3 De G. J. & Sm. 653; *Cuthbert v. Robinson* (1882), 51 L. J. Ch. 238; *Thomas v. Owen* (1887), 20 Q. B. D. 225; *Roe v. Siddons* (1888), 22 Q. B. D. 224; *Schwann v. Cotton & Hayles* (1916), 85 L. J. Ch. 689; *Hansford v. Jago*, [1921] 1 Ch. 322.

*MALLETT* (1912), 21 W. W. R. 566; 5 D. L. R. 62.—*CAN.*

g. "Nearest recurring anniversary of date of lease."—*TEMPLE v. A. G. OF NOVA SCOTIA & EVANS* (1897), 27 S. C. R. 355.—*CAN.*

h. Question for jury.—Quarterly or yearly.—*Held*: on the facts in this case, it was properly left to the jury to say whether the rent was to be paid quarterly or yearly.—*WILSON v. MACNAMARA* (1855), 12 U. C. R. 446.—*CAN.*

**PART XV. SECT. 4, SUB-SECT. 1.—B. (d).**

**3716 i. Day after due date.]**—*ALBERT v. STOREY*, [1925] 4 D. L. R. 374.—*CAN.*

k. — Though due date Sunday.—Day after public holiday.]—*LAWLEY v. VAN DYK* (1888), 2 S. A. R. 246.—*S. AF.*

**PART XV. SECT. 4, SUB-SECT. 1.—C.**

**3718 i. General rule.—Any time up to**

**end of day.]**—To an action for a quarter's rent due May 12, it was objected that the rent was demanded on May 12, & the summons taken out the same day:—*Held*: the suit was premature & must be dismissed on the ground that the tenant has the right to the whole day to pay his rent & it ought not therefore to have been sued for until May 13.—*GELLING v. BEVAN* (1842), Bluet, 245.—1. of M.

**3719.** ———.]—The tenant has until the last moment of the day to pay rent; & if he tender it to the lessor personally on the land, if he can find him, a convenient time before midnight, he is not liable to an action (PARKE, B.).—**STARTUP v. MACDONALD** (1843), 6 Man. & G. 593; 7 Scott, N. R. 269; 12 L. J. Ex. 477; 1 L. T. O. S. 172; 134 E. R. 1029, Ex. Ch.

*Annotations:—*Refd. Coddington v. Paleologo (1867), L. R. 2 Exch. 193. *Mentd.* Burton v. Griffiths (1843), 1 L. T. O. S. 289; Gilmour v. Supple (1858), 32 L. T. O. S. 1; Crane v. London Dock Co. (1864), 5 B. & S. 313; Sutherland v. Allhusen (1866), 14 L. T. 666; Biddell v. Clemens Horst Co., [1911] 1 K. B. 934; Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam, [1916] 1 K. B. 495.

**3720. Before sunset—Former law.]—KEATING v. IRISH** (1698), 1 Lut. 590; 125 E. R. 310.

*Annotation:—*Refd. Startup v. Macdonald (1843), 6 Man. & G. 593.

**3721.** ———.]—Lessor dies on Michaelmas Day, & before sunset. The heir or jointress, & not the exor., shall have the rent. *Qu.*: if the lessor had died after sunset, though before midnight. *Qu.*: if the tenant had paid the rent on the day, the payment had been good, though the lessor had died before sunset; but his exors. to account for this to the jointress, etc.—**ROCKINGHAM (LORD) v. PENRICE** (1711), 1 P. Wms. 177; 24 E. R. 345; *sub nom.* ROCKINGHAM (LORD) v. OXENDEN, 2 Salk. 578.

*Annotation:—*Refd. Lettley v. Mills (1791), 4 Term Rep. 170.

**3722.** ———.]—**TINCKLER v. PRENTICE**, No. 4431, *post*.

**3723. Before midnight.]—FURSER & BOND v. PROWD, No. 3810, *post*.**

**3724.** ———.]—Rent is not regularly due until midnight of the day on which it is reserved.—**DUPPA v. MAYO** (1669), 1 Wms. Saund. 275; 85 E. R. 336.

*Annotations:—*Refd. Strafford v. Wentworth (1720), Prec. Ch. 555; Cutting v. Derby (1776), 2 Wm. Bl. 1075; Startup v. Macdonald (1843), 6 Man. & G. 593; Acocks v. Phillips (1860), 5 H. & N. 183. *Mentd.* Inledon v. Crisp (1702), 2 Salk. 658; Jones v. Meredith (1739), 2 Com. 661; Doe d. Saye & Sele v. Guy (1802), 3 East, 120; Harry v. Jones (1817), 4 Price, 89; Smith v. Doe (Jersey's Lessee) (1819), 7 Price, 379; Partington v. Woodcock (1835), 5 Nev. & M. K. B. 672; Marston v. Roo (1837), 2 Nev. & P. K. B. 504; Webb v. Baker (1838), 7 Ad. & El. 841; Simmons v. Wood (1843), 5 Q. B. 170; Thibault v. Gibson (1843), 13 L. J. Ex. 2; Doe d. Phillips v. Rollings (1847), 4 C. B. 188; Palk v. Force (1848), 12 Q. B. 666; Matthew v. Osborne (1853), 13 C. B. 919; Croft v. Lumley (1858), 6 H. L. Cas. 672; Cotesworth v. Spokes (1861), 30 L. J. C. P. 220; Marshall v. Green (1875), 1 C. P. D. 35; Futeher v. Futeher (1881), 29 W. R. 884; Lavery v. Pursell (1888), 39 Ch. D. 508; Re Smith, Bilke v. Roper (1890), 45 Ch. D. 632; Sidebotham v. Holland (1894), 64 L. J. Q. B. 200; Kauri Timber Co. v. Taxes Comr., [1913] A. C. 771; Stephenson v. Thompson, [1924] 2 K. B. 240.

**3725.** ———.]—As to the second point, I doubt, that though the rent is demandable at sunset, yet it is not due nor does the lease expire till midnight (BLACKSTONE, J.).—**CUTTING v. DERBY** (1776), 2 Wm. Bl. 1075; 96 E. R. 633.

*Annotations:—*Mentd. Whitley v. Roberts (1825), McCle. & Yo. 107; Wilkinson v. Hall (1835), 1 Bing. N. C. 713.

**3726.** ———.]—**STARTUP v. MACDONALD**, No. 3719, *ante*.

#### D. Where Days of Grace Allowed.

**3727. General rule—Rent not due till expiration of days of grace.]—SMITH & BUSTARD'S CASE** (1589), 1 Leon. 141; 73 E. R. 131.

**3728.** ———.]—**PILKINGTON v. DALTON** (1598), Cro. Eliz. 575; 78 E. R. 819.

*Annotation:—*Refd. Clun's Case (1613), 10 Co. Rep. 127 a.

**3729.** ———.]—**JOSSELYN & JOSSELYN'S CASE** (1589), 4 Leon. 19; 74 E. R. 699.

**3730.** ———.]—Where one makes a lease for years, rendering rent at Michaelmas, or

within twenty days after, & dies after Michaelmas, & within the twenty days, the rent is due to the heir & not to the exor. (WALMSLEY, J.).—**BLUNDEN'S CASE** (1598), Cro. Eliz. 565; 78 E. R. 810.

**3731.** ———.]—Rent upon a lease for fifty years, if the lessor should so long live, was reserved payable at the four usual feasts, or within thirteen weeks after. After Lady Day, but within the thirteen weeks the lessor died. Her exor. brought debt against the lessee for the rent due at Lady Day.—*Held*: the action was not maintainable.

If the lessee, donee, or tenant pay his rent before the day, it is voluntary.—**CLUN'S CASE** (1613), 10 Co. Rep. 127 a; 77 E. R. 1117; *sub nom.* CLUN v. FISHER, Cro. Jac. 309.

*Annotations:—*Refd. Fox v. Whitecooke (1616), 2 Bulst. 290; Hemming v. Brabason (1660), O. Bridg. 1; Rockingham v. Oxenden (1711), 2 Salk. 578; It. v. Treasury Lords, The Queen Dowager's Annuity (1851), 20 L. J. Q. B. 305. *Mentd.* Coates v. Hewit (1744), 1 Wils. 80; Plack v. Downing College, Cambridge (1853), 1 C. L. R. 692; Bailey v. Badham (1885), 30 Ch. D. 84.

**3732.** ———.]—Where rent is reserved payable at Michaelmas or twenty-eight days after the lessee may pay the rent at any time on or after the first day, but is not compellable to pay it till the last day.—**FOX v. WHITCHOCKE** (1616), 2 Bulst. 290; 80 E. R. 1129; *sub nom.* WHITCHCOT v. FOX, Cro. Jac. 398.

*Annotations:—*Refd. Rockingham v. Oxenden (1711), 2 Salk. 578. *Mentd.* Tongue v. Pitcher (1691), 3 Lev. 295; Baily v. Wells (1769), Wilm. 341; Dowell v. Dew (1842), 1 Y. & C. Ch. Cas. 345; Re Stephenson, Poole v. The Co., [1915] 1 Ch. 802.

**3733.** ———.]—Upon a lease for years from June 24, rendering rent at Michaelmas, St. Thomas, Lady Day, & Midsummer, or within twenty days after; a demand of a year's rent as due on Dec. 2, is bad.

An action could not be brought for the rent until twenty days were passed, but it was due immediately after the feast & payable (*per cur.*).—**THOMKINS v. PINCENT** (1702), 7 Mod. Rep. 96; 87 E. R. 1118; *sub nom.* TOMKINS v. PINSENT, 2 Ld. Raym. 819; *sub nom.* TOMPKINS v. PINCENT, 1 Salk. 141.

*Annotation:—*Mentd. Doe d. Harries v. Morse (1831), 4 Tyr. 185.

**3734. What amount to days of grace—Whether postponement of right of entry.]—GLOVER & ARCHER'S CASE** (1614), 4 Leon. 247; 74 E. R. 850.

**3735. How days of grace calculated.]—ANON.** (1558), Dal. 27; 2 Dyer, 142 a; 123 E. R. 240.

**3736.** ———.]—Allowance of further days before penalty incurred.—**CLARK & KEMPTON'S CASE** (1583), 4 Leon. 91; 74 E. R. 750.

**3737. Effect of expiration of lease—Days of grace not allowed.]—Rent reserved yearly, payable at Michaelmas, or ten days after, if the term expire, the rent is due at the Michaelmas before the ten days; & in debt for such rent, "adhuc a retro existit" supply the averment that it was not paid on the tenth day.—**BARWICK v. FOSTER** (1610), Cro. Jac. 233; Yelv. 167; 79 E. R. 201.**

*Annotations:—*Consd. Clun v. Fisher (1612), Cro. Jac. 309. *Mentd.* Newport v. Godfrey (1691), 4 Mod. Rep. 44.

**3738. For whose benefit days of grace enure—Surety on behalf of lessee.]—Lease by plaintiff to T. for years of a messuage & farm, at a yearly rent, payable quarterly, & T. covenants to pay the rent at the days & in manner therein mentioned, & also to pay interest in case the rent should be behind three quarters; & deft. covenants that T. shall at all times during the term, well & truly pay to pltf. the said rent at the respective days, & also interest, & shall duly observe all the covenants, & that in case T. should neglect to pay the rent for forty days, deft. shall pay on**

**Sect. 4.—Payment of rent: Sub-sect. 1, D. & E.**  
**(a) & (b).]**

**demand:—Held:** debt. was not chargeable until after forty days & demand made; & pltf. having declared generally, assigning for breach rent arrear, & it appearing upon oyer that the lease contained the qualification above stated, that the breach was ill assigned, & there being general damages upon the whole declaration, which contained other breaches which were well assigned, that judgment nevertheless must be arrested *causd qud supra*.—*SICKLEMORE v. THISTLETON* (1817), 6 M. & S. 9; 105 E. R. 1146.

**Annotations:—***Refd.* *Jowett v. Spencer* (1846), 15 M. & W. 662; *Bradford Old Bank v. Sutcliffe*, [1818] 2 K. B. 833. *Mentd.* *Re Colnaghi, Ex p. Marks* (1838), 3 Deac. 133; *Hoggett v. Exley* (1840), 6 Bing. N. C. 207; *Macintosh v. Midland Counties Ry.* (1845), 14 M. & W. 548; *Re Brown's Estate, Brown v. Brown*, [1893] 2 Ch. 300.

**3739. Lease terminable on death of lessor—Death of lessor during days of grace.]—**If a lease be made for fifty years, if the lessor live so long, rendering rent at Michaelmas, or within thirteen weeks afterward, & the lessor die after Michaelmas, within the thirteen weeks, the rent for that payment is discharged.—*CLUN v. FISHER* (1613), Cro. Jac. 309; 79 E. R. 265; *sub nom.* *CLUN'S CASE*, 10 Co. Rep. 127 a.

**Annotations:—***Refd.* *Fox v. Whitchooke* (1616), 2 Bulst. 290; *Hemming v. Brabason* (1660), O. Bridg. 1; *Rockingham v. Oxendon* (1711), 2 Salk. 578; *R. v. Treasury Lords, Re Queen Dowager's Annuity* (1851), 20 L. J. Q. B. 365. *Mentd.* *Coates v. Hewit* (1744), 1 Wils. 80; *Flack v. Downing College, Cambridge* (1813), 1 C. L. R. 692; *Bailey v. Budham* (1885), 30 Ch. D. 84.

**E. Payment in Advance.**

**(a) In General.**

**3740. General rule—Not enforceable.]—**An award made on June 23, ordering one of the parties to pay so much for rent that will become due on June 24, is void.—*BARNARDISTON v. FOWLER* (1714), 10 Mod. Rep. 204; Gilb. 125; 88 E. R. 694.

**Annotation:—***Refd.* *Lewis v. Rossiter* (1875), 44 L. J. Ex. 136.

**3741. Stipulation for payment in advance—What amounts to.]—**Deft. occupied premises from Dec. 1, 1830, under an agreement, dated Feb. 1831, for the term of one year, the rent to be paid on the usual quarter days, "the first day of payment to be on Dec. 25 last." He paid four quarters' rent, the last payment being on Sept. 29, 1831; &, on Dec. 4, sent the key of the premises to the landlord, who, on Dec. 20, gave possession to a new tenant:—*Held:* the agreement was for payment of rent in advance, &, therefore, deft. was entitled to costs, under 43 Geo. 3, c. 46, on an arrest & holding to bail for a whole quarter's rent.—*ALLEN v. BATES* (1833), 3 L. J. Ex. 39.

**3742. ———.]—**A tender of a quarter's rent, coupled with a demand of a receipt to a particular day, the contest between the parties being whether one or two quarters' rent were due, is not a valid tender.

A. held premises of B. under a lease for three, seven, or ten years, determinable on notice; with a stipulation that the amount of a quarter's rent should be paid by A. on taking possession, which was to be allowed to him for the last quarter's rent, "on the determination of the

tenancy." After a notice to determine the lease at the expiration of the third year had been given, & before its expiration, the parties verbally agreed that A. should continue tenant for another year, no express mention being made of the terms of the tenancy:—*Held:* the above was in substance a stipulation for a forehand rent; &, in the absence of any express mention of other terms, A. continued to hold subject to the terms of the original lease: &, consequently, the payment made on taking possession, was applicable to the last quarter of the fourth year.—*FINCH v. MILLER* (1848), 5 C. B. 428; 10 L. T. O. S. 327; 136 E. R. 945.

**3743. ———.]—**Declaration in covenant stated that pltf., by indenture dated Mar. 21, 1828, demised certain premises, from Mar. 25, then instant, for & during the term of seven years next ensuing, wanting seven days, to deft., yielding & paying therefore yearly & every year, during said term, the yearly rent of £285, by four equal quarterly payments, on Mar. 25, June 24, Sept. 29, & Dec. 25, in every year, commencing from said Mar. 25, then instant, & that deft. covenanted to pay rent accordingly, but that in breach thereof, in the last year of the term, he had only paid half of the rent, & that on Mar. 25, 1836, there was due £140 for two quarterly payments. Deft. pleaded payment into ct., of the first quarter, & demurred generally to the insufficiency of the alleged breach of covenant, in respect of the last quarterly payment, on the ground that it appeared on the face of the declaration that the second quarter's rent, mentioned in the breach, did not become due "during the term" as stipulated in the covenant. The ct. gave judgment for pltf. construing the covenant to be for payment of a beforehand rent, the first quarter being payable on Mar. 25, 1828, the day of the commencement of the term, so that the whole rent was payable within the term.—*HOPKINS v. HELMORE* (1838), 8 Ad. & El. 463; 3 Nev. & P. K. B. 453; 1 Will. Woll. & H. 386; 7 L. J. Q. B. 195; 2 Jur. 856; 112 E. R. 914.

**3744. ———.]—**An agreement for the lease of a cotton weaving mill provided for a term of seven years, at a rent of 30s. *per annum* for each loom worked, if the lessor provided steam power; the lessee not to work less than three hundred looms in the first year, & not less than five hundred & forty in any subsequent year. It also contained provisions by reference to another lease, whereby it was provided that one year's rent, in that case a fixed rent, should always be payable in advance on demand. The lessee having been, on July 1, 1879, let into possession, paid rent quarterly up to Jan. 1881. On Mar. 13, 1882 the lessor served the lessee with notice of a demand for a year's rent in advance, reckoned at 30s. a loom upon all the looms he was then working, being five hundred & sixty in number:—*Held:* upon the construction of the agreement, the intention was to fix a minimum dead rent of 30s. upon five hundred & forty looms & to that extent, namely, £810, the lessor was entitled to demand a year's rent in advance, but not beyond.—*WALSH v. LONSDALE* (1882), 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109, C. A.

**Annotations:—***Mentd.* *Allhusen v. Brooking* (1884), 26 Ch. D.

**PART XV. SECT. 4, SUB-SECT. 1.—E. (a).**

**3741 i. Stipulation for payment in advance—What amounts to.]—**A. leased lands to B. for ten years from Jan. 1, 1863; yielding & paying yearly during the said term the yearly rent of £720, the first payment to begin & be made

on Jan. 1, 1863, next ensuing from the date of these presents. Covenant by lessee to pay said yearly rent, on the said day & time therein limited & appointed for payment thereof:—*Held:* the second year's rent was payable on Jan. 1, 1864.—*JOSLIN v. JEFFERSON* (1864), 14 C. P. 260.—*CAN.*

1. ——— *Acceleration clause.]—*A stipulation in a lease that in the event of an assignment being made for the benefit of creditors the then current rent together with the rent for three months thereafter should immediately become due & payable, is a valid stipulation.—*HARWOOD v. ASSINTROIA*

559; *Re Northumberland Avenue Hotel Co., Sully's Case* (1885), 54 L. T. 76; *Coatsworth v. Johnson* (1880), 54 L. T. 520; *Furness v. Bond* (1888), 4 T. L. R. 457; *Swain v. Ayres* (1888), 21 Q. B. D. 289; *Lowther v. Heaver* (1889), 41 Ch. D. 248; *Strong v. Stringer* (1889), 61 L. T. 470; *Foster v. Reeves*, [1892] 2 Q. B. 255; *Belighton v. Belighton* (1895), 64 L. J. Ch. 796; *Murgatroyd v. Silkstone & Dodsworth Coal & Iron Co., Ex p. Charlesworth* (1895), 65 L. J. Ch. 111; *List v. Tharp* (1897), 45 W. R. 243; *Friary Holroyd & Hooley's Breweries v. Singleton*, [1899] 1 Ch. 86; *Lowe v. Adams*, [1901] 2 Ch. 598; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608; *Lewis v. Baker*, [1905] 1 Ch. 46; *Jones v. Tankerville*, [1909] 2 Ch. 440; *Gilboy v. Cossey* (1912), 106 L. T. 607; *White v. Grand Hotel, Eastbourne* (1912), 106 L. T. 785; *Allen v. I. R. Comrs.*, [1914] 2 K. B. 327; *I. R. Comrs. v. Derby*, [1914] 3 K. B. 1180; *Hurst v. Picture Theatres*, [1915] 1 K. B. 1; *Purchase v. Lichfield Brewery Co.*, [1915] 1 K. B. 184; *Slough Picture Hall Co. v. Wade, Wilson v. Neville, Reid* (1916), 32 T. L. R. 542; *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97; *Gray v. Spyer*, [1922] 2 Ch. 22; *Carrington Manufacturing Co. v. Saldin* (1925), 133 L. T. 432.

**3745.** ———. *By a lease dated Dec. 23, 1910, but which had been executed earlier by the lessor, the rent was payable by equal quarterly payments to be made on the usual quarter days "of which the first shall be made on Dec. 25, next":—Held: the first quarterly payment of rent was due on Dec. 25, 1910.*—*SIMNER v. WATNEY* (1911), 28 T. L. R. 162, C. A.

**3746. Application of stipulation — Whether limited to first quarter only.**—*Agreement to let a house for a year, the rent to commence at Michaelmas, & to be paid three months in advance such advance to be paid on taking possession:—Semble: this stipulation relates to the first quarter's rent only.*—*HOLLAND v. PALSER* (1817), 2 Stark. 161, N. P.

**3747.** ———. *Tenant holding over.*—*FINCH v. MILLER*, No. 3742, *ante*.

**3748. Proof of stipulation—Specifying rent so payable—Though not so paid.**—*In an action for excessive distress, it appeared that P. became tenant of deft. in 1851, for more than three years, under a written agreement, which was void under Real Property Act, 1845 (c. 100), as not being under seal. One of the terms of the agreement was, that a quarter's rent should be payable in advance; but no such rent was ever paid, though the receipts all specified the fact that the rent was so payable:—Held: such receipts were ample evidence of a tenancy on the terms of one quarter's rent being payable in advance; & though the agreement was void, deft. was entitled to distrain for one quarter in advance.*—*LEE v. SMITH* (1854), 9 Exch. 662; 2 C. L. R. 1079; 23 L. J. Ex. 198; 23 L. T. O. S. 70; 156 E. R. 284; *sub nom. LEES v. SMITH*, 2 W. R. 377.

**3749.** ———. *Indorsement on cheque.*—*NASH v. GRAY* (1861), 2 F. & F. 391, N. P.

**3750. Mode of recovery—Action for use & occupation.**—*An agreement to take a house having been entered into, conditioned to pay two quarters' rent in advance, the tenant entered & failed to perform such condition. In an action to recover that sum:—Held: the count for use & occupation did not apply to such a case, & pltf. could only recover under the special count on the agreement.*—*ANGELL v. RANDALL* (1867), 16 L. T. 498.

**3751.** ———. *Distress in advance—Trustee in bankruptcy in possession.*—*A debtor covenanted to pay rent in advance. After he had filed his petition for liquidation, & while the trustee was*

*still in possession of the premises, a further sum became due for rent under the covenant to pay in advance:—Held: the landlord was entitled to distrain for such rent.*—*Re BINNS, Ex p. HALL* (1875), 1 Ch. D. 285; 45 L. J. Bcy. 21; 33 L. T. 706; 24 W. R. 300.

*Annotation:—Reid. Itc Howell, Ex p. Mandelberg*, [1895] 1 Q. B. 844.

**3752.** ———. *Effect of subsequent winding-up of tenant company.*—*The mere fact that rent payable by a co. is payable in advance does not render it inequitable that the landlord, who has distrained for the same before the commencement of the winding-up, should be allowed to proceed with the distress in order to enforce his legal right.*—*VENNER'S ELECTRICAL COOKING & HEATING APPLIANCES, LTD. v. THORPE*, [1915] 2 Ch. 404; 84 L. J. Ch. 925; 113 L. T. 1137; 60 Sol. Jo. 27; [1915] H. B. R. 201, C. A.

*See, further, DISTRESS, Vol. XVIII., pp. 309, et seq., Nos. 444 et seq.*

#### (b) Conditional on Demand.

**3753. What amounts to stipulation.**—*Deft. let premises to a tenant, from June 15, 1815, for five years, at a yearly rent of £100, to become due & payable in advance, if demanded, by equal quarterly payments, on Sept. 15, Dec. 15, Mar. 15, & June 15 respectively in every year: "Provided always, that if the yearly rent hereinbefore reserved, or any part thereof, shall be in arrear & unpaid for twenty-one days next after any of the days hereinbefore appointed for payment thereof in advance, being first lawfully demanded upon or at any time after the said twenty-one days, & not paid when demanded," then the lessor should have power to re-enter, etc. No rent was demanded until Aug. 1852, when upon its not being paid deft. distrained:—Semble: the construction of this demise was, that the rent was payable in advance, but was not to be actually paid until demanded, & therefore, deft. was entitled to distrain.*—*WILLIAMS v. HOLMES* (1853), 8 Exch. 861; 1 C. L. R. 463; 22 L. J. Ex. 283; 1 W. R. 391; 155 E. R. 1602.

*Annotations:—Apld. Witty v. Williams* (1864), 4 New Rep. 138. *Mentd. Lyons v. Elliott* (1876), 33 L. T. 806.

**3754. Construction of stipulation—At what time rent demandable.**—*A house was let at a rent "payable quarterly & always, if required, a quarter in advance." When one quarter's rent was in arrear & another nearly due the furniture was seized on behalf of a bill of sale holder, & was about to be sold when defts. demanded the rent up to the end of the current quarter. The amount was paid under protest, & the present action was brought by pltf. to recover it back:—Held: the effect of the clause in the agreement was to make the rent payable a quarter in advance throughout, & the landlord was entitled to payment, or in default to distrain on giving reasonable notice of his demand; the question whether the notice given was reasonable was one of fact, & under the circumstances of this case, having regard to the fact that the goods were being, or about to be, actually removed, reasonable notice had been given.*—*LONDON & WESTMINSTER LOAN & DISCOUNT CO. v. LONDON & NORTH WESTERN RY. CO.*, [1893] 2 Q. B. 49; 62 L. J. Q. B. 370;

*TRUST CO.* (1915), 8 W. W. R. 565; 25 D. L. R. 830; 8 Sask. L. R. 162.—CAN.

m. ———. *CRISTALL v. MCKERNAN*, [1917] 2 W. W. R. 1063; 35 D. L. R. 452.—CAN.

n. *Parol agreement to pay.*—A

tenant may by parol bind himself to pay rent in advance.—*GALBRAITH v. FORTUNE* (1860), 10 C. P. 109.—CAN.

PART XV. SECT. 4. SUB-SECT. 1.—E. (b).

o. *Whether necessary—Where rent*

*day fixed.*—*A lease provided for the payment of rent monthly in advance at the office of the lessor's attorneys. Rent being in arrear, the lessor issued summons without having made any previous demand. The lessor thereupon tendered the amount due but without costs:—Held: the day of*

**Sect. 4.—Payment of rent: Sub-sect. 1, E. (b) & (c); sub-sect. 2, A., B. & C. (a) & (b).]**

69 L. T. 320; 41 W. R. 670; 37 Sol. Jo. 497; 5 R. 425, D. O.

**3755. Reasonable notice of demand—Question of fact.]—**LONDON & WESTMINSTER LOAN & DISCOUNT CO. v. LONDON & NORTH WESTERN RY. CO., No. 3754, *ante*.

**Demand as precedent to distress.]—**See DISTRESS, Vol. XVIII., p. 274, Nos. 122–124.

**Liquidation of company—Apportionment of rent.]—**See COMPANIES, Vol. X., p. 1014, Nos. 7041, 7042.

(c) *Effect of Payment in Advance.*

**3756. Whether payment before due date is discharge of rent.]—**Rent paid before the day, will not save the condition of re-entry, if on demand it be not paid at the day.—CROMWELL (LORD) v. ANDREWS (1583), Cro. Eliz. 15; 78 E. R. 281.

**Annotation:—**Mentd. Baker v. Hacking (1635), Cro. Car. 405.

**3757. — Payment voluntary.]—**CLUN'S CASE, No. 3731, *ante*.

**3758. — —.]—**ROCKINGHAM (LORD) v. PENRICE, No. 3721, *ante*.

**3759. — Payment on account at request of lessor.]—**A tenant having made payments to his landlord, & also advances at his request to a firm of which he was a member, on account, as the tenant alleged, of rent not then due:—**Held:** if the advances were made on account of the rent, they were an answer to an action for the rent by the landlord's exors.—NASH v. GRAY (1861), 2 F. & F. 391, N. P.

**3760. — Effect of assignment of reversion.]—**R., having leased his land to pltf. at a rent payable quarterly, subsequently mortgaged the land to defts., who allowed B. to remain in receipt of the rent. Subsequently to the mtge., B. applied to pltf., who was not aware of the mtge., to pay him a year's rent in advance, & pltf. did so. After the payment, & before the rent had become due, defts. gave notice to pltf. to pay the rent to them, pltf. refusing to pay it, defts. distrained for it:—**Held:** in an action for an illegal distress, payment of the rent before it became due was not a good payment as against defts., the mtgees., & pltf. was still liable to pay them the rent.

Payment of rent before it is due is not a fulfilment of the obligation imposed by the covenant to pay rent, but is, in fact, an advance to the landlord, with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay the rent. The receipt of the rent could not be treated here as a discharge by the landlord, because by assigning the reversion before the rent was received by him he had parted with the power of giving such a discharge (WILLES, J.).—DE NICHOLLS v. SAUNDERS (1870), L. R. 5 C. P. 589; 39 L. J. C. P. 297; 22 L. T. 661; 18 W. R. 1100.

**Annotations:—**Apld. Ashburton v. Nocton, [1915] 1 Ch. 274. **Refd.** Cook v. Guerra (1872), L. R. 7 C. P. 132; Green v. Rheinberg (1911), 104 L. T. 149. **Mentd.** Glyn Mills v. East & West India Dock Co. (1882), 7 App. Cas. 591.

**3761. — —.]—**In July, 1864, L. demised premises to deft. for five years at a rent of £55 per annum payable quarterly. Immediately after

the grant of the lease, deft. advanced to L. £170 on account of rent; & in Sept. 1865, L. mortgaged the premises to pltf.

In May 1866, B., who claimed under a prior mtge. from L. dated in Sept. 1858, through C. his attorney commenced an action of ejectment against deft. to recover possession of the premises, but did not proceed with it; & on Nov. 1, 1866, pltf.'s attorney wrote to deft.: "Mr. C. has written to say his clients are no longer entitled to receive your rent. I therefore request that you will have the kindness to pay the same here by Monday next":—**Held:** the prepayment of rent was no bar to pltf.'s claim to the rent accruing after deft. had notice that pltf. was grantee of the reversion; & the above letter, coupled with the circumstances known to deft. that he was raising money by mortgaging his reversion, & that pltf.'s claim for rent could hardly be founded upon any other alleged right than one resulting from a grant of the reversion, would warrant a jury in inferring that deft. had notice that pltf. was such grantee.—COOK v. GUERRA (1872), L. R. 7 C. P. 132; 41 L. J. C. P. 89; 26 L. T. 97; 20 W. R. 367.

**Annotation:—**Refd. Ashburton v. Nocton, [1915] 1 Ch. 274.

See, further, MORTGAGE.

**3762. — Payment after registration of writ of elegit against landlord—Tenant without notice.]—**After the registration by a judgment creditor of writs of *elegit*, but before the appointment of a receiver, the judgment debtor, whose land was subject to a legal mtge., entered into an arrangement with a tenant by which the tenant paid him rent in advance. The judgment creditor obtained the appointment of a receiver before the rent became due. The tenant made the arrangement *bonâ fide* & without notice of the judgment creditor's claim:—**Held:** the arrangement was not binding on the judgment creditor, & he was entitled to payment of the rent by the tenant.—ASHBURTON (LORD) v. NOCTON, [1915] 1 Ch. 274; 84 L. J. Ch. 193; 111 L. T. 895; 31 T. L. R. 122; 59 Sol. Jo. 145, C. A.

**3763. Whether lessee estopped from denying lease.]—**Deft. was tenant to A. of premises of which A. agreed, in writing, to grant a long lease to pltf., subject to certain conditions. Deft. thereupon paid the next quarter's rent to pltf.; the agreement was not carried into effect, & A. gave deft. notice to pay the next quarter's rent to him as before:—**Held:** in an action brought by pltf. for the next quarter's use & occupation, deft. was not estopped from showing by these facts, that all parties were remitted to their original rights.—BROOK v. BIGGS (1836), 2 Bing. N. C. 572; 1 Hodg. 462; 2 Scott, 803; 5 L. J. C. P. 143; 132 E. R. 223.

SUB-SECT. 2.—TO WHOM PAYABLE.

A. In General.

**3764. Where claims to rent conflicting—Right to pay into court.]—**Tenants who had notice from pltf. not to pay rent to deft.'s trustees, & who had notice from the trustees not to pay their rent to pltf., ordered, on the motion of pltf. & on the consent of all parties, to pay their rent into

payment having been fixed no demand had been necessary, & the lessee was liable for costs.—KERSEL v. DAVIS (1905), T. S. 731.—S. AF.

PART XV. SECT. 4, SUB-SECT. 1.—E. (c).

p. Lease construed as providing for

rent in arrear—**Effect of first payment in advance.]—**Under a lease dated Oct. 1, 1857, *habendum* for five years from the date thereof, yielding & paying therefor on every first day of Oct. during the said term, it was proved that the first year's rent had been paid in advance:—**Held:** the rent was not

payable in advance for the subsequent years.—MCALLUM v. SNYDER (1860), 10 C. P. 191.—CAN.

q. **Condition for payment on demand—Sale after payment—Claim by purchaser for rent—Tenant not liable.]—**NAND KISHORE v. ANWAR HUSAIN (1907), I. L. R. 30 All. 82.—IND.

ct. It was held the tenants themselves could not make such a motion.—*BELBEE v. BELBEE* (1821), 6 Madd. 28; 56 E. R. 1000.

### *B. Agents.*

**Authority of agents to receive rent.]—See AGENCY, Vol. I., p. 328, Nos. 446-449.**

**Revocability of agent's authority.]—See AGENCY, Vol. I., p. 696, No. 3038.**

### C. Assignees of Reversion.

(a) *In General.*

*See, now, Law of Property Act, 1925 (c. 20), s. 141.*

**3765. General rule.**—**BROWNE v. SARY** (1625), Benl. 159; 73 E. R. 1024; *sub nom.* **SURY v. BROWN**, Lat. 99.

*Annotation* :—**Reid**. *Sachoverel v. Walker* (1671), *Freem.*  
K. B. 16.

**3766.** —.]—HARPER v. BURGH (1677), 2 Lev. 206; 83 E. R. 521; *sub nom.* HARPER v. BIRD, T. Jo. 102.

**3767. — Assignee of leasehold reversion.]—**  
**DAVY v. MATTHEW** (1509), Cro. Eliz. 649; Moore,  
 K. B. 525; 78 E. R. 888.

**3768. Effect of release by lessor—After reversion assigned.]—HARPER v. BURGH (1677), 2 Lev. 206; 83 E. R. 521; *sub nom.* HARPER v. BIRD, T. Jo. 102.**

**3769. Effect of agreement between assignor & assignee—For apportionment of current quarter.]—**Where land in the possession of a tenant for years, is conveyed by deed, the right of the purchaser, as assignee of the reversion to receive the whole rent for the current quarter cannot be controlled by a contemporaneous parol agreement to apportion the quarter's rent between the assignor & assignee.—**FLINN v. CALOW** (1840), 1 Man. & G. 589 : 133 E. R. 468.

**3770. Whether grantor bound by notice of assignment.**—**BAMBUCK v. XYMENES** (1845), 4 L. T. O. S. 317.

**Right of assignee to recover rent by action.]—**  
*See Sect. 10, sub-sect. 2, post.*

**What amounts to assignment of the reversion.]—**  
*See Part XXII., Sect. 1, post.*

*(b) Necessity for Notice.*

**3771. General rule.]**--(1) The bargainee of a reversion shall not take benefit of a condition on a demand of rent, without giving notice to the lessee of the bargain & sale.

(2) A reservation in a lease for years, of rent during the term to one or his successors, is good; & the rest shall continue during the whole term.—MALLORY'S CASE (1601), 5 Co. Rep. 111 b; 77 E. R. 228; *sub nom.* PAIN *v.* MALORY, Cro. Eliz. 832.

*Annotations:—As to (1) Consd. Wood v. Leadbitter (1845), 13 M. & W. 838. Reisd. Molnux v. Molnux (1607), Cro. Jac. 144; Frances, Case (1609), 8 Co. Rep. 89 b; Williams v. Fry (1685), 3 Keb. 19; Scatcock v. Harston (1871), 1 P. D. 106. As to (2) Reisd. Hewet v. Painter (1875), 1 Bulst. 174; Bland's Case (1632), Godb. 448; Sacheverell v. Froggatt (1672), 2 Saund. 367. Generally, Mentd. Onely v. Bat (1591), Cro. Eliz. 264; Bach v. Onosly (1594), Cro. Eliz. 354; Finch's Case (1607), 6 Co. Rep. 63 a; Tracey v. Dutton (1621), Cro. Jac. 617; Blucke v. Mole (1661), 1 Lev. 40; Long v. Buckeridge (1718), 1 Stra. 106.*

**3772.** —.]—In debt for rent by the assignee of a fine levied to their use, it is not necessary to allege in the declaration that the lessee attorned, or that he had any notice of the use limited, but he is not bound to pay without notice, & if he has paid to the ancient lessor, he may plead it.—*WATTS v. OGNELL* (1807), Cro. Jac. 192; 79 E. R. 167.

**Annotations:—***Refd.* *Birch v. Wright* (1786), 1 Term Rep. 378; *Wood v. Dunn* (1866), 7 B. & S. 94; *De Nicholls v. Saunders* (1870), L. R. 5 C. P. 589. *Mentd.* *Glyn Mills Currie & Co. v. East & West India Dock Co.* (1882), 7 App. Cas. 591.

**3773.** —.]—The feoffee of land or bargainee of a reversion by deed indebted & enrolled shall not take advantage of a condition for non-payment of rent reserved on a lease, upon demand by them; unless they have first given notice to the lessee of the feoffment, etc.—**FRAUNCES'S CASE** (1609), 8 Co. Rep. 89 b; 72 E. R. 609; *sub nom.* **MILLER v. FRANCIS**, Brownl. 277.

*Annotations:—Reid.* Williams v. Fry (1672), 3 Keb. 19; Whately v. Reece & Hall (1698), 1 Lut. 804; Sealock v. Harston (1875), 1 C. P. D. 106. *Mentd.* Hicks v. Goates (1616), Cro. Jac. 390; Tracey v. Dutton (1621), Cro. Jac. 617; R. v. Hampden (1637), 3 State Tr. 826; Fry's Case (1672), 1 Vent. 199; Malloon v. Fitzgerald (1683), 3 Mod. Rep. 29; Lancashire v. Killingsworth (1701), 12 Mod. Rep. 529; Anon. (1715), 1 Com. 228; Burleton v. Humfrey (1755), Amb. 256; Le Bret v. Papillon (1804), 4 East, 502; Doe d. Kenrick v. Beaucherk (1809), 11 East, 657; Castledine v. Mundy (1832), 4 B. & Ad. 90; Doe d. Taylor v. Crisp (1838), 1 Per. & Dav. 37; West v. Blakeway (1841), 2 Man. & G. 729; Clavering v. Ellison (1856), 3 Drew. 451; Kiallmark v. Kiallmark (1856), 26 L. J. Ch. 1; Jeffreys v. Jeffreys (1901), 84 L. T. 417.

**3774.** —.]—(1) Articles of settlement showing an intention to transfer leasehold premises to trustees, held sufficient to transfer such property, although a deed of settlement, which appeared to have been contemplated, had not been executed. The legal title being transferred, the assignee held entitled to distrain for rent; at all events, with notice to the tenant of the transfer: *Qu.*: whether sufficient without such notice. Assuming that there was no such transfer of legal title, *semble*, a new tenancy to third parties could not be created merely by the tenant's paying rent to them, without the assent of his former landlord to such transfer of the tenancy; even though it were with his privity & tacit assent, under the impression that there had been a transfer of title.

(2) As against the tenant, however, in an action by him for a wrongful distress by third parties, an authority from the former landlord to them to receive the rents, proved to have been shown to the tenant, is admissible in evidence. — *ROBERTS v. SHALLESS* (1858), 1 F. & F. 139.

**3775. Effect of notice—When acted upon—Whether assignor estopped from demanding rent.]—** By a deed of settlement of Aug. 7, 1832, a farm was conveyed to A. for life, subject to a term of one thousand years, with power to lease for three lives, with a remainder over which ultimately became vested in B. & C. The term of one thousand years was created for the securing a sum of £3,000, & was at the time of such settlement vested in two trustees, one of whom was A., the tenant for life. In exercise of the leasing power, A. granted a lease of the farm for three lives, under which lease pltf. became tenant, subject to the rent thereby reserved, & which rent was paid by

PART XV. SECT. 4, SUB-SECT. 2.—  
C. (b).

3771 i. *General rule.*—A re-entry by the assignee of the reversion for non-payment to him of rent which the tenant, having had no notice of the

transfer, had paid to the vendor is void, since the tenant is protected by 4 & 5 Anne, c. 16, s. 10.—*ORR v. SMITH*, [1919] N. Z. L. R. 818.—N.Z.

3771 II. —.]—Where property subject to a lease is sold, & the purchaser & seller agree that the seller shall

retain the right to all rents due under the lease, the tenant is liable to pay the rent to the seller provided that he have received notice of such arrangement.—TRANSVAAL MORTGAGE CO., LTD. v. ARONSON (1904), T. S. 864.—S. AF.

**Sect. 4.—Payment of rent: Sub-sect. 2, C. (b) & (c), D., E., F., G. & H.]**

pltf. to B. & C., or to R. & D., their attorneys, upon their coming into possession of the property. Subsequently, R. & D., as the attorneys for B. & C., wrote to pltf. stating that the legal estate under the term for one thousand years was in S., & directing him to pay the rent to S.; & in consequence of that communication, pltf. allowed S. to recover judgment against him in an action for rent under the lease. B. & C. afterwards distrained for rent as due to them; whereupon pltf. brought replevin, & a case was stated by the county ct. judge for the opinion of this ct.:—**Held:** as the term of one thousand years had, as to one moiety, merged in A. & B., & C. had therefore a right to distrain for a moiety of the rent, the effect of the representation by R. & D. would not stop B. & C. from recovering rent which pltf. had not paid in consequence of such representation, or had not made himself liable to pay under the judgment obtained against him by S.—**WHITE v. GREENISH** (1861), 11 C. B. N. S. 209; 8 Jur. N. S. 503; 142 E. R. 770; *sub nom.* **GREENISH v. WHITE**, 31 L. J. C. P. 93.

**Annotation:—***Mentd.* **Bateman v. Faber**, [1898] 1 Ch. 144.

*See* **KSTOPPEL**, Vol. XXI., pp. 300 *et seq.*

**3776. — By equitable mortgagee.]**—To an action for rent by the assignee of the reversion, an equitable plea that he has made an equitable mtgee. of his reversion, & that the equitable mtgee. has given notice to the tenant of the mtgee. to pay the rent to him is bad.—**HUNT v. DUCKWORTH** (1875), 39 J. P. 168.

*See, generally,* **MORTGAGE**.

**(c) Rent Accruing due Before or After Assignment.**

**3777. Whether assignee entitled.]**—**HALL v. DEWE** (1026), Lat. 157; 82 E. R. 323.

**3778. — Arrears due at date of assignment.]**—(1) The assignee of a reversion is not entitled under 32 Hen. 8, c. 34, to arrears of rent which became due prior to the assignment.

(2) The depositary of a lease for securing a debt is liable to the rent & covenants, although he has not taken possession of the premises.—**FLIGHT v. BENTLEY** (1835), 7 Sim. 149; 4 L. J. Ch. 262; 58 E. R. 793.

**Annotations:—***As to* (1) *Refd.* **Dale v. Hatfield Chase Corpn.**, [1922] 2 K. B. 282. *As to* (2) *Consd.* **Jenkins v. Portman** (1836), 1 Koon, 433. *N.F.* **Moore v. Choat** (1839), 8 Sim. 508. The decision in that case cannot be supported (**SHADWELL v. C.**). *Consd.* **Robinson v. Roshier** (1841), 1 Y. & C. Ch. Cas. 7. *Dctd.* **Moore v. Greg** (1843), 2 Ph. 717. **Cox v. Bishop** (1857), 8 De G. M. & G. 815.

**3779. — Effect as to right of re-entry.]**—An agreement for a three years' tenancy of certain premises was entered into on Dec. 19, 1907, to run from Dec. 25, 1907, at a rental of £60 *per annum*. The agreement contained a proviso for re-entry if any part of the rent should be in arrear for fourteen days. The rent due on Dec. 25, 1908, was not paid. On Jan. 18, 1909, the reversion of the premises was assigned to pltf., & on Feb. 16, there was an assignment to pltf. of the benefit of the agreement of Dec. 19, 1907, & of the rent which had accrued due on Dec. 25, 1908. The rent which accrued due on Mar. 25, 1909, not having been paid, pltf. commenced an action in the county ct. under County Courts

Act, 1888 (c. 43), s. 139, to recover possession of the premises & also the six months' rent in arrear, without having previously distrained. Evidence was given by a person who went over the premises at deft.'s request that there was not sufficient distress on the premises to satisfy pltf.'s claim for rent. The county ct. judge found as facts that six months' rent was in arrear, & that there was no sufficient distress on the premises, & held that it was not a condition precedent to proceeding under County Courts Act, 1888 (c. 43), s. 139, that a distress should have been put in & proved to be insufficient; that the agreement, though void in law under Real Property Act, 1845 (c. 106), s. 3, not being under seal, must be construed as a valid lease to which Conveyancing & Law of Property Act, 1881, (c. 41), s. 10 applied, & that pltf., as assignee of the reversion under that section, had a right of re-entry notwithstanding that six months' rent in arrear accrued due partly before & partly after the date of the assignment:—**Held:** the decision of the county ct. judge was right.—**RICKETT v. GREEN**, [1910] 1 K. B. 253; 70 L. J. K. B. 193; 102 L. T. 16, D. C.

**Rent paid in advance.]—***See* Nos. 3760, 3761, *ante*.

**D. Mortgages.**

*See* **MORTGAGE**.

**E. Assignees of and Persons Authorised to Receive Rent.**

**3780. Authority given by former landlord.]**—**ROBERTS v. SHALLESS**, No. 3774, *ante*.

**3781. Assignee for value—Whether authority revocable.]**—A customer, in July, borrowed £200 from his bankers, upon the terms of a verbal agreement that the loan should be repaid out of the rent of a farm which would become due to him at Michaelmas. The money was advanced by the bankers, & the customer then gave them a letter addressed by him to the tenant of the farm, by which he authorised & requested the tenant, when his Michaelmas rent became due, to pay £200 to the bankers. The letter contained no reference to the loan, & did not show that any consideration had been given for the authority. The bankers sent the letter to the tenant. The customer was adjudicated a bkpt. upon an act of bkpcy. committed in Aug.:—**Held:** as the rent was an interest in land, the agreement was one which, by Stat. Frauds, s. 4, could not be proved by parol evidence & therefore the letter could alone be looked at: & the letter amounted only to a revocable authority to pay the rent to the bankers, & it was revoked by the bkpcy.—*Re* **WHITTING, Ex p. HALL** (1879), 10 Ch. D. 615; 48 L. J. Bcy. 79; 40 L. T. 179; 27 W. R. 385, C. A.; *affg.* *S. C. sub nom.* *Re* **WHITTING, Ex p. ROWELL** (1878), 48 L. J. Bcy. 46.

**Annotations:—***Mentd.* **Greenway v. Atkinson** (1881), 29 W. R. 560; **Mounsey v. Rankin** (1885), Cab. & El. 496; **Perival v. Dunn** (1885), 29 Ch. D. 128; **McManus v. Cooke** (1887), 35 Ch. D. 681; **Brandts v. Dunlop Rubber Co.**, [1904] 1 K. B. 387.

**3782. —**—**]**—A landlord borrowed money of pltf., & gave him a letter addressed to his tenant, of which the tenant had notice, directing him to pay to pltf. the rent until the order should be countermanded by pltf.:—**Held:** this was an

**PART XV. SECT. 4, SUB-SECT. 2.—C. (c).**

**3777. 1. Whether assignee entitled.]**—The assignee of a reversion cannot recover rent accrued due before the assignment.—**WITTROCK v. HALLINAN** (1856), 13 U. C. R. 135.—**CAN.**

**3777 H. —**—**]**—**BALLIE v. FLETCHER**, [1915] S. C. 677; 1 S. L. T. 364; 52 So. L. R. 487.—**SCOT.**

**PART XV. SECT. 4, SUB-SECT. 2.—E.**

**r. Bond conditioned to pay rent—**

**Assignment—Rent paid to assignee.]**—In debt on a bond conditioned to pay rent, a plea that before the rent became due pltf. assigned to A., to whom deft. paid the rent, on demurrer:—**Held:** good.—**McDOUGALL v. YOUNG** (1830), Dra. 118.—**CAN.**

absolute assignment under Jud. Act, 1873 (c. 66), s. 25, & that pltf. could sue the tenant for the rent.—*KNILL v. PROWSE* (1884), 33 W. R. 163, D. C.

Assignments of choses in actions generally, see *CHOSSES IN ACTION*, Vol. VIII., pp. 424 *et seq.*  
Payment to agents generally, see *AGENCY*, Vol. I., p. 328, Nos. 446-449.

See, also, Sect. 10, sub-sect. 2, D. (b), *post*.

### F. Receivers and Sequestrators.

**3783. Receiver appointed under poor law—Whether limited to particular sum.]**—Two justices, by order under 5 Geo. 1, c. 8, s. 1, directed the overseers, etc., to receive the annual rents & profits of the lands & tenements of B. a pauper who had run away from his family, & to certify to the next sessions, etc. The sessions confirmed the order, & directed them to receive the sum of £7 16s. rent of the rents & profits of the lands of B.:—*Held*: upon demurrer, in an action of covenant between the pauper & his tenant, that these orders extend only to one specific sum of £7 10s., & do not authorise the seizing of the annual profits from time to time. *Semble*: the order should always be specific, to receive so much of the annual rents & profits, or, at least, for a certain time; for the purview of the statute is to seize so much thereof as shall seem necessary, etc.—*STABLE v. DIXON* (1805), 6 East, 163; 1 Bott. 6th ed. 410; 2 Smith, K. B. 278; 102 E. R. 1249.

See, generally, POOR LAW.

**3784. Receiver appointed by court—Whether attornment necessary.]**—A tenant who had not attorned to the receiver, ordered to pay him the arrears of rent in fourteen days & the costs of the application.—*HOBSON v. SHERWOOD* (1854), 19 Beav. 575; 52 E. R. 474.

**3785. ———.]**—Where an order appointing a receiver does not contain a direction that possession of the property shall be delivered up to the receiver, a party in possession is justified in refusing to deliver it up, & may retain it, paying an occupation rent.

The ordinary course was where a party was in possession, & a receiver was appointed to direct either a delivery up of possession to the receiver, or that an occupation rent might be set. It was true that the order, as such orders always did, directed that the tenants should attorn & pay arrears, rents, etc., to the receiver (*KINDERSLEY, V.-C.*)—*RANDFIELD v. RANDFIELD* (1859), 7 W. R. 651; *subsequent proceedings* (1860), 1 Drew. & Sm. 310; (1861), 3 De G. F. & J. 766, L. J.

*Annotation*:—*Consd. Yorkshire Banking Co. v. Mullan* (1887), 35 Ch. D. 125.

See, generally, Part I., Sect. 2, *ante*.

**3786. ——— By way of equitable execution—Subject to rights of prior incumbrancer.]**—A person who is prejudiced by the conduct of a receiver

appointed in an action by way of equitable execution, ought not without leave of the ct. to commence a fresh action to restrain the proceedings of the receiver, even though the act complained of was beyond the scope of the receiver's authority; but ought to make an application for such relief as he is entitled to in the action in which the receiver was appointed.

With respect to the first question, I am of opinion that what was done by the receiver was wrong. He was appointed without prejudice to the rights of prior incumbrancers, & he ought not to have taken possession as against S. His first notice recites correctly the order appointing him receiver, & he knew that pltf. was a prior incumbrancer, & yet he gives notice to the tenants to pay their rents to him. This notice would entirely prevent any reasonable tenant from paying his rent to S. who as intgee. in possession, was entitled to receive it. That being so, I think the proceedings of the receiver were wrong & were in violation of his duty & of the rights of the present pltf. (*COTTON, L.J.*)—*SEARLE v. CHOAT* (1884), 25 Ch. D. 723; 53 L. J. Ch. 506; 50 L. T. 470; 32 W. R. 397, C. A.

See, generally, EXECUTION, Vol. XXI., pp. 664 *et seq.*

**3787. ——— Effect of payment in advance to lessor.]**—*ASHBURTON (LORD) v. NOCTON*, No. 3762, *ante*.

See, generally, RECEIVERS.

**3788. Sequestrators—Tenant's right to indemnity.]**—A person who had refused to pay the rent of a sequestered estate which he occupied as tenant to the sequestrators, except under an indemnity was nevertheless held entitled to his costs of a motion by the sequestrators to compel payment of the money.—*WHITE v. WOOD* (1843), 2 Y. & C. Ch. Cas. 615; 2 L. T. O. S. 116; 7 Jur. 1124; 63 E. R. 275.

### G. Personal Representatives.

**3789. Payment to administrator—Effect of revocation of grant.]**—*STEPHENS v. LANGLEY* (1673), Cas. temp. Finch, 40; 23 E. R. 22.

*Annotation*:—*Reld. Hewson v. Shelley*, [1914] 2 Ch. 13.

**Interest of representative in deceased's property—Leaseholds.]**—See EXECUTORS, Vol. XXIII., pp. 302-304, Nos. 3674-3689.

**Right of personal representative of lessor to recover rent.]**—See EXECUTORS, Vol. XXIII., p. 304, Nos. 3687, 3688.

**Devolution of the reversion generally.]**—See Part XXII., *post*.

### H. Co-Owners.

**3790. Whether rent apportionable—Demise of share of rent.]**—*ARDES v. WATKINS*, No. 4127, *post*.

**3791. ——— Reversion split by operation of law.]**—A declaration in account stated that A. & B.

### PART XV. SECT. 4, SUB-SECT. 2.—F.

**t. Writ of sequestration—Payment to commissioner.]**—The tenant of a party against whom a writ of sequestration has issued, will be ordered to pay to the comr. rent shown to be due, & also to attorn & pay the accruing rents.—*JACKSON v. JACKSON*, 1 Ch. Ch. 115.—CAN.

**a. Rent due before sequestration—Payment to landlord.]**—*STAFFORD v. STAFFORD* (1844), 7 I. Eq. R. 197.—IR.

**b. Rent due prior to appointment of receiver.]**—A tenant, who was not served with the order to pay his rent until after expiration of the interest over which the receiver had been appointed, will not be attached for

non-payment of an arrear which accrued due before the expiration of that interest, even though he had previously paid rent to the receiver.—*ANON.* (1836), 2 Jo. Ex. Ir. 280.—IR.

**c. Rent paid to landlord after receiver appointed—Before notice of appointment.]**—A pltf. who receives rent after the appointment of a receiver in the cause, although before he knew of the order appointing him, will be presumed to have notice of the appointment, & will be attached.—*AYLMER v. AYLMEER* (1828), 1 Ir. L. Rec. 1st ser. 389.—IR.

**d. Refusal to pay to receiver—Where receiver's powers questioned.]**—An attachment will not be granted

against a tenant for not paying rent to a receiver, where there is a question at law, as to whether the receiver can enforce the covenants of a lease, executed subsequent to his appointment by the inheritor, with the consent of all the parties in the cause; but the receiver will be left to any remedy he has at law.—*FORD v. HEAD* (1829), 3 Ir. L. Rec. 1st ser. 15.—IR.

### PART XV. SECT. 4, SUB-SECT. 2.—G.

**a. Rent "if demanded by lessor in person"—Recoverable by lessor's personal representative.]**—*HARRIS v. HARRIS* (1895), 16 N. S. W. L. R. (L.) 176.—AUS.

**Sect. 4.—Payment of rent: Sub-sects. 5, 6, 7 & 8.]**

lessee for a quarter's rent upon a covenant in a lease for payment of the rent quarterly in advance, deft. set up by way of defence that by a parol agreement made between pltf. & deft. antecedently to the execution of the lease pltf. agreed to take a bill payable at three months by way of payment of each quarter's rent in advance as it became due, & that deft. had tendered such a bill to pltf. in respect of the rent sued for, which pltf. refused to take:—*Held*: evidence of such an agreement as alleged was inadmissible.—*HENDERSON v. ARTHUR*, [1907] 1 K. B. 10; 76 L. J. K. B. 22; 95 L. T. 772; 23 T. L. R. 60; 51 Sol. Jo. 65.

*Annotations*:—*Consd. Re Defries, Elcholy v. Defries*, [1909] 2 Ch. 423; *Allen v. Royal Bank of Canada* (1925), 41 T. L. R. 625.

— **Authority of agent to accept.**—*See* AGENCY, Vol. I., pp. 367 *et seq.*

— *See, further*, CONTRACT, Vol. XII., p. 460, Nos. 3817, 3818.

**Payment by post.**—*See, generally*, CONTRACT, Vol. XII., pp. 471, 472.

**3808. Transfer to lessor's account at same bank—Bank subsequently suspending payment.**—Pltf. & deft. each kept an account with a banker at M. In Oct. pltf. desired deft. to pay in to his account a sum due to him for rent. Deft. wrote to pltf., stating that he had caused the amount to be transferred to his account & pltf. sent him a receipt by return of post. The sum, however, was not actually transferred until Dec. 8. On Dec. 9, notice of the transfer was sent to pltf. by post which did not reach him till Dec. 11. On Dec. 10 the banker stopped payment:—*Held*: the transfer was equivalent to payment.—*EYLES v. ELLIS* (1827), 4 Bing. 112; 12 Moore, C. P. 306; 5 L. J. O. S. C. P. 110; 130 E. R. 710.

*Annotation*:—*Refd. Re Land Development Assocn., Kent's Case* (1888), 39 Ch. D. 259.

**Tender under protest.—Whether sufficient.**—*See* CONTRACT, Vol. XII., p. 331.

**Payment to superior landlord.**—*See* Sect. 5, sub-sect. 2, Sect. 10, sub-sect. 2, *P. (a), post*.

**SUB-SECT. 6.—PLACE OF PAYMENT.**

**3809. Where no place specified.**—*ANON.* (1444), Y. B. 22 Hen. 6, fo. 57, pl. 7.

*Annotations*:—*Refd. Crouche v. Fastolfe* (1680), T. Raym. 418. *Mentd. Seymer's Case* (1585), Gouldsb. 8; *Tey's Case* (1592), 5 Co. Rep. 38 a; *Finch's Case* (1607), 6 Co. Rep. 63 a; *Six Carpenter's Case* (1610), 5 Co. Rep. 146 a; *Pilfold's Case* (1612), 10 Co. Rep. 115 b; *Rowe v. Young* (1820), 2 Brod. & Bing. 165.

**3810. Where no express covenant.**—(1) An award, on a controversy respecting a lease & arrears of rent, that the party should pay so much for the arrears, is a sum in gross, payable without demand.

(2) Tender of rent must be pleaded to have been upon the land, & at the last hour.—*FURSER & BOND v. PROWD* (1617), Cro. Jac. 423; 79 E. R. 361.

*Annotation*:—*As to (2) Refd. Lancashire v. Killingworth* (1700), 1 Ld. Raym. 686.

**3811.** — *See*—*CROUCHE v. FASTOLFE* (1680), T. Raym. 418; 83 E. R. 219.

*Annotations*:—*Consd. Haldane v. Johnson* (1853), 8 Exch. 689. *Refd. Horne v. Lewin* (1700), 1 Ld. Raym. 639; *Rowe v. Young* (1820), 2 Bli. 391.

**3812.** — *See*—Another class of cases, which I will mention, are cases of rents. Rent is reserved in some cases generally, & then the proper place for the payment, the place appointed by law, is the land out of which it issues. In some cases it is expressly made payable at some other place; & yet, in either case, is there a precedent, either in debt on the *reddendum*, or in covenant, of an averment, that pltf. was at the time & place to demand it. The declaration, in such cases, is always general, that on such a day so much of the said rent became due & in arrear, & that deft., although often requested, had not paid (*BAYLEY, J.*).—*ROWE v. YOUNG* (1820), 2 Bli. 391; 2 Brod. & Bing. 165; 4 E. R. 372, H. L.; *revsg.*, S. C. *sub nom. YOUNG v. ROWE* (1816), 5 M. & S. 291.

*Annotations*:—*Refd. Haldane v. Johnson* (1853), 8 Exch. 689. *Mentd. Cowie v. Halsall* (1821), 4 B. & Ald. 197; *Rhodes v. Gent* (1821), 5 B. & Ald. 244; *Smith v. Jersey* (1821), 3 Bli. 290; *Treacher v. Hinton* (1821), 4 B. & Ald. 413; *Re Dillworth, Ex p. Lancaster Canal Co.* (1831), Mont. 27; *Gibb v. Mather* (1832), 8 Bing. 214; *Re Mayor, Ex parte Whitworth* (1841), 2 Mont. D. & De G. 158; *Skelton v. Halstead* (1842), 11 L. J. Q. B. 331; *Saul v. Jones* (1858), 1 E. & E. 59; *Smith v. Vertue* (1860), 9 C. B. N. S. 214.

**3813.** — *See*—It is no answer to an action on a covenant for rent, no particular place for payment being mentioned in the deed, that deft. was on the premises demised for half an hour before, & continued there to the setting of the sun, being a sufficient time before sunset to allow of the counting of the money for the rent; & that he was, during that time, ready & willing to pay the rent, if pltf. had been minded to take & accept it, but that neither pltf. nor any person on his behalf came to receive it; & that from thence hitherto deft. has been & is ready & willing to pay the same, concluding by payment of the amount into ct.—*HALDANE v. JOHNSON* (1853), 8 Exch. 689; 1 C. L. R. 672; 22 L. J. Ex. 264; 32 L. T. O. S. 11; 17 Jur. 937; 155 E. R. 1529.

*Annotations*:—*Consd. North London & General Property Co. v. Moy*, [1917] 2 K. B. 617. *Refd. The Elder*, [1893] P. 119.

**3814. — Crown lease.**—Queen Elizabeth made a lease of land for years, reserving rent payable at the Exchequer or into the hands of her bailiffs or receivers, with condition to be void by non-payment of rent, & afterwards granted the reversion to another & his heirs:—*Held*: (1) the grantee, to take advantage of the condition, must demand the rent upon the land. In the case of a common person, if the rent is reserved payable at a place out of the land, to take advantage of the condition, the rent must be demanded at the place where it is appointed to be paid; (2) the Queen shall take advantage of the condition without any demand; otherwise of her grantee; (3) if the King makes a lease without appointing any place, or into whose hands the rent should be paid, the lessee may pay it either at the receipt of the Exchequer, or into the hands of the King's bailiffs or receivers, authorised to the purpose.—*BOROUGHES' CASE, BOROUGHS v. TAYLOR* (1596),

of Great Britain."—*ADAMS v. HARVEY* (1904), 9 Nfld. L. R. 6.—*NFLD.*

k. *Tenant company with headquarters in United States—Premises partly in Canada & partly in United States—Covenant made in Canada—Rent payable in Canadian currency.*—*NIAGARA FALLS INTERNATIONAL*

*BRIDGE Co. v. GREAT WESTERN RY. Co.* (1863), 22 U. C. R. 592.—*CAN.*

1. *Rent reserved in money—Payable in cash only.*—Rent reserved in money is payable in cash only upon the days appointed for payment, & evidence of any agreement to the

contrary is inadmissible.—*RAKERA v. DOWNS*, [1916] N. Z. L. R. 669.—*N.Z.*

**PART XV. SECT 4, SUB-SECT. 6.**

m. *What is sufficient specification.*—*See p. BELL* (1903), 3 S. R. N. S. W. 449; 20 N. S. W. W. N. 169.—*AUS.*

4 Co. Rep. 72 b; Gouldsb. 124; Moore, K. B. 404; Cro. Eliz. 462; 78 E. R. 1043.

*Annotation*.—*Consd. Hassell d. Hodgson v. Gouthwaite* (1744), Willes, 500.

**3815.** — *Lease by bishop.*—*ELLIOTT v. NUTCOMBE* (1556), Benl. 14; 73 E. R. 941.

**3816.** — *Rent in kind & money rent distinguished.*—*CHENEY'S CASE* (1590), 3 Leon. 260; 74 E. R. 672.

**3817.** *Where payment at particular place provided for.*—*ROWE v. YOUNG*, No. 3812, *ante*.

**3818.** — *Crown lease.*—*BOROUGHES' CASE*, *BOROUGHES v. TAYLOR*, No. 3814, *ante*.

**3819.** *Under collateral covenant.*—*ANON.* (1444), Y. B. 22 Hen. 6, fo. 57, pl. 7.

*Annotation*.—*Refd. Crouche v. Fastolfe* (1680), T. Raym. 418. *Mentd. Seymer's Case* (1585), Gouldsb. 8; *Tey's Case* (1592), 5 Co. Rep. 38 a; *Finch's Case* (1607), 6 Co. Rep. 63 a; *Six Carpenter's Case* (1610), 8 Co. Rep. 146 a; *Pillfold's Case* (1612), 10 Co. Rep. 115 b; *Rowe Young* (1820), 2 Brod. & Bing. 165.

**3820.** *Where demand may be made.*—*Rent* seek is well demanded on the land, though made payable at another place.—*BISHOP v. GRANT* (1594), Cro. Eliz. 324; 78 E. R. 574.

*Annotation*.—*Refd. Walford v. Anthony* (1831), 8 Bing. 75.

**3821.** — *A demand & non-payment of rent at the house out of which it issues, is a disseisin of the rent, although by the grant it was made payable at another place.*—*SMITH v. SMITH* (1638), Cro. Car. 507; 79 E. R. 1038.

**3822.** *Failure of landlord to attend for payment—Lessee attending & ready to pay—Pleading.*—*CROUCHE v. FASTOLFE* (1680), T. Raym. 418; 83 E. R. 219.

*Annotations*.—*Consd. Huldane v. Johnson* (1853), 8 Exch. 689. *Refd. Horne v. Lewin* (1700), 1 Ld. Raym. 639; *Rowe v. Young* (1820), 2 BH. 391.

#### SUB-SECT. 7.—SECURITY FOR PAYMENT.

**3823.** *On reduction of capital of company—Ordered on application of lessor.*—A co. had petitioned for an order to confirm a resolution to reduce their capital. On the application of a lessor to the co., a sum of money was ordered to be paid into ct. & invested as security for part of the rent, & to be retained in ct. for a part of the term of the lease.—*Re TELEGRAPH CONSTRUCTION CO.* (1870), L. R. 10 Eq. 384; 22 L. T. 649; *sub nom. TELEGRAPH CONSTRUCTION & MAINTENANCE CO. (LTD. & REDUCED)*, *Ex p. ENDERBY'S TRUSTEES*, 39 L. J. Ch. 723; 18 W. R. 729.

*Annotations*.—*Consd. Re Gartness Iron Co., Ex p. Elphinstone* (1870), L. R. 10 Eq. 412. *Apld. Oppenheimer v. British & Foreign Exchange & Investment Bank* (1877), 6 Ch. D. 744. *Refd. Re Westbourne-Grove Drapery & Furnishing Co.* (1877), 25 W. R. 509; *Gooch v. London Banking Asscn.* (1886), 32 Ch. D. 41; *Re Midland Coal Coke & Iron Co., Craig's Claim*, [1895] 1 Ch. 267.

*On winding up of company.*—*See COMPANIES*, Vol. X., pp. 1000, 1001, Nos. 6946–6948.

**Business wound up under Trading with Enemy Amendment Act, 1916 (c. 105).**—*See ALIENS*, Vol. II., p. 150, No. 224.

**Bond for payment of rent—Stamping.**—*See BONDS*, Vol. VII., p. 258, Nos. 996, 997.

#### SUB-SECT. 8.—RECOVERY OF RENT PAID.

**3824.** *On ejectment by party claiming against landlord—Landlord not opposing claim.*—A tenant having paid rent to A. was ejected at the suit of a third person, who afterwards recovered from him the mesne profits for the period in respect of which he had paid rent to A. — *Held*: the tenant, in an action for money had & received, might recover back that rent from A. he not having set up any title to the premises at the trial.—*NEWSOME v. GRAHAM* (1829), 10 B. & C. 234; 5 Man. & Ry. K. B. 64; 8 L. J. O. S. K. B. 100; 109 E. R. 437.

*Annotations*.—*Distd. Finck v. Tranter*, [1905] 1 K. B. 427. *Refd. Clure v. Lamb* (1875), L. R. 10 C. P. 334.

**3825.** *Payment to equitable mortgagee of lessor.*—Although an equitable mtgee. has no legal right to be paid the rents of the mtgd. property, yet if he has been paid rent by a tenant of the equitable mtgor. after notice to the tenant that the rent is claimed by him as equitable mtgee. he cannot be compelled to refund the rent to the tenant.—*FINCK v. TRANTER*, [1905] 1 K. B. 427; 74 L. J. K. B. 345; 92 L. T. 297, D. C.

*Annotation*.—*Refd. Vacuum Oil Co. v. Ellis*, [1914] 1 K. B. 693.

*See, generally*, MORTGAGE.

**3826.** *Payment after bankruptcy of tenant.*—Money paid for rent to a landlord who was about to distrain, by a trader after an act of bkpcy. committed, is not recoverable back by the assignees.—*STEVENSON v. WOOD* (1805), 5 Esp. 200, N. P.

*Annotations*.—*Fold. Mayor v. Croome* (1823), 1 Bing. 261. *Apld. Re Griffith, Ex p. Official Receiver* (1897), 66 L. J. Q. B. 763.

**3827.** — *A bkpt. proposed, after an act of bkpcy., to dispose of his lease, which was a beneficial lease; the purchaser refused to buy unless five quarters' rent due to the landlord were first paid; after negotiation between the bkpt. & the landlord, who knew the bkpt.'s situation, the rent was paid out of the money which the purchaser had agreed to give for the lease, there being at the time of the transaction no distress on the premises, but the landlord having a right of re-entry:—Held: the bkpt.'s assignee could not recover from the landlord the rent so paid him.*—*MAVOR v. CROOME* (1823), 1 Bing. 261; 8 Moore, C. P. 171; 1 L. J. O. S. C. P. 91; 130 E. R. 105.

*Annotations*.—*Apld. Re Griffith, Ex p. Official Receiver* (1897), 66 L. J. Q. B. 763. *Refd. Bourne v. Graham* (1856), 2 Jur. N. S. 1225.

#### PART XV. SECT. 4, SUB-SECT. 7.

*n. Agreement for sale of tenant's goods as satisfaction—Failure to realise—Landlord's original rights restored.*—*POOLE v. BUTLER* (1924), 57 N. S. R. 228.—*CAN.*

*o. Storage of goods as security—After expiry of lease—Whether charge for storage.*—A lessor cannot charge rent for the storage, after the lease has come to an end, of goods which he retains against the will of the lessee in the exercise of the lessor's right of retention to secure payment of rent still due under the lease.—*LAINGSBURG SCHOEN. BOARD v. LOGAN* (1910), 27 S. C. 240.—*S. AF.*

#### PART XV. SECT. 4, SUB-SECT. 8.

*p. Rent paid in advance—Proportionate repayment in case of fire.*—*HORTON v. TAYLOR* (1870), 21 C. P. 56.—*CAN.*

*q. — Occupation prevented by war.*—A lessee who has paid rent in advance & has, owing to war, been deprived of the beneficial occupation of the leased premises for portion of the period in respect to which rent has been so paid is entitled to reclaim the rent paid for such period.—*HUGHES v. LEVY* (1907), T. S. 276.—*S. AF.*

*r. Seizure of property in satisfaction—Rent found already paid—Right to recover surplus.*—*SATTLER v. WILSON*

(1913), 24 W. L. R. 150.—*CAN.*

*t. Rent paid by co-lessee—Right to recover from co-lessees.*—When one of several co-lessees had paid the whole rent of a subject:—*Held*: competent to prove by facts & circumstances the rights of the parties *inter se*, to the effect of establishing that he was entitled to recover the rent from his co-lessees.—*MOORE v. DEMETER, ETU.* (1879), 6 R. (Ct. of Sess.) 930; 16 Sc. L. R. 536.—*SCOT.*

*u. Rent paid by purchase of land—For buildings presumed owned by tenant—Ownership disproved.*—*HARPER v. GAYNOR* (1893), 19 V. L. R. 675.—*AUS.*

*b. Area of holding over estimated.*]

**Sect. 4.—Payment of rent: Sub-sect. 8. Sect. 5: Sub-sect. 1, A., B. & C. (a).]**

**3828. — Payment in advance.]—**Money received by an undischarged bkpt. & paid away for value cannot be followed by the trustee, though the person to whom the money was paid had notice of the bkpcy. A bkpt., who had not obtained his order of discharge, took a furnished house at £5 per week from a person who had notice of the bkpcy., on the terms of paying six months' rent in advance if required. Having obtained £200 as compensation for being turned out of an appointment which he had taken since the bkpcy., he paid to the landlord out of this sum £130 as the six months' rent, the landlord having required payment:—*Held*: though the trustee in bkpcy. could have intercepted the £200 & required it to be paid to him he could not follow any part of it into the hands of the landlord.—*Re VANLOHE, Ex p. DEWHURST* (1871), 7 Ch. App. 185; 41 L. J. Bcy. 18; 25 L. T. 731; 20 W. R. 172, L. J.J.

*Annotations*:—*Consd. Wadling v. Oliphant* (1875), 1 Q. B. D. 145; *Cohen v. Mitchell* (1890), 25 Q. B. D. 262.

**Rent paid in advance—Payment voluntary.]—***See No. 3731, ante.*

**3829. — Subsequent bankruptcy of tenant.]—***Re VANLOHE, Ex p. DEWHURST*, No. 3828, *ante.*

**Rent paid by mistake.]—***See MISTAKE.*

**Under Rent Restriction Acts.]—***See Part XXVII., Sect. 3, sub-sect. 6, post.*

## SECT. 5.—DEDUCTIONS FROM RENT AND SET-OFF.

### SUB-SECT. 1.—BY LESSEE.

#### A. In General.

**3830. Set-off — Debts of unequal degree.]—***BROWN v. HOLYOAK* (1734), cited in *Willes* at p. 263; 125 E. R. 1164; *revisg.*, *Barnes*, 290.

*Annotation*:—*Reid. Hutchinson v. Sturges* (1741), *Willes*, 261.

**3831. — Claim must be due to same parties.]—***WILLSON v. DAVENPORT*, No. 3851, *post.*

*See, generally, SET-OFF.*

**3832. Deduction of payment—Payment under compulsion.]—**Where a party threatened with a distress for rent pays money, against the payment of which he might legally have defended himself, but does not do it, this shall not be deemed a payment by compulsion, nor shall he be allowed to set it off against another demand.—*KNIBBS v. HALL* (1794), 1 Esp. 84; *Peake*, 276, N. P.

*Annotations*:—*Reid. Higgs v. Scott* (1849), 7 C. B. 63. *Mentd. Lothian v. Henderson* (1803), 3 Bos. & P. 499; *Morgan v. Palmer* (1824), 2 B. & C. 729; *de Cadaval v. Collins* (1836), 6 Nev. & M. K. B. 324; *Skeate v. Beale* (1841), 11 Ad. & El. 983; *Briscoe v. Hill* (1842), 7 Jur. 306; *Parker v. G. W. Rty.* (1844), 7 Man. & G. 253; *Guliver v. Cosens* (1845), 1 C. B. 788; *Glynn v. Thomas* (1856), 26 L. T. O. S. 281; *Maskell v. Horner*, [1915] 3 K. B. 106.

—*LANDALE v. MINISTER OF LANDS* (1889), 19 N. S. W. L. R. 314; 15 N. S. W. W. N. 176.—*AUS.*  
e. *Rent paid by mistake.]—*Rent paid to Crown by mistake of law & with knowledge of facts cannot be recovered.—*MALONE v. WILLIAMS* (1905), 5 S. R. N. S. W. 665.—*AUS.*

### PART XV. SECT. 5, SUB-SECT. 1.—A.

d. *Set-off — Statute-barred claim.]—*In a suit by the lessor for rent, it is not open to the lessee to set up by way of equitable set-off an unliquidated claim for damages which was barred at the date of the suit.—*VIJAYAN CHETTY v. SRIMATH DEIVASIKAMANI NATARAJA DESIKAR* (1915), 1 L. R.

39 Mad. 939.—*IND.*

e. *Deduction of payment—Covenant to pay rent without any deduction.]—*A tenant who covenants to pay rent without any deduction cannot claim a deduction for taxes paid by him.—*GRANTHAM v. ELLIOTT* (1840), 6 O. S. 192.—*CAN.*

f. *Covenant to allow deduction.]—**HARRIS v. SYDNEY GLASS & TILE CO.* (1904), 2 C. L. R. 227.—*AUS.*

g. *On account of damage by weeds—Evidence of settlements with other lessees admissible.]—**WIENHOLD v. KLEIN* (1884), 10 A. R. 20.—*CAN.*

h. *On appropriation of part of land by government—Retrospective*

**3833. — — —.]—***CARTER v. CARTER*, No. 3878, *post.*

**3834. — — —.]—***WHITMORE v. WALKER*, No. 3857, *post.*

**3835. — What amounts to payment under compulsion—Payment not legally enforceable—Though paid under threat.]—***KNIBBS v. HALL*, No. 3832, *ante.*

**3836. — — — — —.]—***BRYER v. WILLIS*, No. 3861, *post.*

**3837. — — — — —.]—**Effect of landlord giving time.]—*CARTER v. CARTER*, No. 3878, *post.*

**3838. — — — — —.]—**Threat of distress.]—*WHITMORE v. WALKER*, No. 3857, *post.*

**3839. — Payment to stranger—Debt not due to landlord.]—***BOODLE v. CAMBELL*, No. 3889, *post.*

**3840. Covenant to allow deduction—Passes to assignee of lease.]—***BAYLYE v. HUGHES* (1628), Cro. Car. 137; 79 E. R. 720.

*See, further, DISTRESS*, Vol. XVIII., pp. 317 *et seq.*, Nos. 518 *et seq.*

### B. Claims for Damages.

**3841. Claim for unliquidated damages.]—**(1) To an action of covenant for rent by a landlord, deft. cannot set off any uncertain damages that he may be entitled to recover against the landlord on any of the covenants in the lease.

(2) The lessee covenanted to repair, etc., "casualties by fire & tempest excepted." *Qu.*: if the landlord be bound to repair in either of the excepted cases.—*WEIGALL v. WATERS* (1795), 6 Term Rep. 488; 101 E. R. 603; *previous proceedings, sub nom. WATERS v. WEIGALL*, 2 Anst. 575.

*Annotations*:—*As to* (1) *Reid. Hamond v. Toulman* (1798), 7 Term Rep. 612. *As to* (2) *Reid. Hare v. Groves* (1796), 3 Anst. 687.

**3842. — Claim in bankruptcy of lessor.]—**Under Bkpcy. Act, 1869 (c. 71), the right of set-off is extended to unliquidated damages. Where a person from whom rent is due to an estate in course of administration under Bkpcy. Act, 1869 (c. 71), has a claim against the estate, he may set off his claim against all rent due down to the close of the bkpcy.—*BOOTH v. HUTCHINSON* (1872), L. R. 15 Eq. 30; 42 L. J. Ch. 492; 27 L. T. 600; 21 W. R. 116.

*Annotations*:—*Reid. Palmer v. Day*, [1895] 2 Q. B. 618; *Re Daintrey, Ex p. Mant*, [1900] 1 Q. B. 546. *Mentd. Blide v. Harrison* (1873), L. R. 17 Eq. 76; *Re Winter, Ex p. Bolland* (1878), 8 Ch. D. 225; *Peat v. Jones* (1881), 8 Q. B. D. 147; *Re Mid-Kent Fruit Factory* (1896), 65 L. J. Ch. 250; *Ellis' Trustee v. Dixon-Johnson*, [1924] 2 Ch. 451.

Set-off in bankruptcy generally, *see BANKRUPTCY*, Vol. IV., pp. 389 *et seq.*

**3843. Claim must be in respect of interest in land—Breach of personal covenant distinguished.]**

—A building co. entered into an agreement with deft. to erect & complete an hotel so as to be ready for occupation by a certain date, & deft. agreed to take a lease of the hotel for twenty-eight

*operation.]—CLAPP v. RENDELL* (1872), 5 Nfld. L. R. 461.—*NFLD.*

k. *On premises becoming untenable.]—**DRYBROUGH v. DRYBROUGH* (1874), 1 R. (Ct. of Sess.) 909.—*SCOT.*

### PART XV. SECT. 5, SUB-SECT. 1.—B.

l. *Claim for damage to surface by subsidence.]—**DANIEL STEWART'S HOSPITAL (GOVERNORS) v. WADDELL* (1890), 17 R. (Ct. of Sess.) 1077; 27 Sc. L. R. 815.—*SCOT.*

m. *Damages recovered—Remedy exhausted.]—*The tenant of a farm, sued by his landlord for arrears of rent, claimed & obtained in the action an award of damages against the landlord

years at a specified rent, as soon as it was ready for use. The building co. made default in completing the hotel, but on its subsequent completion deft. accepted a lease for the stipulated term without prejudice to any claim for damages for breach of the agreement. The co., who had obtained a head lease of ninety-nine years from the freeholder, mortgaged the same to ptfs. In an action by them, as mtgees. in possession, against deft., for arrears of rent accrued since the date of the mtge. deft. sought to set off a claim for damages in respect of the co.'s default in not completing the hotel by the specified time, & alleged that the mtge. was taken by ptfs., with full notice & knowledge of that claim:—*Held*: inasmuch as the right attempted to be set off was not an interest in land but merely a claim for damages for breach of a personal covenant, the claim to set off could not be allowed; & cases as to set-off by an assignee of a chose in action had no application to the present case.—*REEVES v. POPE*, [1914] 2 K. B. 284; 83 L. J. K. B. 771; 110 L. T. 503; 58 Sol. Jo. 248, C. A.

*See, also*, CHOSSES IN ACTION, Vol. VIII., pp. 491 *et seq.*

**3844. Claim in respect of distress—Goods sold at too low a price.**—In an action for rent:—*Semble*: it is no answer that the landlord has distrained goods for it to the full value of the rent, if he has sold them for a less sum; if he has sold them at too low a price, the tenant's remedy is by action.—*EFFORD v. BURGESS* (1831), 1 Mood. & R. 23.

*Annotation*:—*Refd.* *Lehain v. Philippott* (1875), 44 L. J. Ex. 225.

**3845. Claim for breach of personal covenant—Though connected with land.**—*REEVES v. POPE*, No. 3843. *ante*.

**3846. Non-repair of roof—Roof not demised by landlord.**—The lessor of an unfurnished flat, where the roof forms no part of the demise, but remains in the control of the lessor, owes an absolute duty to his lessee to keep the roof in repair & is not merely under an obligation to use reasonable care to keep it in repair. A breach of this duty is however no answer to a claim for rent, but is a matter for cross action.—*HART v. ROGERS*, [1916] 1 K. B. 646; 85 L. J. K. B. 273; 114 L. T. 329; 32 T. L. R. 150.

*Annotations*:—*Mentd.* *Groves v. Western Mansions* (1916), 33 T. L. R. 76; *Dunster v. Hollis*, [1918] 2 K. B. 795; *Murphy v. Hurly*, [1922] 1 A. C. 369; *Fairman v. Perpetual Investment Bldg. Soc.*, [1923] A. C. 74; *Cockburn v. Smith*, [1924] 2 K. B. 119.

#### C. Debt due by Lessor.

##### (a) To Lessee.

**3847. General rule.**—*TEGETMEYER v. LUMLEY* (1785), Willes, 264, n.; 125 E. R. 1164.

*Annotations*:—*Refd.* *Rogerson v. Ladbroke* (1822), 7 Moore, C. P. 412. *Mentd.* *Schofield v. Corbett* (1836), 11 Q. B. 779; *Watts v. Rees* (1854), 23 L. J. Ex. 238.

**3848.** —.]—Bill for an injunction to restrain proceedings at law for rent, on the ground of an agreement under which the landlord was indebted more than the amount of the rent:—*Held*: it was a legal set-off, & demurrer allowed:—*Qu.*: whether this ct. can relieve by allowing an equitable set-off on a demand for rent.—*TOWNROW v. BENSON* (1818), 3 Madd. 203; 56 E. R. 484.

*Annotations*:—*Consd.* *Pratt v. Keith* (1864), 33 L. J. Ch. 528. *Refd.* *Hamp v. Jones* (1840), 9 L. J. Ch. 258.

**Whether allowed in replevin.**—*See, generally* *DISTRESS*, Vol. XVIII., pp. 317 *et seq.*

**3849. Sums due under mutual covenants.**—If A. covenant with B. to pay so much money for tithes, & to be accountable for all arrears of rent, & B. covenant to allow certain disbursements upon the account, A. cannot plead, in an action of covenant, that he was ready to account if B. would allow him the disbursements; for the covenants being mutual, each of them has remedy against the other for non-performance.—*SAMWAYS v. ELDSLY* (1678), 2 Mod. Rep. 73; 86 E. R. 949.

**3850.** —.]—*GOWER v. HUNT* (1734), Barnes, 290; Bull. N. P. 181 b; 94 E. R. 920.

*Annotation*:—*Mentd.* *Oldershaw v. Thompson* (1816), 1 Stark. 311.

**3851. Sum due to wife of tenant.**—A. rented land of B., who was trustee of certain property, a part of which was this land, the rents of which B. was to pay in certain shares; one of those shares belonged to the wife of A. B. had in his hands a greater amount due to A. in right of his wife than the rent amounted to:—*Held*: this could not be set off against the rent without a special agreement to that effect.—*WILLSON v. DAVENPORT* (1833), 5 C. & P. 521, N. P.

**3852. Expenditure on improvements—In anticipation of grant of lease.**—The tenant of a farm, contemplating taking a lease, & pending negotiations for the same, being desirous of carrying out certain improvements of thatching & draining, & anxious as to repayment for them, wrote to her landlord thus "I should feel obliged if you would send us a rough draft of the agreement at your earliest convenience, as I do not feel comfortable to proceed with the necessary improvements of thatching the barn, draining the land, etc., without some little assurance from you that we are acting safely." The landlord replied as follows: "I will send you a copy of the lease next week, & trust you will make yourself comfortable as to the thatching of the barn & the draining, etc. I will pay for the thatching & draining if we do not come to terms, but as the covenants will not be unusual, I trust there will be no necessity for that." The tenant, who was under notice from the landlord to quit at the end of the half-year, declined continuing tenant of the farm. The landlord on the determination of the tenancy brought his action for the half-year's rent. The tenant pleaded by way of set-off, the money she had paid for thatching & draining, & paid into ct. the balance of the landlord's claim:—*Held*: on the interpretation of the correspondence, deft. was entitled to set off, against ptlf.'s claim for rent, the money she had so expended on the said improvements.—*CLEGHORN v. DURRANT* (1858), 31 L. T. O. S. 235; 22 J. P. 419.

**3853. Agreement for set-off—Subsequent devise of premises subject to rent—Whether right of set-off passes to devisees.**—By a deed of even date with a lease the lessor covenanted that the lessee should retain part of each year's rent until satisfaction of a debt due from the lessor to the lessee:—*Held*: (1) though the covenant might be pleaded at law as a release *pro tanto* of the rent, this was only to avoid circuity of action, & the covenant was not for all purposes a release; (2) the lessee having specifically bequeathed the premises subject to the rent, as between the

for his failure to implement certain obligations under the lease:—*Held*: the tenant, having obtained damages, had exhausted his remedy, & could not retain the balance of the rent due on

the plea that the landlord's failure to implement his part of the contract barred him from claiming rent.—*CHRISTIE v. WILSON*, [1916] S. C. 645. —*SCOT*.

PART XV. SECT. 5, SUB-SECT. 1.—C. (a).

**3847 i. General rule.**—*SMITH v. HOWE* (1835), 2 Mon. 163, 171.—S. AF.

**Sect. 5.—Deductions from rent and set-off: Subsect. 1, C. (a) & (b), D., E., F., G. & H.]**

exors. & the specific legatees, the specific legatees took subject to the whole rent, & the benefit of the covenant for reduction of rent went to the exors.—*LEDGER v. STANTON* (1861), 2 John. & H. 687; 4 L. T. 795; 9 W. R. 848; 70 E. R. 1235.

**3854. Effect of assignment of debt by tenant.]**—Defts. bound themselves to plffs. by certain instruments, called Lloyd's Bonds, to pay certain sums of money & interest at the expiration of a year. A few days afterwards defts. granted plffs. a lease. Plffs. then assigned away the said bonds. In an action brought by plffs. for the benefit of the assignees on the said bonds, defts. claimed to be entitled to set off rent which accrued due under the lease after such assignment & notice thereof:—*Held*: defts. were not so entitled either at law or in equity.—*WATSON v. MID WALES RY. CO.* (1867), L. R. 2 C. P. 593; 36 L. J. C. P. 285; 17 L. T. 94; 15 W. R. 1107.

*Annotations*:—*Consd. Higgs v. Assam Tea Co.* (1869), L. R. 4 Exch. 387. *Apld. Re Milan Tram. Co., Ex p. Theys* (1882), 22 Ch. D. 122. *Consd. Newfoundland Government v. Newfoundland Ry.* (1888), 13 App. Cas. 199; *Christie v. Taunton, Delmard, Lane, Re Taunton, Delmard, Lane*, [1893] 2 Ch. 175. *Reid. Harter v. Colman* (1882), 19 Ch. D. 630; *Re City Life Assoc.* (1925), 42 T. L. R. 45.

**(b) To Superior Landlord.**

See Nos. 3873–3878, *post*.

**D. Payments to Mortgagees.**

**3855. Payment in respect of arrears of interest.]**—To an avowry for rent in arrear, plff. pleaded that before deft. had any interest in the lands, they were charged with a mtge. in fee, that the mtgor., who retained the possession after forfeiture of the land demised same to deft. for a term, who demised to plff. who entered into possession until the mtgee., there being an arrear of interest & also of rent due from plff. to deft., gave notice to the former to pay the portion of the rent, amounting to the arrear of the interest to him, & in default threatened to put the law in force, & was about to do so, to recover the arrear of interest, whereupon plff. necessarily paid the said sum to the mtgee., & so the rent was not in arrear to deft.; concluding with a verification:—*Held*: the plea was good, being in effect a plea of payment, & not of *nil habuit in tenementis* & it was correct in setting out the facts, & concluding with a verification.—*JOHNSON v. JONES* (1839), 9 Ad. & El. 809; 1 Per. & Dav. 651; 8 L. J. Q. B. 124; 112 E. R. 1421.

*Annotations*:—*Foll. Underhay v. Read* (1887), 20 Q. B. D. 209. *Reid. Boodle v. Cambell* (1844), 7 Man. & G. 386; *Carpenter v. Parker* (1857), 3 C. B. N. S. 206.

**3856. —.]**—A mtgor. let the mtged. premises subsequently to the mtge. During the quarter ending at Michaelmas the mtgees. gave a notice to the tenant informing him of the existence of the mtge., & that the principal sum was still due & owing together with an arrear of interest, & requiring him to pay the rent thereafter to accrue due to them. The rent which became due at Michaelmas being still unpaid, an order was made in an action against the mtgor. appointing plff., who had recovered judgment, receiver of the rents of the premises, "without prejudice to the rights of any prior incumbrancers who may think proper to take possession of the same by virtue of their respective securities." Subsequently the mtgees. threatened the tenant with legal proceedings unless he paid the rent to them, & the tenant thereupon paid them the quarter's rent

due at Michaelmas. The receiver claimed payment of such rent from the tenant:—*Held*: the tenant had not been guilty of any disobedience of the receivership order in paying rent to the mtgees., they being prior incumbrancers whose rights were reserved by the order; the tenant, having paid the rent to the mtgees. under compulsion of law & in consequence of his lessor's default, could set up such payment in answer to the claim for the rent by the receiver, who claimed through his lessor; & consequently the claim of the receiver could not be maintained.—*UNDERHAY v. READ* (1887), 20 Q. B. D. 209; 57 L. J. Q. B. 129; 58 L. T. 457; 36 W. R. 298; 4 T. L. R. 188, C. A.

*Annotation*:—*Mentd. Towerson v. Jackson*, [1891] 2 Q. B. 484.

**3857. Payment in excess of interest.]**—(1) A. was seised in fee of a house & two acres of land, which he had let to B. A. mortgaged this property to C. in fee, & it was arranged between A., B., & C. that B. should pay the amount of the interest on the mtge. to C., & the residue of the rent to A. After this C. gave notice to B. to pay the whole rent to him. B. did so:—*Held*: by reason of the arrangement, B. was not justified in so doing; but if there had been no such arrangement it would have been otherwise.

(2) A. was seised in fee of nine acres of land charged with legacies, for which there was a power of distraining. A. let the land to B., & the legatees assigned their legacies to C. who gave notice to B. to pay the rent to him:—*Held*: B. was not justified in so doing upon a notice only, although he would have been under the threat of a distress.—*WHITMORE v. WALKER* (1848), 2 Car. & Kir. 615.

**3858. To whom available — Underlessee — Though payment made by lessee.]**—In 1796, H. demised to S. for sixty-eight years, premises which in 1793 had been mortgaged to F. S. assigned to N., who underlet to D. In 1818, H. conveyed the premises in fee to R. N., who was also agent of H., paid the interest on the mtge. to F. from 1816 to 1820 to the amount of the rent reserved. R. distrained for rent in 1820:—*Held*: D., who replevied at the instigation of N., might, under the plea of *riens in arriere*, avail himself of these payments.—*DYER v. BOWLEY* (1824), 2 Bing. 94; 9 Moore, C. P. 196; 2 L. J. O. S. C. P. 129; 130 E. R. 240.

*Annotations*:—*Reid. Johnson v. Jones* (1839), 8 L. J. Q. B. 124; *Wheeler v. Branscombe* (1843), 5 Q. B. 373.

See, further, MORTGAGE.

**E. Payments in respect of Party Walls.**

**3859. General rule.]**—In debt for rent against an administrator, as assignee of the intestate, deft. pleaded, in discharge of his liability otherwise than as administrator, that the intestate underlet, for an unexpired term, to a tenant who had become insolvent & unable to pay rent; that the premises were of less value than the rent, viz. of the value of a certain sum, part of which deft. had paid to plff., & part towards the expense of a party wall under Fire Prevention (Metropolis) Act, 1774 (c. 78); that, before the rent became due, deft. offered to surrender all his interest in the premises to plff., who refused to accept them; & that he had fully administered, etc. Replication; that the premises were of more value than the sum mentioned in the plea, viz. of the value of the rent; & that deft. did not offer to surrender, etc. Issue thereon:—*Held*: (1) the real value of the premises, as against deft., must be taken to be that which it would have been if he had not

himself committed a breach of a covenant to repair in the original lease; (2) the value, as between pltf. & deft., was not affected by the insolvency of the undertenant, whose lease also contained a covenant to repair with a proviso of re-entry for breach & for non-payment of rent.

(3) Another question was raised as to a sum paid in respect to a party wall; but we do not think deft. entitled to deduct that sum at all, & even if he were entitled, he could not do so, without pleading either a set-off or payment (DENMAN, C.J.).—*HORNIDGE v. WILSON* (1840), 11 Ad. & El. 645; 3 Per. & Dav. 641; 9 L. J. Q. B. 72; 113 E. R. 559.

*Annotations*:—As to (1) *Apld. Re Bowes, Strathmore v. Vane, Norcliffe's Claim* (1887), 37 Ch. D. 128. *Refd.* *Hopwood v. Whalley* (1848), 6 C. B. 744; *Rendall v. Andrae* (1802), 61 L. J. Q. B. 630.

**3860.** —.]—A tenant who has been compelled by the "building owner" to pay the proportion of the expenses of a party wall or structure which was payable under 18 & 19 Vict., c. 122, by his landlord, the "adjoining owner," may maintain an action against the latter to recover the sum so paid, & is not bound, though entitled, to deduct it from rent due or accruing due.—*EARLE v. MAUGHAM* (1863), 14 C. B. N. S. 626; 2 New Rep. 327; 8 L. T. 637; 10 Jur. N. S. 208; 11 W. R. 911; 143 E. R. 590.

*Annotation*:—*Mentd. Wigg v. Lefevre* (1892), 8 T. L. R. 493.

**3861. Payment not enforceable at law**—Though paid under threat of proceedings.]—In the course of reinstating a party structure under 18 & 19 Vict., c. 122, it was adjudged necessary by the surveyors to pull down some partitions abutting on but forming no part of the party structure, & the expense of pulling down & reinstating the same amounted to £118:—*Held*: (1) a building owner was not compelled by the Act to do these works, & could not recover for the same, but only for the adjoining owner's share of the expense of reinstating the party structure; (2) the adjoining occupier having paid the £118 to the building owner under threat of conviction, could not recover the amount from his lessors, or deduct the same from his rent under sect. 97.—*BRYER v. WILLIS* (1870), 23 L. T. 463; 35 J. P. 471; 19 W. R. 102.

*See, now, London Building Act, 1894 (c. cxxiii), s. 173.*

**Liability of adjoining owners generally.**—*See* BOUNDARIES, Vol. VII., pp. 305, 306.

#### F. Rentcharges.

**3862. Payment by direction of lessor.**—*TAYLOR v. BEAL* (1591), as reported in Cro. Eliz. 222; 78 E. R. 478.

**3863. Payment under threat of distress.**—*HANMAN v. REDMAN* (1697), Holt, K. B. 625; 3 Salk. 109; 90 E. R. 1246.

**3864.** —.]—To an avowry for rent, it is a good plea, that before the lessor had anything in the land, a termor granted an annuity or rent charge, & granted & covenanted that the grantee might distrain on the premises; that the annuity was in arrear, & the grantee demanded it, & threatened distress; & pltf. paid her the amount of the rent then due to the avowant, & so, nothing in arrear.—*TAYLOR v. ZAMIRA* (1816), 6 Taunt. 524; 2 Marsh. 220; 128 E. R. 1138.

*Annotations*:—*Distd.* *Andrew v. Hancock* (1819), 1 Brod. & Bing. 37; *Stubbs v. Parsons* (1820), 3 B. & Ald. 516; *Alchorne v. Gomme* (1824), 2 Bing. 54. *Apld.* *Carter v. Carter* (1829), 5 Bing. 406; *Pope v. Biggs* (1829), 9 B. & C. 245; *Johnson v. Jones* (1839), 9 Ad. & El. 809. *Distd.* *Davies v. Stacey* (1840), 12 Ad. & El. 506; *Graham v. Allsopp* (1848), 18 L. J. Ex. 85. *Apld.* *Jones v. Morris* (1849), 3 Exch. 742. *Refd.* *Dyer v. Bowley* (1824), 2 Bing. 94; *Wheeler v. Branscombe* (1843), 5 Q. B. 373; *Underhay v. Read* (1887), 36 W. R. 298; *Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc.*, [1899] 1 Q. B. 161.

#### G. Expenditure on Repairs.

**3865. General rule.**—*TAYLOR v. BEAL* (1591), Cro. Eliz. 222; 78 E. R. 478; *sub nom.* *BEALE & TAYLOR'S CASE*, 1 Leon. 237.

**3866.** —.]—Where a landlord is bound in law or equity to repair in certain cases, & the tenant is obliged from a sudden accident to make those repairs to prevent further mischief, the tenant may set it off as money paid to the use of the landlord, against an action for rent, & therefore a ct. of equity will not interfere.—*WATERS v. WEIGALL* (1795), 2 Anst. 575; 145 E. R. 971; *subsequent proceedings, sub nom.* *WEIGALL v. WATERS*, 6 Term Rep. 488.

**3867. Agreement to allow expenditure—Repairs to be inspected & approved—Whether approval condition precedent to set off.**—Agreement that lessee should spend £200 in repairs, to be inspected & approved of by lessor, & to be done in a substantial manner; lessee to be allowed to retain the sum out of the first year's rent of the premises:—*Held*: the lessor's approval was not a condition precedent to the lessee's retaining the rent.—*DALLMAN v. KING* (1837), 4 Bing. N. C. 105; 3 Hodg. 283; 5 Scott, 382; 7 L. J. C. P. 6; 132 E. R. 729.

*Annotations*:—*Consd.* *Diggle v. Ogston Motor Co.* (1915), 84 L. J. K. B. 2165. *Refd.* *Braunstein v. Accidental Death Insec. Co.* (1861), 1 H. & S. 782; *Stadhard v. Lee* (1863), 3 B. & S. 364.

#### H. Other Payments.

**3868. Rates irregularly assessed—Paid at lessor's direction.**—If a landlord direct a tenant, who is overseer of the poor, to pay on the landlord's account, rates irregularly assessed on him, & promises that the levies shall eat out the rents, the tenant may set them off, or prove them as payment, in an action for use & occupation.—

#### PART XV. SECT. 5, SUB-SECT. 1.—F.

n. *Annuitant assignee of lease.*—*IRNHAM'S (LORD) LESSEE v. LUTTRELL* (1775), Wallis by Lyne, 243.—IR.

#### PART XV. SECT. 5, SUB-SECT. 1.—G.

**3865 i. General rule.**—*WHEELER v. SIMS* (1846), 3 U. C. R. 143.—CAN.

o. *Agreement to allow expenditure.*—*WOODS v. ROCK* (1832), Alc. & N. 57.—IR.

p. —.]—*POYNTON v. CRAN* (1910), App. D. 205.—S. AF.

q. *Repairs must in fact be made.*—The tenant of a house cannot, when provisional sentence is claimed against him upon the lease for arrear rent, set

off the estimated amount necessary to put the house into proper repair, but not actually expended.—*FISH v. HAUSMAN* (1890), 8 S. C. 44.—S. AF.

r. *Refusal of lessor to repair.*—*STEWART v. CAMPBELL* (1889), 16 R. (Ct. of Sess.) 346; 26 Sc. L. R. 226.—SCOT.

t. —.]—*Semble*: inasmuch as repairs were required which, in terms of the lease, it was the duty of the landlord to effect, the lessees would themselves be entitled on the refusal of the landlord to effect such repairs, to cause such repairs to be effected & to deduct the expense from the rent.—*KAISER BROTHERS' ASSIGNEES v. CONTINENTAL CAOUTCHOUC Co. (alias HOESCHEN)* (1906), 23 S. C. 736; 16

C. T. R. 1078.—S. AF.

a. *Repairs made at request of lessor.*—Certain repairs made by the lessee were made at the request of the lessor:—*Held*: the lessee was entitled to recover upon his counterclaim a sum sufficient to offset the rent.—*BURGOYNE v. MALLETT* (1912), 21 W. L. R. 666; 5 D. L. R. 62.—CAN.

#### PART XV. SECT. 5, SUB-SECT. 1.—H.

b. *Expenditure on improvements—Agreement to allow expenditure.*—Where the landlord had covenanted to allow the tenant all reasonable improvements made by him, in the amount of his rent:—*Held*: the tenant could deduct the value of the improvements from the rent due.—*WILCOXSON v.*

*Sect. 5.—Deductions from rent and set-off: Sub-sect. 1, H.; sub-sects. 2, 3 & 4. Sect. 6: Sub-sect. 1, A.]*

**ROPER v. BUMFORD** (1810), 3 Taunt. 76; 128 E. R. 31.

**3869. Acknowledgment rent for right of way—Paid under provision in lease.]—**Avowry for rent due on a demise at £40 *per annum*. Pleas in bar; *non tenuit modo et forma*; as to a part of the rent, that it was not due. Pltf. held under a lease, reserving £40 *per annum* in the body thereof; but, before the lease was executed, the following words were added, between which & the body of the lease the signatures were written. "The allowance of the road to the Six Bells' Yard to be made as usual." It had been usual for the lessor to allow the lessee £5 *per annum* for so much annually paid by the lessee to a third party for the use of such road to the demised premises:—*Held*: this did not reduce the reservation to £35 *per annum*, so as to entitle pltf. to a verdict on the plea of *non tenuit*. *Qu.*: whether a payment made under this memorandum would have been evidence under the plea of *riens in arrears*.—**DAVIES v. STACEY** (1840), 12 Ad. & El. 506; 4 Per. & Dav. 157; 9 L. J. Q. B. 393; 113 E. R. 904.

**3870. Premium paid to lessor—Recoverable by lessee under Stamp Acts.]—**To debt for rent due on a lease, deft. pleaded, set-off for money had & received. Pltf. had granted to deft. a prior lease at a certain rent, & at a premium of £40, & being indebted to deft. for work done to that amount, it was agreed on a settlement of accounts that the work done should be treated as payment of the premium; but the premium was not expressed in the lease. Def. sought to set off the premium thus paid, on the ground that he was entitled by Probate & Legacy Duties Act, 1808 (c. 149), s. 24, to recover it by reason of its not having been expressed in the prior lease:—*Held*: (1) the effect of Stamp Act, 1815 (c. 184), was to put leases on the same footing as conveyances, under Probate & Legacy Duties Act, 1808 (c. 149), & to make it necessary to state the premium or consideration in the lease; (2) the transaction amounted to money paid by deft. to pltf., & it might be recovered back in an action for money had & received by virtue of Probate & Legacy Duties Act, 1808 (c. 149), s. 24, & therefore might be set off.—**GINGELL v. PURKINS** (1850), 4 Exch. 720; 19 L. J. Ex. 129; 14 L. T. O. S. 354; 154 E. R. 1405.

**3871. — Lessee let into possession but lease not taken up—Claim by lessor by use & occupation.]—**Pltf. agreed to let to deft. a house at a certain rent, a premium to be paid on the completion of the lease. Def. was let into possession & paid part of the premium. He subsequently refused to take the lease, owing to some difference about the terms of the agreement. Pltf. sued for use & occupation of the premises. Def. pleaded set-off:—*Held*: he was not entitled to set off the part of the premium he had paid, as there had not been an entire failure of consideration.—**COLTON v. DORRELL** (1869), 17 W. R. 672.

**3872. Expenditure for benefit of tenant—Verbal**

**PALMER** (1840), 2 Ont. Dig. 3864.—CAN.

c. *License fee paid by lessee—Agreement to allow expenditure.]—***WRIGHT v. SHARMAN** (1877), 41 U. C. R. 249.—CAN.

d. *Water rent paid by lessee—For maintenance of reservoir.]—*The tenant of a bleach work paid the

customary water rent voluntarily contributed by bleachers on the stream for the maintenance of reservoirs necessary to secure a steady supply of water:—*Held*: he was entitled to deduct the sums so paid from his rent because the payment was made as the counterpart of a sufficient supply of water, which the landlord was bound under his lease to communicate to the

promise to allow from rent.]—Bkpt. agreed in writing to take a lease of a manufactory for a term of years, & the landlord agreed to erect at his own expense certain buildings, upon bkpt. paying, as an additional rent, £7 10s. per cent., upon the amount so expended. The buildings, however, were subsequently erected by bkpt., on the verbal assurance of the landlord that bkpt. might deduct the amount expended from the rent. The assignees elected not to adopt the agreement for the lease, but refused to deliver up possession to the landlord, unless he allowed them the sum which bkpt. had expended on the buildings:—*Held*: as both the written & verbal agreement between the landlord & bkpt. contemplated a continuance of the tenancy, which the assignees had themselves repudiated, they had no lien on the premises for the money expended by bkpt.—*Re RYLAND, Ex p. LADD, Re RYLAND, Ex p. MOLE* (1834), 3 Deac. & Ch. 647, Ct. of R.

#### SUB-SECT. 2.—BY UNDERLESSEES.

**3873. Ground rent paid to superior landlord.]—**To an avowry for rent the tenant may plead payment of a ground rent to the original landlord.—**SAPSFORD v. FLETCHER** (1792), 4 Term Rep. 511; 100 E. R. 1147.

*Annotations:—***Distd.** **Wilkinson v. Cawood** (1797), 3 Anst. 905. **Apld.** **Taylor v. Zamira** (1816), 2 Marsh. 220. **Distd.** **Andrew v. Hancock** (1819), 1 Brod. & Bing. 37; **Stubbs v. Parsons** (1820), 3 B. & Ald. 516. **Apld.** **Carter v. Carter** (1829), 5 Bing. 406; **Pope v. Biggs** (1829), 9 B. & C. 245; **Johnson v. Jones** (1839), 9 Ad. & El. 809. **Distd.** **Davies v. Stacey** (1840), 12 Ad. & El. 506; **Boodle v. Campbell** (1844), 7 Man. & G. 386; **Graham v. Allsopp** (1848), 18 L. J. Ex. 85. **Folld.** **Jones v. Morris** (1849), 3 Exch. 742. **Refd.** **Dyer v. Bowley** (1824), 9 Moore, C. P. 196; **O'Donoghue v. Coalbrook & Broadacre Co.** (1872), 26 L. T. 806; **Underhay v. Read** (1887), 36 W. R. 298; **Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc.** [1899] 1 Q. B. 161. **Mentd.** **Griethuoft v. Daubuz** (1855), 5 E. & B. 746; **Stephens v. Hotham** (1855), 1 Jur. N. S. 842.

**3874. —.]—**In covenant for rent, deft. pleaded that he was undertenant of parcel of certain premises, for the whole of which pltf., his lessor, had covenanted to pay rent to the landlord paramount, & showed that he, deft., paid to the landlord paramount, under threat of distress, more rent than he owed to pltf.; pltf. traversed that any rent was due from himself to the landlord paramount:—*Held*: this replication was not supported by proving that pltf. had assigned his term in the residue of the premises to K., who assigned them to deft., who covenanted to pay in discharge of pltf. the whole rent reserved to the landlord.—**STURGESS v. FARRINGTON** (1812), 4 Taunt. 614; 128 E. R. 471.

**3875. —.]—**A tenant is presumed to be authorised by his landlord to pay a ground rent or a payment in the nature of a ground rent to a superior landlord, & may plead such payment against his immediate landlord.

In an action of replevin, where the pltf. pleaded the facts showing such payment specially, upon demurrer:—*Held*: amounted to a plea of "*riens in arrears*" & ought to have been so pleaded concluding to the country.—**JONES v. MORRIS** (1849),

tenant.—**SAWERS v. McCONNELL** (1874), 1 R. (Ct. of Sess.) 392; 11 Sc. L. R. 202.—SCOT.

#### PART XV. SECT. 5, SUB-SECT. 2.

e. *Voluntary payment of head rent to superior landlord.]—***AHEARN v. McSWINEY** (1874), 1 R. 8 C. L. 568.—IR.

3 Exch. 742; 18 L. J. Ex. 477; 154 E. R. 1044; *sub nom.* MORRIS v. JONES, 14 L. T. O. S. 41.

*Annotation*:—*Refd.* Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc., [1899] 1 Q. B. 161.

**3876.** —[j]—In 1811, W., being possessed of certain premises under leases which would expire at Midsummer, 1854, granted to T. & E. respectively, an annuity of £222 4s. 5d. for three lives, to secure which he granted to each of them an underlease of the same premises for forty-three years, if the lives, or survivor of them, should so long endure. In 1827, the premises in the annuity deeds mentioned were assigned to pltf. for the residue of the terms granted to W., subject to the annuities to T. & E., & to the underleases for securing the same. In 1825 T. & E. were let into possession of the premises so underlet to them; & in 1830, pltf. became tenant to them of part of the premises at the rent of £550, payable to them in equal moieties. T., the last survivor of the *cestuis que vie* in his annuity deed, died in 1851; & from the time of his death, down to the time of the expiration of the leases granted to W., D., as their agent, applied for & received the rent of £550 from pltf. for them & the representative of E., & accounted for a moiety to each of them—deducting certain payments thereout in respect of ground rent, rates, taxes, insurance, repairs, & commission:—*Held*: pltf. was entitled, in an action for money had & received, to recover back the sums so paid by him under the mistaken impression that the right to receive them still continued deducting only the sums paid by the agent in respect of ground rent, rates & taxes.—*BARBER v. BROWN* (1856), 1 C. B. N. S. 121; 26 L. J. C. P. 41; 28 L. T. O. S. 318; 21 J. P. 294; 3 Jur. N. S. 18; 5 W. R. 79; 140 E. R. 50. *Annotation*:—*Mentd.* Peruvian Guano Co. v. Dreyfus, [1892] A. C. 170, n.

**3877.** — *For period before commencement of occupation.*—Where A. took possession of premises on June 2, & a sum of money became due for ground rent on June 24, for the quarter ending on that day, which A. paid:—*Held*: in an action for mesne profits against A., he was entitled to deduct the money so paid from the damages.—*DOE v. HARE* (1833), 2 Cr. & M. 145; 4 Tyr. 29; 3 L. J. Ex. 17; 149 E. R. 709.

*Annotations*:—*Refd.* Barber v. Brown (1856), 1 C. B. N. S. 121; Peruvian Guano Co. v. Dreyfus, [1892] A. C. 170, n.

**3878.** — *From what deduction may be made—Rent accruing due after payment of ground rent.*—A tenant, shortly after he had paid half a year's rent to his landlord, due at Lady Day preceding, was called upon by the agent of the ground landlord for ground rent due previously to Lady Day, & which the landlord had refused to pay:—*Held*: (1) the payment of such ground rent by the tenant was not a voluntary payment, although the agent of the ground landlord gave him time for that purpose; (2) the tenant was entitled to deduct such payment from the next rent accruing due to his landlord, although it was not actually due at the time the ground rent was paid; & the tenant having tendered the balance remaining due, after deducting such payment, together with another sum paid for land tax previously due which the landlord refused to accept, but distrained for the whole rent then in arrear.—*CARTER v. CARTER* (1829), 5 Bing. 406; 2 Moo. & P. 732; 7 L. J. O. S. C. P. 141; 130 E. R. 1118.

*Annotations*:—*As to* (1) *Refd.* Valpy v. Manley (1845), 1

C. B. 594. *As to* (2) *Distd.* Davies v. Stacey (1840), 12 Ad. & El. 506; Graham v. Allsopp (1848), 18 L. J. Ex. 85. *Compare* No. 3877, *ante*.

*See, also*, DISTRESS, Vol. XVIII., p. 318, No. 529.

**3879.** *Whether payment compulsory—Ground landlord giving time for payment.*—*CARTER v. CARTER*, No. 3878, *ante*.

*Compare* Nos. 3832, 3857, 3861, 3878, *ante*.

**3880.** *Mesne lessor holding under two landlords—One lease disclaimed by assignees in bankruptcy—*

*Ground rent in respect of premises disclaimed paid by underlessee.*—In 1840, A. being lessee of a warehouse & cellar under a demise from B., & also lessee under C. of other adjoining property, comprising (*inter alia*), a vault, D. became tenant from year to year to A. of the warehouse, & cellar, & vault, at an annual rent of £185, made up of £140, for the warehouse & cellar, & £45 for the vault. On Oct. 27, 1845, A. became bkpt., £92 10s. being at that time due as rent from D. to bkpt. The assignees, upon being appointed, elected to take the property held under B.; & on Feb. 26, 1846, elected not to take the property held under C. At Christmas, 1845, rent to the amount of £144 7s. 6d. became due from A. to C. for which amount, on Feb. 19, 1846, C. distrained upon the goods in the vault held by D., who, to relieve himself of that distress, paid that sum to C. An action having subsequently been brought by the assignees of A. against D. to recover the above sum of £92 10s. & £35 for a quarter's rent due at Christmas for the warehouse & cellar:—*Held*: (1) D. was not entitled to set off the sum so paid by him to C.; (2) pltf. could well sue for the quarter's rent due since bkpcy. in their representative character as assignees.—(*GRAHAM v. ALLSOPP* (1848), 3 Exch. 186; 18 L. J. Ex. 85; 12 L. T. O. S. 273; 154 E. R. 809.

*Annotations*:—*As to* (1) *Refd.* Jones v. Morris (1849), 3 Exch. 742; O'Donoghue v. Coalbrook & Broad Oak Co. (1872), 26 L. T. 806.

#### SUB-SECT. 3.—RATES, TAXES, ETC.

*See, generally*, Part XVI., *post*.

#### SUB-SECT. 4.—AGRICULTURAL COMPENSATION.

**3881.** *Claim under Agricultural Holdings Act, 1883 (c. 61).*—A claim for compensation by a tenant under the Agricultural Holdings Act, 1883 (c. 61), if disputed, must be referred to arbitration only, & cannot form the subject matter of a counter claim in an action for rent brought by the landlord in the High Ct.—(*GASLIGHT & COKE CO. v. HOLLOWAY* (1885), 52 L. T. 434; 49 J. P. 344, D. C.

*Annotation*:—*Refd.* Schofield v. Hincks (1888), 58 L. J. Q. B. 147.

*See, now*, Agricultural Holdings Act, 1923 (c. 9), s. 16, & *generally*, AGRICULTURE, Vol. II., pp. 41 *et seq.*

#### SECT. 6.—SUSPENSION OF RENT.

##### SUB-SECT. 1.—BY EVICTION OF LESSEE.

###### A. In General.

**3882.** *General rule.*—(1) To an *assumpsit* or an express promise to pay rent pursuant to the terms of a demise, deft. may plead eviction.

#### PART XV. SECT. 6, SUB-SECT. 1.—A.

**3882 i.** *General rule.*—Entry by a lessor or by any one claiming through

him into any part of the demised premises to take possession thereof, has the effect of suspending the payment of rent, & therefore as to subsequently

accruing rent, the eviction will be bar.—*STUDDY v. HENNESSEY* (1899) 8 Nid. L. R. 231.—*NFLD.*

*Sect. 6.—Suspension of rent: Sub-sect. 1, A. & B. (a.)*

(2) On a special *assumpsit* for rent, pltf. shall recover all the arrears in damages.

(3) To *assumpsit* deft. may plead a bond given for the recovery, for the bond determines the contract.—*ACTON v. SYMON* (1635), Cro. Car. 414; W. Jo. 364; 79 E. R. 960.

*Annotation:—Generally, Mentd. Carlton v. Mortagh* (1704), 1 Salk. 268.

**3883.** —.]—*DRAKE v. BEERE* (1663), 1 Sid. 151; 1 Lev. 104; 1 Keb. 555; 82 E. R. 1026.

*Annotation:—Mentd. Clark v. Denton* (1830), 1 B. & Ad. 92.

**3884.** —.]—In debt for rent S. moved for leave to plead a tender & eviction, which was granted.—*CARY v. JENKINGS* (1722), 1 Stra. 496; 93 E. R. 657.

**3885.** —.]—*TOMLINSON v. DAY*, No. 4304, post.

**3886.** —.]—*OLDERSHAW v. HOIT*, No. 4022, post.

**3887.** —.]—(1) An eviction by a landlord of his tenant, from a part of the demised premises, creates a suspension of the entire rent during the continuance of the eviction; but the tenancy is not thereby put an end to; nor is the tenant thereby discharged from the performance of his covenants other than the covenant for the payment of rent.

Where, therefore, in *assumpsit* by a landlord against his tenant for breach of a promise to use the premises in a tenant-like manner during the continuance of the tenancy, the latter pleaded, that, during the continuance of the tenancy, & before any breach, the former entered upon part of the premises & evicted him therefrom, & that he thereupon relinquished & gave up, & the landlord had & thence hitherto retained the possession of, the residue of the premises:—*Held*: the plea was bad, inasmuch as it did not show a dissolution of the tenancy, by mutual consent.

(2) A further plea stated, that, during the tenancy, & before any breach, the premises, & deft.'s estate & interest therein, were duly surrendered to pltf. by act & operation of law, that is to say, by deft.'s then quitting the same premises, & every part thereof, with the licence & consent of pltf., & relinquishing the possession thereof to pltf., with the intention of putting an end to the tenancy, & by pltf.'s then accepting such possession, with the intention of putting an end to the same tenancy:—*Held*: if the tenancy continued up to the time of the arrangement stated in the plea, such arrangement would not enure as a surrender by act & operation of law; & it was a valid objection to the plea, on special demurrer, that it amounted only to an argumentative denial that there had been any breach during the tenancy.—*MORRISON v. CHADWICK* (1849), 7 C. B. 266; 6 Dow. & L. 567; 18 L. J. C. P. 189; 13 Jur. 638; 137 E. R. 107; *sub nom.* *MORRIS v. CHADWICK*, 13 L. T. O. S. 208.

*Annotations:—As to (1) Refd. Matthey v. Curling*, [1922] 2 A. C. 180. *As to (2) Refd. Smith v. Lovell* (1850), 10 C. B. 6.

**3888. Application of rule—To rent only—Not seigniorial in gross.**—Debt reserved upon the lease of a warren of conies. Deft. pleaded that pltf. had ploughed a field parcel of the warren, by which the conies had not sufficient pasture:—*Held*: no plea, for it is not a rent, but a seigniorial in gross due by reason of the contract, by which the entry or user of that part is no suspension.—*ANON.* (1597), Noy, 60; 74 E. R. 1028.

**3889.** —.]—*Not to accrued rent.*—To a declaration in debt by A. against B. for £191 5s. due for two

& a half years' rent under a demise, by indenture, B. pleaded as to £40 10s., parcel, etc., that, before the making of the indenture, A. conveyed parcel of the demised premises to C., in fee, who devised the same to D., his wife, & E. & their heirs; that, after the commencement of the suit, D. & E., "gave notice to B. of their title, & required him to pay them such portion of the rent, not paid over to pltf. at the time of the giving of the said notice, as might, on a just apportionment, be found to be the just proportional part thereof in respect of the said parcel of the demised premises; & D. & E. then gave notice to, & threatened B., that if he should neglect or refuse forthwith to pay over such proportional part to D. & E., they would immediately eject & expel him from the said parcel; that the said sum of £40 10s. was the sum which, upon a just apportionment of the said rent, would be, & was, the proportional part of the rent in respect of the said parcel, & was at the time of the notice unpaid to A.; that the rent sued for, accrued & became due after the death of C.; that, if B. had not paid the £40 10s. to D. & E., they would have proceeded to eject & expel deft. from the said parcel of the demised premises, wherefore P., after the commencement of the suit, necessarily & unavoidably paid them that sum; & that A. never had any thing in the said parcel of the demised premises, except as appeared in that plea:—*Held*: this was neither a good plea of eviction, the notice being subsequent to the rent becoming due; nor a good plea of payment, inasmuch as the alleged payment was not in satisfaction of any charge upon the land or of any debt due from A.—*BOODLE v. CAMBELL* (1844), 2 Dow. & L. 66; 7 Man. & G. 386; 8 Scott, N. R. 104; 13 L. J. C. P. 142; 3 L. T. O. S. 102; 8 Jur. 475; 135 E. R. 161.

*Annotation:—Refd. Underhay v. Read* (1887), 20 Q. B. 1029.

**3890.** —.]—To an action for use & occupation, a plea that pltf. held under a lease, granted by A. for seventy-one years, & demised to deft. from year to year, & that, after the causes of action accrued, & before the commencement of the suit, A. re-entered, under a proviso for re-entry, by reason of breaches of covenant committed by pltf., & expelled deft., is bad, either as amounting to *non assumpsit*, or *nunquam indebtedatus*, if applied to rent accruing since the eviction; or as being no answer, if applied to rent accruing previously.—*SELBY v. BROWNE* (1845), 7 Q. B. 620; 14 L. J. Q. B. 307; 5 L. T. O. S. 213; 9 Jur. 923; 115 E. R. 623.

*Annotation:—Mentd. Elliott v. Boynton*, [1924] 1 Ch. 236.

**3891.** —.]—*Not to covenants other than for rent.*—In covenant by landlord against tenant, on a farming lease, assigning breaches on deft.'s covenants; to repair; not to plough meadow land; or depasture orchards; or cut, lop or injure trees, woods or plantations, etc.; or assign or underlet the demised premises, or any part thereof, without pltf.'s consent in writing; deft. pleaded that before any of the breaches assigned he was evicted & kept out of part of the demised premises by the authority of pltf.:—*Held*: the plea afforded no defence to the action.—*NEWTON v. ALLIN* (1841), 1 Q. B. 518; 1 Gal. & Dav. 44; 10 L. J. Q. B. 179; 6 Jur. 99; 113 E. R. 1231.

*Annotations:—Refd. Morrison v. Chadwick* (1849), 7 C. B. 266; *Matthey v. Curling*, [1922] 2 A. C. 180.

**3892.** —.]—*MORRISON v. CHADWICK*, No. 3887, ante.

**3893.** —.]—*To estoppel as to title.*—Pltf., as landlord, levied his plaint in the county ct., under 19 & 20 Vict. c. 108, s. 50, against deft., to whom he had let certain premises, for the recovery of

the premises & for rent. When the case came on for hearing it appeared that deft. had gone out of possession of the premises, on a third person setting up a claim to them who paid him for his crops; & deft. sought to set up that third person's title against pltf. his landlord. The county ct. judge, on objection made that question of title arose, without inquiring whether deft. went out of possession voluntarily or was evicted, dismissed the case on that ground:—*Held*: the duty of the county ct. judge was to have gone further, before he dismissed the case, & have ascertained whether deft. went out voluntarily or by compulsion; if voluntarily, then deft. was estopped from setting up the title of the third person, & the county ct. had jurisdiction; if evicted by compulsion, then, deft. was not so estopped, title came into question, & the jurisdiction of the county ct. was at an end.—*Re EMERY & BARNETT* (1858), 4 C. B. N. S. 423; 140 M. R. 1149; *sub nom.* EMERY v. BARNETT, 27 L. J. C. P. 216; 31 L. T. O. S. 247; 22 J. P. 577; 4 Jur. N. S. 634; 6 W. R. 634.

*Annotations*:—*Re*ld. Howarth v. Sutcliffe, [1895] 2 Q. B. 358. *Mentd.* Matthey v. Curling, [1922] 2 A. C. 180.

—*Eviction from part of premises.*—*See* Nos. 3930–3935, *post*.

**3894.** — *Eviction between two days of payment—Right of lessor to apportion.*—A landlord who has wrongfully evicted his tenant between two quarter-days is not entitled to the apportioned rent up to the day of eviction under the Apportionment Act, 1870 (c. 35).—*CLAPHAM v. DRAPER* (1885), Cab. & El. 484.

As to apportionment generally, *see* Sect. 7, *post*; *EQUITY*, Vol. XX., pp. 280 *et seq.*

As defence to action for use & occupation.—*See* Sect. 10, sub-sect. 3, G. (a), *post*.

*Interruption of licence.*—*See* No. 1652, *ante*.

#### B. What amounts to Eviction.

##### (a) In General.

**3895.** Whether expulsion of tenant necessary—*Breaking a partition wall.*—*HARRISON'S CASE* (1635), Clay. 34.

*Annotations*:—*Re*ld. Hunt v. Cope (1775), 1 Cowp. 242; *Upton v. Townsend*, *Upton v. Greenlees* (1855), 17 C. B. 30.

**3896.** — *In covenant for rent, if deft. pleads eviction, a traverse that he enjoyed after the eviction is impertinent. To a plea of eviction a man may reply an entry by virtue of a power, & traverse the eviction.*—*BUSHELL v. LECHMORE* (1698), 1 Ld. Raym. 369; 91 E. R. 1141.

*Annotations*:—*Re*ld. Hunt v. Cope (1775), 1 Cowp. 242; *Upton v. Townsend*, *Upton v. Greenlees* (1855), 17 C. B. 30.

*See, also*, Nos. 3898, 3900, 3907, 3908, *post*.

**3897.** Not entry as of right.—*BUSHELL v. LECHMORE*, No. 3896, *ante*.

**3898.** Intention to determine occupation necessary.—A. demised, under separate leases, two separate tenements to B., with a covenant on the part of A. to insure the premises, & to rebuild in the event of their destruction by fire. B.

demised one of the tenements to C., & the other to D.; & during their respective tenancies the whole premises were destroyed by fire. The premises were afterwards rebuilt by A., pursuant to a new plan submitted to B., & approved of & signed by him. B., before the rebuilding, agreed to surrender the premises, & take a new lease of them in their altered state, which he afterwards did. The new buildings varied from the old ones, inasmuch as the area of C.'s premises was thereby decreased, & that of D.'s increased:—*Held*: B. was not entitled to recover against C. & D., as for use & occupation, the rent accruing after the period at which the rebuilding had arrived at such a stage as permanently to alter the character of the respective premises, the alterations in the subject-matter of the demises amounting to an eviction, to which he was a party.—*UPTON v. TOWNEND*, *UPTON v. GREENLEES* (1855), 17 C. B. 30; 25 L. J. C. P. 44; 26 L. T. O. S. 76; 19 J. P. 775; 1 Jur. N. S. 1089; 4 W. R. 56; 130 E. R. 976.

*Annotations*:—*Re*ld. Williams v. Hayward (1859), 1 E. & E. 1040; *Matthey v. Curling*, [1922] 2 A. C. 180.

**3899.** — *Personal trespass distinguished.*—In use & occupation deft. having put a man into possession, whom pltf. had turned out, it was left to the jury whether this had been done with the intention of evicting deft.

Was the expulsion a mere personal trespass, or done with the purpose of turning M. out of possession, & depriving him of the occupation? In the latter case there would be an eviction, & no rent would be due. But if it was a mere personal trespass, which could be compensated in damages, find for pltf. (*HILL, J.*).—*HENDERSON v. MEARS* (1859), 1 P. & F. 636.

**3900.** — *It is a mistake to suppose that a temporary trespass by a landlord, unaccompanied by any intention to put an end to the tenancy, is an eviction.* (*THIESIGER, L.J.*).—*NEWBY v. SHARPE* (1878), 8 Ch. D. 39; 47 L. J. Ch. 617; 38 L. T. 583; 26 W. R. 685, C. A.

*Annotations*:—*Mentd.* Blenkhorn v. Penrose (1880), 43 L. T. 668; *Laird v. Briggs* (1881), 19 Ch. D. 22; *Milch v. Coburn* (1910), 27 T. L. R. 170.

**3901.** Must be involuntary on part of tenant—*Surrender by agreement for limited period—Refusal by lessor to restore possession.*—In debt upon a parol demise plan, that during the term it was agreed that deft. should relinquish the possession to pltf. for a month, after which the possession should be resumed by deft.; & deft. did relinquish the possession, but pltf. would not restore the possession:—*Held*: bad, as not showing a surrender or an eviction.—*DUNN v. DI NUOVO* (1841), 3 Man. & G. 105; 3 Scott, N. R. 487; 10 L. J. C. P. 318; 5 Jur. 578; 133 E. R. 1075.

**3902.** — *Re EMERY & BARNETT*, No. 3893, *ante*.

**3903.** — *Surrender of part by assignee.*—*BAYNTON v. MORGAN*, No. 4167, *post*.

**3904.** Pulling down building.—*How v. BROOM* (1601), Gouldsb. 125; 75 E. R. 1040.

#### PART XV. SECT. 6, SUB-SECT. 1.—B. (a).

**3898 i.** Intention to determine occupation necessary.—To constitute an eviction there must be some act of a grave & permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises.—*UHDE v. ASCHER* (1887), 8 N. S. W. L. R. 472; 4 N. S. W. W. N. 117.—*AUS.*

**3898 ii.** — *Interference by a landlord with his tenant's enjoyment of demised premises, even to the extent of depriving the tenant of the use of a*

portion, does not necessarily work an eviction; a tenant may be deprived of the beneficial occupation of the premises for part of his term, by an act of the landlord which is wrongful as against him, but unless the act was done with the intention of producing that result it would not work an eviction.—*FERGUSON v. TROOP* (1890), 17 S. C. R. 527.—*CAN.*

**3898 iii.** — *Harrod v. Watt* (1905), 1 W. L. R. 216.—*CAN.*

**3898 iv.** — *Mahe Po v. McCarthy* (1909), 10 W. L. R. 670; 2 Sask. L. R. 119.—*CAN.*

**3898 v.** — *Woods v. Johnson* (1911), 9 Nfld. L. R. 457.—*NFLD.*

**3898 vi.** — *Gordon v. Sime* (1917), 44 N. B. R. 535; 37 D. L. R. 185.—*CAN.*

**3898 vii.** — *Wilson v. Burne* (1880), 24 L. R. ir. 14.—*IR.*

**1.** Ejectment by mortgagee—*Mortgage made by lessor's predecessor in title.*—*BARNES v. BELLAMY* (1879), 44 U. C. R. 303.—*CAN.*

**2.** Acts not authorised by landlord.—*It v. Miller* (1883), 4 R. & G. 381.—*CAN.*

*Sect. 6.—Suspension of rent: Sub-sect. 1, B. (a), (b), (c), (d) & (e); sub-sect. 2.]*

**3905. — Penthouse attached to messuage.]—**ROPER v. LLOYD (1681), T. Jo. 148; 84 E. R. 1190.

**3906. — Summer house.]—**In replevin upon a distress for rent, plea in bar, that deft. pulled down a summer house, whereby pltf. was deprived of the use thereof, without saying that he was expelled or put out of the same, is insufficient; being a mere trespass, but no eviction.—HUNT v. COPE (1775), 1 Cowp. 242; 98 E. R. 1065.

*Annotation:—*Consd. Upton v. Townsend, Upton v. Greenlees (1855), 17 C. B. 30.

**3907. Entry on premises by lessor.]—**REYNOLDS v. BUCKLE (1620), Hob. 326; 80 E. R. 468.

*Annotations:—*Refd. Hunt v. Cope (1775), 1 Cowp. 242; Upton v. Townsend, Upton v. Greenlees (1855), 17 C. B. 30. *Mentd.* Jones v. Bodingham (1685), 1 Com. 8.

**3908. — & user—Lodgings.]—**If the landlord of lodgings enter into, or use the lodgings, while his tenant is in possession of them, it deprives the landlord of his right to rent; but if the tenant has, during the tenancy, abandoned the possession, & the landlord lights fires in the rooms, & even makes some use of such fires, he will not by this lose his right to rent.—GRIFFITH v. HODGES (1824), 1 C. & P. 419, N. P.

*Annotation:—*Mentd. Phene v. Popplewell (1862), 12 C. B. N. S. 334.

**3909. — — After abandonment by tenant.]—**GRIFFITH v. HODGES, No. 3908, *ante*.

**3910. Conduct causing tenant to leave.]—**If a landlord of furnished lodgings by his misconduct justifies a tenant in an abrupt departure during a tenancy limited to a specific period, he cannot recover rent for the whole time agreed on, but is entitled to rent for the time during which there has been an actual occupation.—KIRKMAN v. JERVIS (1830), 7 Dowl. 678; 3 Jur. 605.

**3911. Nuisance rendering premises unfit for occupation—Nuisance not remedied by landlord.]—**A party actually occupied premises which had been let to him under a written agreement; in the course of his tenancy a nuisance occurred, which put an end to the comfortable occupation of the premises; this nuisance was not remedied by the landlord, & the tenant quitted as soon as he could obtain other premises:—*Held*: he was not liable to rent for the period between the time of the occurrence of the nuisance & that at which he quitted the premises.—COWIE v. GOODWIN (1840), 9 C. & P. 378, N. P.; *subsequent proceedings, sub nom.* COWEY v. GOODWIN, 4 Jur. 506.

*Annotation:—*Refd. Surplice v. Farnsworth (1844), 7 Man. & G. 576.

**3912. Alteration in premises—Though amounting to increase.]—**UPTON v. TOWNEND, UPTON v. GREENLEES, No. 3898, *ante*.

**3913. Premises re-let to person not entitled—Pending grant of representation to deceased tenant.]—**Pltf. had leased premises to A. for a term of years, & A. died intestate pending the term, & then pltf., considering that no one would administer to A.'s estate, agreed with A.'s son, that he should occupy the premises as yearly tenant, at the same rent as that reserved under the

lease to his father; & the son did so, & paid rent. Pltf. repaired the premises at or about Michaelmas, 1861, & having afterwards discovered that deft., a daughter of A. had taken out letters of administration to his estate, & as such administratrix, claimed to hold the premises for the remainder of the term, pltf. sued her on the covenant to repair in one action, & in ejectment, as for a forfeiture for the non-repair, in another action, *i.e.*, the present action. In the action of covenant, however, deft. paid money into ct., which pltf. took out in satisfaction, etc. There was no want of repair in the premises after pltf. had repaired them, & the rent due up to Michaelmas, 1861, was paid by A.'s son, & received by pltf., before either action was commenced:—*Held*: in the ejectment either the rent so paid was to be taken as a satisfaction of the rent due under the lease, & so the acceptance of it to operate as a waiver of the forfeiture, or there had been an eviction of deft. by pltf., which prevented his taking advantage of a forfeiture for non-repair during the eviction.—PELLATT v. BOOSEY (1862), 31 L. J. C. P. 281; 8 Jur. N. S. 1107.

**3914. Trespass distinguished from eviction.]—**UPTON v. TOWNEND, UPTON v. GREENLEES, No. 3898, *ante*.

**3915. —.]—**NEWBY v. SHARPE, No. 3900, *ante*.

— **Personal trespass.]—**See No. 3899, *ante*.

— **Trespass to property.]—**See Nos. 3905, 3906, *ante*.

#### (b) Eviction from Part of Premises.

See Nos. 3930–3935, *post*.

#### (c) Acts of Strangers.

**3916. General rule.]—**In debt for rent, entry & seisin by a third party is no good plea.—COOPER v. YOUNG (1733), Fortes. Rep. 360; 92 E. R. 891.

**3917. Application of rule—Sequestration.]—**ANON. (1562), Dal. 44; 123 E. R. 259.

**3918. — Land extended by the Crown.]—**Rent due from a lessee is not extinguished by the land's being extended by the Queen, though it accrue between the extent & the liberate.—PLAINE'S CASE (1586), Cro. Eliz. 47; 78 E. R. 310.

*Annotations:—*Mentd. R. v. Giles (1820), 8 Price, 293; Giles v. Grover (1832), 9 Bing. 128.

**3919. — Expulsion by alien enemy.]—**PARADINE v. JANE, No. 3958, *post*.

**3920. — Right of common established—Over part of land demised.]—**JEW (OR TEW) v. THIRKWEIL (OR THACKWELL), No. 3927, *post*.

**3921. — Ejection by military force—During rebellion.]—**HARRISON v. NORTH (LORD) (1667), 1 Cas. in Ch. 83; 22 E. R. 706, L. C.

*Annotations:—*Refd. Hare v. Groves (1796), 3 Anst. 687; Hart v. Windsor (1844), 8 Jur. 150; Matthey v. Curling (1922), 127 L. T. 247.

**3922. Pleading—Title of evictor should be set out.]—**In pleading eviction by a person other than pltf., deft. must show that the evictor had title to enter; whose title ought to have been set out; & deft. should also show under what process the

#### PART XV. SECT. 6, SUB-SECT. 1.— B. (e).

**h. Application of rule—Ejection by military force.]—**LOGAN & CO. v. COLONIAL GOVERNMENT (1901), 18 S. C. 60.—S. AF.

**k. —.]—**FOULGER v. LIEBERMANN, BELLSTED & CO. (1902), 19 S. C. 15.—S. AF.

**l. —.]—**NORTH WESTERN

HOTEL, LTD. v. ROLFES, NEBEL & CO. (1902), T. S. 324.—S. AF.

**m. —.]—**MORRIS v. MAPPIN & WEBB, LTD. (1903), T. S. 244.—S. AF.

**n. —.]—**FLEMING v. JOHN-SON (1903), T. S. 319.—S. AF.

**o. —.]—**CUTHBERT & CO., LTD. v. BAIN (1905), T. S. 603.—S. AF.

**p. —.]—**UNITED MINES

OF BULTFONTEIN v. DE BEERS CONSOLIDATED MINES (1906), 17 S. C. 419.—S. AF.

**3922i. Pleading—Title of evictor should be set out.]—**Where in *assumpsit* for non-payment of rent according to agreement, deft. pleaded an eviction by a stranger, who he averred entered under a lawful claim derived through or under pltf.:—*Held*: the plea was bad, because it did not show that the

evictor entered.—*JORDAN v. TWELLS* (1735), *Lee temp. HARD.* 171; 95 E. R. 109.  
*Annotation* :—*Consd. Simons v. Farren* (1835), 1 Bing. N. C. 272.

(d) *In respect of Easements and Rights of Common.*

**3923. Whether rent suspended—Enclosure of common.**—*SANDERSON v. HARRISON* (1623), *Cro. Jac.* 680; *Palm.* 392; *sub nom.* SAUNDERSON *v.* HARRISON, 2 Roll. Rep. 415.

**3924.**—*Use of easement prevented.*—*WILLIAMS v. HAYWARD*, No. 4118, *post*.

(e) *Acts of Law or State.*

**3925. Lease made void by Act of Parliament—Right of lessee to apportionment of rent.**—

*Semble* : if an Act of Parliament takes away a portion of the subject-matter of a demise the lessee is not entitled to an apportionment of the rent.—*HARRIS v. MORRICE* (1842), 10 M. & W. 260; 12 L. J. Ex. 42; 7 J. P. 614; 152 E. R. 466.

**Tenant becoming alien enemy.**—*See ALIENS*, Vol. II., p. 177, Nos. 413, 414.

**Contract becoming impossible of legal performance—Frustration of adventure.**—*See CONTRACT*, Vol. XII., p. 399, Nos. 3230, 3231.

#### SUB-SECT. 2.—BY EVICTION FROM PART OF PREMISES.

**3926. What amounts to eviction from part—Entry of landlord on part—Need not be permanent.**—*CIBEL & HILLS CASE* (1588), 1 Leon. 110; 74 E. R. 102.

*Annotation* :—*Refd.* *Upton v. Townend*, *Upton v. Greenlees* (1855), 17 C. B. 30.

**3927.**—*Right of common established by stranger—Over part of land demised.*—*Pltf.* was lessee of divers lands, whereon one entire rent was reserved; a township recovered right of common in part of the land; not being evict, the lessee could not apportion the rent at law, so sues here for apportionment, as there were precedents that he might; but it being proved that the land was still worth the rent, the bill was dismissed.—*JEW (OR TEW) v. THIRKWEEL (OR THACKWELL)* (1663), 1 Cas. in Ch. 31; 3 Rep. Ch. 11; *Freem. Ch.* 174; 22 E. R. 679; *sub nom.* *THEW v. THIRCKNELL*, Nels. 69, L. C.

**3928.**—*Entry by landlord as assignee of sub-lessee.*—A. leased premises to B. for years rendering rent, B. underleased part to C. reserving no rent, & C. assigned to A. who entered :—*Held* : the entry of A. was no suspension of either the whole or any part of the rent payable by B.

If it appeared that *pltf.* entered by the consent of the lessee this was no such entry or expulsion

as would avoid the payment of the rent (*HALE, C.J.*)—*HODGKINS v. THORNBURY* (1675), 1 *Freem. K. B.* 417; 3 *Keb.* 557; 2 *Lev.* 143; *Poll.* 141; 89 E. R. 310.

**3929.**—*Expulsion of undertenant from part.*—

A. let lands to B., who underlet to C. & others; during these tenancies A. gave notice to C., & the other undertenants to quit, & C. did quit, & the lands before occupied by him remained unoccupied for a year, & were then again let by B. :—*Held* : A. could not recover against B. for the use & occupation of this land for the year; *Semble* : under these circumstances, an eviction might be pleaded to the whole demand.—*BURN v. PHELPS* (1815), 1 *Stark.* 94, N. P.

*Annotations* :—*Refd.* *Upton v. Townend*, *Upton v. Greenlees* (1855), 17 C. B. 30. *Mentd.* *Henderson v. Mears* (1859), 28 L. J. Q. B. 305.

**3930. Whether entire rent suspended.**—If the lessee assigns, the lessor may have debt against the assignee. But if the lessor ousts his lessee from any part, he cannot have debt for the rent; though in case of a lawful entry into part, as upon a surrender, etc., the rent is apportionable.—*WALKER'S CASE* (1587), 3 *Co. Rep.* 22 a; 2 *Wms. Saund.* 302, n.; 76 E. R. 676; *sub nom.* *WALKER v. HARRIS*, *Moore K. B.* 351.

*Annotations* :—*Consd.* *Hellar v. Casebrooke* (1665), 1 *Keb.* 923; *Swansea Corp. v. Thomas* (1882), 10 Q. B. D. 48. *Refd.* *Humble v. Glover* (1694), *Cro. Eliz.* 328; *Overton v. Sydal* (1597), *Cro. Eliz.* 555; *Broom v. Hore* (1598), *Cro. Eliz.* 633; *Marrow v. Turpin* (1598), *Cro. Eliz.* 715; *March v. Brace* (1613), 2 *Bulst.* 151; *Wynne v. Boughey* (1666), *O. Bridg.* 570; *Thursby v. Plant* (1669), 1 *Saund.* 230; *Jenkins v. Hermitage* (1674), *Freem. K. B.* 377; *Reeve v. Bird* (1834), 4 *Tyr.* 612; *Neale v. Mackenzie* (1835), 4 L. J. Ex. 185; *The Russell Road Purchase Monies* (1871), L. R. 12 Eq. 78. *Mentd.* *Iremonger v. Newsam* (1627), *Lat.* 260; *Windsor (Dean & Chapter) v. Gover* (1670), 2 *Saund.* 296; *Anon.* (1675), 2 *Mod. Rep.* 7; *Bankers' Case* (1695), *Skin.* 601; *Cook v. Harris* (1698), 1 *Ld. Raym.* 367; *Morley v. Attenborough* (1849), 3 *Exch.* 500; *Elchholz v. Bannister* (1864), 17 C. B. N. S. 708.

**3931.**—*CIBEL & HILLS CASE* (1588), 1 Leon. 110; 74 E. R. 102.

*Annotation* :—*Refd.* *Upton v. Townend*, *Upton v. Greenlees* (1855), 17 C. B. 30.

**3932.**—*HUTCHINSON v. TAYLOR* (1884), 77 L. T. Jo. 120.

*See, also*, Nos. 3933, 3938, *ante*.

**3933.**—*Debt for rent on a demise of three rooms.* *Plea*, that *pltf.* demised the three rooms & another room, & that he entered into the other room, but did not traverse the demise of the three rooms only, held bad for want of such a traverse.—*SAMMON v. SMITH* (1669), 1 *Wms. Saund.* 202; 1 *Lev.* 263; *T. Raym.* 175; 85 E. R. 205; *sub nom.* *SAMON v. SMITH*, 2 *Keb.* 470; *sub nom.* *SAMMON v. SMITH*, 1 *Sid.* 405.

*Annotations* :—*Mentd.* *Inclendon v. Crips* (1702), 2 *Salk.* 658; *Parker v. Langley* (1713), *Gillb.* 163; *Bowden v. Horne* (1831), 5 *Moo. & P.* 756; *Pearson v. Rogers* (1838), 9 *Ad. & El.* 303; *Holland v. Clark* (1842), 1 *Y. & C. Ch. Cas.* 151; *Wheeler v. Stevenson* (1860), 6 *H. & N.* 155.

claim might not have been under a title derived from the tenant himself.—*McNAB v. McDONELL* (1845), 2 U. C. R. 169.—*CAN.*

#### PART XV. SECT. 6, SUB-SECT. 1.—B. (e).

**q. Requisition by Government department—Involving structural alterations.**—*HAIGH v. DYER*, [1918] N. Z. L. R. 638.—*N.Z.*

**r. Premises closed by order of Government—On account of plague.**—Where a tenant had lost beneficial occupation of premises by reason of a closing order issued by the local authorities under Govt. regulations in consequence of an outbreak of plague in such premises :—*Held* : he was not

entitled to any remission of rent.—*JOE v. MAHOMET* (1901), 11 C. T. R. 816.—*S. AF.*

**t.**—*Stockham & De Jong v. Kaplansky & Co.* (1901), 18 S. C. 156.—*S. AF.*

**a. Part of premises closed by order of Government—Lessee remaining in possession—Loss of custom.**—*HANSEN, SCHRADER & Co. v. KOPELOWITZ* (1903), T. S. 707.—*S. AF.*

**b. Liquor license cancelled by Government—Occupation by military authorities.**—*NORTH WESTERN HOTEL, LTD. v. ROLFES, NEBEL & Co.* (1902), T. S. 324.—*S. AF.*

#### PART XV. SECT. 6, SUB-SECT. 2.

**3930 i. Whether entire rent suspended.**—

—In an action of covenant between the original parties to the deed, an eviction from part of the premises is a good defence to the action. There can be no apportionment of the rent as in debt.—*SHUTTLEWORTH v. SHAW* (1849), 6 U. C. R. 539.—*CAN.*

**3930 ii.**—*Where the landlord, having let out a portion of a land to an earlier lessee, lets it out again with other lands to a subsequent lessee, & fails to deliver to the subsequent lessee possession of the entire land leased to him, the entire rent is suspended.*—*MANINDRA CHANDRA NANDI v. NARENDRA CHANDRA LAHIRI* (1919), 1 L. R. 46 *Calc.* 956.—*IND.*

**3930 iii.**—*ECCLESIASTICAL COMRS. OF IRELAND v. O'CONNOR* (1858), 9 I. C. L. R. 242.—*IR.*

**Sect. 6.—Suspension of rent: Sub-sects. 2, 3, 4 & 5, A.]**

**3934. — Where residue of premises given up.]**—Where premises are let at an entire rent, an eviction from part, if the tenant thereupon gives up possession of the residue, is a complete defence to an action for use & occupation.—*SMITH v. RALEIGH* (1814), 3 Camp. 513, N. P.

**Annotations:—***Apld.* *Stokes v. Cooper* (1814), 3 Camp. 514, n. *Refd.* *Upton v. Townend*, *Upton v. Greenlees* (1855), 17 C. B. 30.

**3935. — —.]**—After eviction from part, the landlord cannot recover upon the original contract, & the tenant, by giving up possession of the residue, is entirely discharged; but if the tenant, after the eviction, continues in possession of the residue, he may be liable upon a *quantum meruit*.—*STOKES v. COOPER* (1814), 3 Camp. 514, n.

**Annotation:—***Consd.* *Reeve v. Bird* (1834), 1 Cr. M. & R. 31.

**3936. Whether tenancy determined.]**—*MORRISON v. CHADWICK*, No. 3887, *ante*.

**3937. Effect on other covenants.]**—*MORRISON v. CHADWICK*, No. 3887, *ante*.

**3938. Apportionment of rent—Duty of lessee.]**—*Qu.*: whether on an avowry for an entire rent, if ptlf. plead eviction of part of the land by elder title, he must show how much in value was evicted, & how the rent ought to be apportioned.

If the lessor take a surrender of part of the land, there shall be apportionment (*POPHAM, C.J.*).—*SMITH v. MALINGS* (1608), Cro. Jac. 160; 79 E. R. 140.

**Annotations:—***Refd.* *Hodgkins v. Thornbury* (1675), 3 Kob. 500; *Salts v. Battersby*, [1910] 2 K. B. 155.

**3939. — Right of lessee to—Right of common established by stranger—Over part of land demised.]**—*JEW (OR TEW) v. THIRKWEEL (OR THACKWELL)*, No. 3927, *ante*.

**3940. — Who may apply.]**—On a bill by joint lessees for an allowance out of the rent in respect of eviction from part of the premises, all the lessees should be parties.—*STAFFORD v. LONDON (CITY)* (1718), 2 Eq. Cas. Abr. 1, 166; 1 P. Wms. 428; 1 Stra. 95; 22 E. R. 1, 142, L. C.; on appeal (1719), 4 Bro. Parl. Cas. 635, H. L.

**Annotation:—***Mentd.* *Hill v. Kirwan* (1821), Jac. 163.

**3941. — Where lessee retains possession of residue—Liability on quantum meruit.]**—*STOKES v. COOPER*, No. 3935, *ante*.

**SUB-SECT. 3.—BY EVICTION UNDER TITLE PARAMOUNT.**

**3942. General rule.]**—*NEWTON v. BARNARDINE* (1583), Moore, K. B. 127; 72 E. R. 484; *sub nom.* *COSEN'S CASE*, Owen, 29.

**Annotations:—***Refd.* *Doe d. Cape v. Walker* (1840), 2 Man. & G. 113. *Mentd.* *Eastcourt v. Weeks* (1698), 1 Salk. 186; *Scattergood v. Edge* (1699), 12 Mod. Rep. 278; *Walter v. Drow* (1723), 1 Com. 372; *Goodridge v. Goodridge* (1742), 7 Mod. Rep. 463; *Lloyd v. Abrahall* cited in (1754), 1 Hov. Supp. 378.

**3943. —.]**—A lessee who is evicted in consequence of a statute acknowledged by a former owner of the estate, cannot be sued by his lessor for an apportionment of the rent, on an indenture

to perform covenants, etc., & a plea of a performance need only answer the indenture substantially & to a common intent.—*EMOTT v. COLE* (1591), Cro. Eliz. 255; 78 E. R. 510.

**3944. —.]**—One K. demised land to H. for building, with a proviso for re-entry by K. in case of the non-completion of the houses contracted to be built thereon by a given time. H. demised one of the houses to ptlf. for one year certain, with an agreement for a further lease, at a rent payable quarterly. Before any rent became due from ptlf. to H., K. re-entered, for a breach of the covenant of H. to complete the buildings within the time, & ptlf. was turned out of possession. Ptlf. subsequently took the house he formerly occupied under H., from K., upon a new agreement, under which he, after an interval of a few weeks, resumed possession:—*Held*: H. could not legally distrain the goods of ptlf. for rent subsequently accruing; & the eviction by the superior landlord might be given in evidence under the plea of *non tenuit*.—*HOPCRAFT v. KEYS* (1833), 9 Bing. 613; 2 Moo. & S. 760; 131 E. R. 744.

**Annotation:—***Refd.* *Jew v. Wood* (1841), Cr. & Ph. 185.

**3945. Eviction must be lawful.]**—In covenant for non-payment of rent reserved by a lease containing a clause prohibiting the carrying on of certain trades upon the demised premises without the licence of the lessor, deft. pleaded that his immediate lessor, who held under one C., subject to a similar covenant, gave him a licence to carry on one of those trades, & that, by reason & on the ground that deft. so carried on such trade, R. "having good right & title to the demised premises as heir-at-law of C.," evicted deft.:—*Held*: the plea not negating that the trade was carried on with the licence of the original lessor, did not disclose such right in R. to evict, as to afford an answer to ptlf.'s claim for rent.—*SIMONS v. FARREN* (1834), 1 Bing. N. C. 272; 1 Scott, 105; 4 L. J. C. P. 41; 131 E. R. 1121.

**3946. Expulsion necessary.]**—(1) Covenant for rent on a lease. Plea, that, before the lease was made, one P. impleaded ptlfs., & had judgment of *elegit* against their lands, etc.; that the inquisition found ptlfs., seized of the demised premises then leased to B., subject to two mtges. for years; that the sheriff delivered the demised premises to P., to hold, etc., till his damages & costs should be levied thereout; that, before the rent became due, deft. was evicted by P., who entered, & then ejected, expelled, put out, & removed deft. therefrom, & kept & continued him so ejected, etc.; that £1,000 was still due to P. which was not levied. Replication traversed the eviction in the words of the plea. At the trial the lease, *elegit*, & inquisition, were put in, & it was proved that P. had called on deft. to pay him rent, or he, P., would turn him out, on which deft. attorned to him, without privity of ptlfs., his lessors:—*Held*: ptlfs. were entitled to recover, as P.'s *elegit* only entitled him to the reversion expectant on the mtges. by the lessors. The expulsion, as pleaded, was not established by the evidence.

(2) *Semle*: if a party, having a paramount

**3936 i. Whether tenancy determined.]**—*Held*: the act complained of was equivalent to an eviction by the landlord, & the consequence was a suspension of the rent while the exclusion lasted, but not the termination of the tenancy.—*CURRY v. FARRELL*, [1925] 4 D. L. R. 145; 57 O. L. R. 451.—*CAN.*

**3941 i. Apportionment of rent—Where lessee retains possession of residue—**

**Liability on quantum meruit.]**—*BICKLE v. BEATTY* (1859), 17 U. C. R. 465.—*CAN.*

**c. —.]**—A landlord having given part of a farm to road trustees for the purpose of making a road:—*Held*: not entitled to the payment of the rent of that ground, leaving the tenant to obtain indemnification from the trustees, but bound to allow a

deduction of rent effecting to the ground so conveyed.—*BROWN v. BROWN* (1826), 4 Sh. (Ct. of Sess.) 489.—*SCOT.*

**d. What amounts to eviction from part—Part occupied with consent of lessee—Consent immaterial.]**—*CAREY v. BOSTWICK & HIGGINS* (1852), 10 U. C. R. 156.—*CAN.*

**e. — Part lost by alluvion—Restored by alluvion—Subsequently**

right to evict a party in occupation of premises, goes to him claiming to exercise his right, on which the tenant consents to change the title under which he holds, & attorns to the claimant accordingly, that would be equivalent to an expulsion.—*POOLE CORPN. v. WHITT* (1846), 15 M. & W. 571; 16 L. J. Ex. 229; 7 L. T. O. S. 232; 10 J. P. 742; 153 E. R. 976.

*Annotations:*—As to (1) *Refd.* *Delaney v. Fox* (1857), 2 C. B. N. S. 768. As to (2) *Refd.* *Underhay v. Read* (1887), 58 L. T. 457. *Generally*, *Mentd.* *Carter v. Hughes* (1858), 2 H. & N. 714.

**3947. What amounts to expulsion of mesne lessor—Attornment by occupier to claimant.]**—*POOLE CORPN. v. WHITT*, No. 3946, *ante*.

**3948. Subsequent re-entry of occupier—As lessee of superior landlord.]**—*HOPCRAFT v. KEYS*, No. 3944, *ante*.

**3949. Apportionment of rent—Duty of lessee on partial eviction.]**—*SMITH v. MALINGS*, No. 3938, *ante*.

**3950. Effect of eviction on collateral security for rent.]**—A man under obligation to the Queen conveyed his land to H. who made a lease for years rendering rent & the lessee was bound to pay this rent. Now the lease was extended for the debt of the Queen:—*Held*: (1) the bond is saved although the rent is not paid, for the Queen came in with title paramount to the lease. So also if part of the rent or profit be extended the lessee need not pay more than the balance of rent to the lessor; (2) if the bond were for the payment of a sum in gross the extent would be no relief against the bond for the sum in gross did not issue out of the land.—*PECKHAM'S CASE* (1594), Sav. 132; 123 E. R. 1054.

**3951. Premises compulsorily acquired—Possession taken between two rent days.]**—Deft. was tenant from year to year of premises which he occupied at a rent payable half-yearly, viz. on Apr. 1 & Oct. 1. On Jan. 28, 1838, he received from a railway co., under the powers of their Act, notice to quit at the end of six months, & on July 28 he gave up possession to them without applying for or receiving compensation for his interest in the premises, to which he was entitled by the Act:—*Held*: he was liable to his landlord for the rent up to Oct. 1838.—*WAINWRIGHT v. RAMSDEN* (1839), 5 M. & W. 602; 1 Ry. & Can. Cas. 714; 9 L. J. Ex. 120; 151 E. R. 255.

*Annotations:*—*Refd.* *Albony v. Rietemeyer* (1841), 3 Moo. P. C. C. 452; *Tasker v. Bullman* (1849), 3 Exch. 351.

**What amounts to—Whether occupation under Defence of Realm Regulations.]**—*See CONTRACT*, Vol. XII., p. 399, Nos. 3230, 3231.

written agreement for this quarterly letting, made while 7 & 8 Vict. c. 76, s. 4, was in force was put in which was signed by B. but not by A.:—*Held*: if a tenant had left a house unoccupied, & the landlord entered & was in the profitable occupation of the house, he could not recover rent from the tenant for any time after such profitable occupation; but if he merely put a person into the house to take care of it & prevent depredations, it would be otherwise.—*BIRD v. DEFONVILLE* (1846), 2 Car. & Kir. 415.

**3954. Premises relet.]**—*HALL v. BURGESS*, No. 4322, *post*.

**3955. ———.]**—Where pltf. let furnished apartments to deft. for a year at a certain rent, & deft. quitted at the end of the first quarter, & paid rent to that day, & pltf. shortly afterwards let the apartment to another, who quitted before the expiration of the year:—*Held*: pltf. could not recover the balance of rent due at the end of the year in an action for use & occupation, as pltf. by re-letting the apartments to another, had put an end to the original contract.—*WALLS v. ATCHESON* (1826), 3 Bing. 462; 2 C. & P. 268; 11 Moore, C. P. 379; 130 E. R. 591; *sub nom.* *WATTS v. ATCHESON*, 4 L. J. O. S. C. P. 154.

**3956. Notice to let put up by landlord.]**—In *assumpsit* for use & occupation of apartments which deft. had quitted without giving notice, pltf. having put up a bill to let the apartments will not prevent his recovering.—*REDPATH v. ROBERTS* (1800), 3 Esp. 225, N. P.

*Annotations:*—*Distd.* *Walls v. Atcheson* (1826), 2 C. & P. 268; *Phone v. Popplewell* (1862), 12 C. B. N. S. 334. *Refd.* *Bessel v. Lansberg* (1845), 9 Jur. 576.

**3957. Caretaker put in by landlord.]**—*BIRD v. DEFONVILLE*, No. 3953, *ante*.

#### SUB-SECT. 5.—DESTRUCTION OF, OR DAMAGE TO PREMISES.

##### A. In General.

**3958. General rule—Apart from special provision in lease.]**—(1) Where a party by his own contract creates a duty or charge upon himself he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, since (2) he might have provided against it by his contract.

Therefore if a lessee expressly covenant to pay rent he ought to pay though (3) the house be burnt by lightning or (4) thrown down by enemies, nor (5) is he excused by reason of the fact that he is expelled from his lands by an alien enemy or (6) though the lands be inundated.

(7) He is equally liable though there is no express covenant since the rent is a duty created by the parties upon the reservation.—*PARADINE v. JANE* (1647), Aleyn, 26; Sty. 47; 82 E. R. 807.

*Annotations:*—As to (1) *Apld.* *Monk v. Cooper* (1727), 2 Stra. 763. *Consd.* *Clark v. Glasgow Assoc.* (1854), 1 Macq. 668; *Redmond v. Dainton*, [1920] 2 K. B. 256; *Matthey v. Curling*, [1922] 2 A. C. 180. *Refd.* *Hadley v. Clarke* (1799), 8 Term Rep. 259; *Touteng v. Hubbard* (1802), 3 Bos. & P. 201; *Atkinson v. Ritchie* (1809), 10 East, 530; *Medeiros v. Hill* (1832), 8 Bing. 231; *Spence v. Chodwick* (1847), 10 Q. B. 517; *Brown v. London Corpn.* (1861), 9 C. B. N. S. 726; *Coward v. Gregory* (1866), 15 L. T. 279; *Clifford v. Watts* (1870), L. R. 5 C. P. 577; *Carstairs v. Taylor* (1871), L. R. 6 Exch. 217; *The Teutonia* (1871), L. R. 3 A. & E. 394; *River Wear Comrs. v. Adamson* (1877), 2 App. Cas. 743; *Sheffield Waterworks Co. v. Carter*, *Same v. Brooks* (1882), 8 Q. B. D. 632; *Re Shipton, Anderson & Harrison's Arbitration*, [1915]

#### SUB-SECT. 4.—ABANDONMENT OF PREMISES AND RE-LETTING.

**3952. Abandonment question of fact.]**—*PINDAR v. AINSLEY & RUTTER* (1767), cited in 1 Term Rep. 312; 99 E. R. 1113.

*Annotations:*—*Refd.* *Belfour v. Weston* (1786), 1 Term Rep. 310; *Doe d. Ellis v. Sandham* (1787), 1 Term Rep. 705; *Hare v. Groves* (1796), 3 Aust. 687; *Hart v. Windsor* (1844), 12 M. & W. 68.

**3953. Effect of abandonment—& profitable occupation of landlord.]**—In an action by A. against B. for rent on a demise from quarter to quarter with the rent payable one quarter in advance, deft. pleaded a denial of the demise or notice to quit & a surrender by operation of law. A

granted to other than tenant.]—When land has been lost to a holding by diluvion & subsequently restored by alluvion, & then settled with persons

other than the tenants of the holding, the tenant is not entitled to a suspension of the entire rent on the ground that the landlord had evicted him from a

portion of the demised premises.—*HAI CHARAN SHAR MAZUMDAR v. ADMINISTRATOR-GENERAL OF BENGAL* (1909), L. L. R. 36 Cal. 856.—*IND.*

*Sect. 6.—Suspension of rent: Sub-sect. 5, C.; sub-sects. 6, 7, 8, 9 & 10. Sects. 7 & 8.]*

**3990. Warehouse floor overloaded.]—**Pltfs. demised certain floors in a warehouse to deft. at a rent. He covenanted to repair, maintain, & keep the inside of the premises in good & tenantable repair & condition, & to deliver them up at the end of the term, damage by fire, storm, or tempest, or other inevitable accident, & reasonable wear and tear only excepted. Pltfs. covenanted to keep the walls, roof, & main timbers of the premises in good & substantial repair & condition. The lease also contained a provision for the suspension of the rent in the event of the premises being burnt down, or damaged by fire, storm, or tempest. Sub-lessees of deft. overloaded a floor with flour, in consequence of which the whole building fell. Pltfs. rebuilt it & sued for rent during the time the building was unoccupied, & for damages. Deft. denied liability, & claimed damages from pltfs. :—*Held*: (1) notwithstanding the fall, deft. was liable to pay the rent; (2) there was no implied warranty by pltfs. that the building was fit for the purpose for which it was to be used; (3) in the absence of notice to them of any damage or want of repair, pltfs. were not liable on their express covenant to keep the walls, roof, & main timbers of the building in repair; (4) on the authority of *Saner v. Bilton*, No. 4865, *post*, the destruction of the building, if caused by using the property demised in what was apparently a reasonable & proper manner, having regard to its character and to the purposes for which it was intended to be used, was not waste, & therefore the tenant would not be liable to pay damages for it; (5) as the case was not within the exceptions in his express covenant to repair, he was liable under it to the cost of putting the inside of the floors demised, & the fixtures therein in good & tenantable repair.—*MANCHESTER BONDED WAREHOUSE CO. v. CARR* (1880), 5 C. P. D. 507; 49 L. J. Q. B. 809; 43 L. T. 476; 45 J. P. 7; 29 W. R. 354.

*Annotations*:—As to (3) *Refd.* Huggall v. McKean (1884), Cab. & El. 391; *Murphy v. Hurly*, [1922] 1 A. C. 369. *Generally, Mentd.* Muir King (Cargo Owners) v. Hughes, [1895] 2 Q. B. 550.

#### SUB-SECT. 6.—ALTERATION OF PREMISES.

**Whether amounting to eviction.]—***See* No. 3898, *ante*.

#### SUB-SECT. 7.—PREMISES UNFIT FOR INTENDED USE.

*See* Part XIII., *ante*.

#### SUB-SECT. 8.—MERGER.

*See, generally, EQUITY*, Vol. XX., pp. 503 *et seq.*  
**3991. Demise of part of premises to lessor.]—**

in consequence of the roof admitting water, & for want of sufficient drainage, whereby the said house became wet, damp & offensive, of which pltf. had notice, & deft. thereupon quitted the same before the commencement of the time for which rent was demanded :—*Held*: no defence.—*DENISON v. NATION* (1861), 21 U. C. R. 57.—*CAN.*

#### PART XV. SECT. 6, SUB-SECT. 10.

**m. Rent of coalfield—Coal unworkable.]—**Note of suspension of a charge for rent of a coalfield on the ground that the coal was unworkable to a profit refused, the tenants having

continued in possession till the end of the term for which the rent was payable & there being no provision in the lease upon the subject.—*BARGADIE COAL CO. v. WARR* (1860), 23 Dunl. (Ct. of Sess.) 44; 33 So. Jur. 19.—*SCOT.*

**n. Covenant to repair—Failure to perform.]—***HAIG & CO., LTD. v. BOSWALL-PRESTON*, [1915] S. C. 339; 1 S. L. T. 26.—*SCOT.*

**o. Covenant to improve & repair licensed premises—In conformance with municipal regulations—Failure to perform—Loss of license.]—***VANCOUVER BREWERIES v. DANA & FULLERTON*

(1915), 21 B. C. R. 19; 52 S. C. R. 134.—*CAN.*  
**p. License cancelled by general resolution of justices.]—**During the currency of the lease the hotel license was lost in consequence of a resolution of the licensing magistrates to withdraw all the hotel licenses in the town. The tenant, without offering to renounce the lease, claimed an abatement of rent in respect that the license having been refused a material change in the character of the subjects had been produced :—*Held*: the tenant was bound to pay the full rent stipulated in the lease.—*DONALD v. LEITCH* (1886),

*Annotations*:—*Refd.* Hodgkins v. Thornbury (1875), Freem. K. B. 417. *Mentd.* Blackamore's Case (1610), 8 Co. Rep. 156 a; *Lampet's Case* (1612), 10 Co. Rep. 46 b; *Simpson v. Jackson* (1622), Palm. 295; *Lyn v. Wyn* (1665), O. Bridg. 122; *Foot v. Berklay* (1670), 2 Keb. 654; *Symonds v. Cudmore* (1692), 12 Mod. Rep. 32; *R. v. Hornby (or Bankers' Case)* (1695), 5 Mod. Rep. 29; *Palmer v. Ekins* (1728), 2 Ld. Raym. 1550; *Doe d. Christmas v. Oliver* (1829), 10 B. & C. 181; *Magrath v. Hardy* (1838), 6 Scott, 627; *Sturgeon v. Wingfield* (1846), 15 M. & W. 224; *Rowbotham v. Wilson* (1857), 27 L. J. Q. B. 61; *Edwards v. Wickwar* (1866), L. R. 1 Eq. 403.

**3992. Assignment to lessor of sub-lease of part of premises demised.]—***HODGKINS v. THORNBURY*, No. 3928, *ante*.

**Termination of merger.]—***See* No. 3997, *post*.

#### SUB-SECT. 9.—DURATION AND TERMINATION OF SUSPENSION.

**3993. Suspension by eviction—House pulled down—Whether rent revives on re-entry of lessee.]—***Qu.*: if the re-entry of a lessee upon the entry of a lessor who had pulled down part of the demised premises, revives the rent?—*CHERBOURN v. RYE* (1594), Cro. Eliz. 341; 78 E. R. 590.

*Annotations*:—*Consd.* Upton v. Townend, Upton v. Greenlees (1855), 17 C. B. 30. *Refd.* Hunt v. Cope (1775), 1 Cowp. 242.

**3994. ———.]—***How v. BROOM* (1601), Gouldsb. 125; 75 E. R. 1040.

**3995. ——— Duration of eviction.]—***MORRISON v. CHADWICK*, No. 3887, *ante*.

**3996. What amounts to re-entry—Cattle straying on to demised premises from adjoining lands.]—***CIBEL & HILLS CASE* (1588), 1 Leon. 110; 74 E. R. 102.

*Annotation*:—*Refd.* Upton v. Townend, Upton v. Greenlees (1855), 17 C. B. 30.

**3997. Suspension by merger—Surrender of lease operating as merger.]—**If the grantee for life of a rent accept a lease of the land from the reversioner, & the lease is afterwards surrendered, the rent revives.—*PETO v. PEMBERTON* (1628), Cro. Car. 101; *Hut. 94*; 79 E. R. 689.

*Annotations*:—*Refd.* Thompson v. Leach (1690), 2 Vent. 198. *Mentd.* Cuge v. Acton (1699) 1 Ld. Raym. 515.

#### SUB-SECT. 10.—OTHER CASES.

**3998. Whether by tortious possession by lessee—Entry before commencement of term.]—**Debt lies for rent upon a lease, though deft. entered before his title began.—*ALEXANDER v. DYER* (1590), Cro. Eliz. 169; 2 Leon. 99; 78 E. R. 426.

*Annotations*:—*Refd.* Macdonnell v. Welder (1722), 1 Stra. 550. *Mentd.* R. v. Chester, Bishop, Peirce & Cook (1896), 5 Mod. Rep. 297.

(1915), 21 B. C. R. 19; 52 S. C. R. 134.—*CAN.*

**p. License cancelled by general resolution of justices.]—**During the currency of the lease the hotel license was lost in consequence of a resolution of the licensing magistrates to withdraw all the hotel licenses in the town. The tenant, without offering to renounce the lease, claimed an abatement of rent in respect that the license having been refused a material change in the character of the subjects had been produced :—*Held*: the tenant was bound to pay the full rent stipulated in the lease.—*DONALD v. LEITCH* (1886),

**3999.** ———.]—An entry before the commencement of the lease will not avoid the payment of the rent reserved.—*MACDONNELL v. WELDER* (1723), 1 Stra. 550; 8 Mod. Rep. 54; 93 E. R. 693.

#### SECT. 7.—RELEASE OF RENT.

**4000. What amounts to release—Receipt given for later rent.]**—Rent being due to a woman, she marries, the husband gives an acquittance for rent due at a later day, this is a bar for all the arrears.—*MORTON v. HOPKINS* (1568) 3 Dyer, 271 a.; *Moore, K. B.* 87; 73 E. R. 603.

*Annotations:*—*Foll.* *Pennant's Case* (1596), 3 Co. Rep. 64 a.; *Pamer v. Stabick* (1661), 1 Sid. 44.

**4001.** ———.]—An acquittance by deed for rent due the last day discharges all arrears:—*secus* as to an acquittance by act of law.—*PENNANT'S CASE, HARVY d. PENNANT v. OSWALD* (1596), as reported in 3 Co. Rep. 64 a.; 76 E. R. 775.

*Annotations:*—*Foll.* *Pamer v. Stabick* (1661), 1 Sid. 44. *Ment.* *French v. Curtis* (1596), 2 And. 90; *March v. Curtis* (1598), Noy. 7; *Frances's Case* (1609), 8 Co. Rep. 89 b.; *Tongue v. Pitcher* (1691), 3 Lev. 295; *Thornly v. Fleetwood* (1720), 1 Stra. 318; *Bally v. Wells* (1769), *Willm.* 341; *Croft v. Lumley* (1858), 6 H. L. Cas. 672; *Williams v. Earle* (1868), L. R. 3 Q. B. 739; *Davenport v. R.* (1877), 3 App. Cas. 115; *Matthews v. Smallwood*, [1910] 1 Ch. 777; *Hartell v. Blackler*, [1920] 2 K. B. 161.

**4002.** ———.]—A vovry for rent due at a particular rent-day does not estop the party from claiming previous arrears, but it is otherwise in the case of a receipt.—*PAMER v. STABICK* (1661), 1 Sid. 44; 82 E. R. 950; *sub nom.* *PALMER v. STRATWICK*, 1 Keb. 113; *T. Raym.* 21; 1 Lev. 43.

*Annotation:*—*Ment.* *It. v. Dublin* (Dean & Chapter) (1723), 1 Stra. 536.

**4003.** ———.]—Effect of new demise—To existing tenant.]—*Replevin.* Cognisance that plff. was tenant to J. at a certain rent, & that deft. distrained for the rent of half a year, ending Sept. 29, 1841. Plea, that after the rent became due, J. by indenture purporting to be made Feb. 1, 1841, but made after Sept. 29, 1841, released the rent. Defts. in their replication set out the indenture, dated Feb. 1, 1841, being a demise to plff. of the premises in question, to hold from July 30, 1840, for fourteen years; the first payment of rent to be made on Mar. 25 then next:—*Held:* the in-

denture has not the effect of releasing the tenant from payment of rent, due under a parol contract before its execution.—*COOPER v. ROBINSON* (1842), 10 M. & W. 694; 12 L. J. Ex. 48; 152 E. R. 651.

Effect of new demise on existing tenancy, *see, generally*, No. 6023–6028, *post*.

**4004. Construction of release—Effect given to intention of parties.]**—General words of a release [of a tenant's rent] restrained in equity to what was the intent of the parties.—*LUCY (LORD) v. WATTS* (1724), *Cas. temp. King*, 1; 25 E. R. 189, 1. C.

**4005. Whether future rent released—Release given to original lessee—After assignment.]**—*COLLINS & HARDING'S CASE* (1597), 13 Co. Rep. 57; *Cro. Eliz.* 622; *Moore, K. B.* 544; 77 E. R. 1467.

**4006.** ———.]—*WHITTON v. BYE*, No. 4150, *post*.

**4007.** ———.]—*HARPER v. BURGH* (1677), 2 Lev. 206; 83 M. R. 521; *sub nom.* *HARPER v. BIRD*, *T. Jo.* 102.

**4008.** ———.]—Release by lessee to assignee—On assignment of whole term.]—*WHITTON v. BYE*, No. 4150, *post*.

**4009.** ———.]—*BYERS v. CROY* (1618), 2 Roll. Rep. 20; 81 E. R. 631.

**4010.** ———.]—Release of all demands.]—A release of all demands does not release future arrears of rent, nor an unbroken covenant. A release of all right in the land extinguishes rent.—*ANON.* (1674), *Freem. K. B.* 367; 89 E. R. 272.

**4011.** ———.]—Growing rent not released by release of all demands.—*STEPHENS v. SNOW* (1691), 2 Salk. 578; 91 E. R. 486.

*See, generally*, *CONTRACT*, Vol. XII., p. 507, Nos. 4162–4167.

#### SECT. 8.—ACCEPTANCE OF RENT.

**4012. As implied promise—Not to interfere with sale of farm stock.]**—Where a tenant, who is shortly about to quit a farm, advertises for sale by auction his stock, etc., upon the farm, his payment of rent already due & to be due at the expiration of his tenancy to his landlord, who has notice of the intended sale, does not raise an implied promise on the part of the landlord not to interfere

13 R. (Ct. of Sess.) 790; 23 Sc. L. R. 588.—*SCOT.*

**q. Disturbance by landlord of peaceable possession—Where not actual eviction.]**—Where the act of a landlord is not a mere trespass, but something of a graver character, interfering substantially with the enjoyment, by the tenant, of the demised property, the tenant is entitled to a suspension of rent during such interference, even though there may not be actual eviction.—*DRUMFUTSINGH v. MAHOMED KAZIM ISPAHAIN* (1896), 1 L. R. 24 Cal. 296.—*IND.*

**r. Covenant to supply water for allotment—Delay—Rent suspended.]**—*CLOUGHLEY v. QUEENSTOWN MUNICIPALITY* (1916), E. D. L. 303.—*S. AF.*

**t. Dangerous defects in drainage—Premises uninhabitable—Delay in making repairs.]**—The tenant of a house removed from the house in consequence of dangerous defects in the drainage. The landlord had the drains put in order, but the operation took two months. In an action by the landlord for the half year's rent:—*Held:* the failure of the landlord for so considerable a period to supply a habitable house disentitled him to

recover any part of the half year's rent.—*SCOTTISH HERITABLE SECURITY CO., LTD. v. GRANGER* (1881), 8 R. (Ct. of Sess.) 459; 18 Sc. L. R. 280.—*SCOT.*

**a. Lease of fishing—Legislation limiting period of fishing—During currency of lease.]**—A party having taken a salmon fishing on a lease for five years or seasons, during the currency of which an Act was passed introducing a uniform period of close time, under circumstances which he alleged rendered its operation more injurious to his than to most other fisheries, & deprived him of about one-third of the produce of his fishing:—*Held:* no warranty had been incurred, & he was not entitled to an abatement of his rent.—*HOLLIDAY v. SCOTT* (1830), 8 Sh. (Ct. of Sess.) 831; 5 Fac. Coll. 668.—*SCOT.*

#### PART XV. SECT. 7.

**b. Covenant for release—Conditional on release of estate to third person.]**—*HAYWARD v. THACKER* (1871), 31 U. C. R. 427.—*CAN.*

**c. Acceptance of rent from sub-lessee—After refusal to cancel lessee's lease.]**—*YUKON TRUST CO. v. MURPHY* (1905), 2 W. L. R. 298.—*CAN.*

**d. Sum paid as security for performance of covenants.]**—*KOBOLD v. ALLEN*, [1922] 1 W. W. R. 1186; 66 D. L. R. 566.—*CAN.*

**e. Receipt for rent providing for abatement of rent—Conditional on punctual payment of future rent—Unpunctual payment of future rent.]**—*SCOTT-CHISHOLME v. BROWN* (1893), 20 It. (Ct. of Sess.) 575; 30 Sc. L. R. 558.—*SCOT.*

**f. Payment to third person—On eviction or compulsion of law.]**—Payment of rent to a third person does not release the tenant of his liability towards the landlord, whoever may be the real owner of the premises, unless such payment is made under compulsion of law or the tenant has been evicted.—*DE WET v. JOOSTE* (1892), 9 S. C. 239.—*S. AF.*

#### PART XV. SECT. 8.

**g. Verdict against overholding tenant—Acceptance of rent after verdict.]**—Where in a proceeding to dispossess an overholding tenant, the jury found in favour of the landlord, the ct. refused to restore the tenant to possession, on the ground that the agent of the landlord had received a month's rent after

*Sect. 8.—Acceptance of rent. Sect. 9: Sub-sect. 1, A., B. & C.]*

with or prevent the sale, or the removal of the property.—*BUSHBY v. FISHER* (1834), 3 Nev. & M. K. B. 381.

*As waiver of forfeiture.]—See Part XXIV., Sect. 1, sub-sect. 8, B. (b), post.*

## SECT. 9.—APPORTIONMENT AND SEVERANCE OF RENT.

### SUB-SECT. 1.—AS BETWEEN PERSONS ENTITLED.

#### A. In General.

*See, generally, EQUITY, Vol. XX., pp. 280 et seq.; Law of Property Act, 1925 (c. 20), s. 190.*

**4013. General rule—Change of interest occasion for apportionment.]—**Under a parol demise from year to year, by a tenant for life, with power to lease by deed, etc. & under written agreements for leases not exceeding three years, signed by the lessees, but not by the tenant for life, though witnessed by his agent, the interest of the lessees determines with the life of the lessor & the rents are apportionable.—*SYMONS v. SYMONS & POWELL* (1821), 6 Madd. 207; 56 E. R. 1070.

**4014. ———.]—**A settlor, by deed, assigned securities to trustees upon trust after his, the settlor's, death, during the minority of A. to pay such portion of the income as they should think proper, for the maintenance & education of A.; & when A. should have attained the age of twenty-one, & thenceforth until he should attain thirty, by & out of the income to pay to A. such annual sum as they should in their discretion think proper, not exceeding £5,000, & accumulate the unapplied portion, & stand possessed of the accumulations upon the trusts thereafter declared concerning the fund; & upon further trust, when & so soon as A. should have attained thirty, to stand possessed of the funds & the annual produce thereof, upon trust that they & he shall pay unto & permit "A. " & his assigns to receive & take the whole of the dividends, interest, & annual produce of the same, during his life, for his & their own use & benefit," with limitations over. Upon A. attaining thirty:—*Held*: there must be an apportionment of the current dividends.

Wherever a person is in receipt of rents & profits & any change takes place whereby that person's interest ceases or is altered, & another interest begins or a change of interest takes place, then an apportionment must be made (*BACON, V.-C.*).—*DONALDSON v. DONALDSON* (1870), 11 R. 10 Eq. 635; 40 L. J. Ch. 64; 23 L. T. 550; 18 W. R. 1104.

——— *Under particular instruments.]—See SETTLEMENTS; TRUSTS.*

**4015. To what apportionment applicable—Apart from statute—Contract.]—***ANON.* (1553), Benl. 12; 3 Leon. 1; 1 And. 26; 73 E. R. 939.

the verdict.—*WRIGHT v. JOHNSON* (1845), 2 U. C. R. 273.—*CAN.*

*h. After expiration of lease.]—ADAMS v. BAINS* (1847), 4 U. C. R. 157.—*CAN.*

### PART XV. SECT. 9, SUB-SECT. 1.—A.

**40131. General rule—Change of interest occasion for apportionment.]—***MCCULLOCK v. ABBOTT* (1885), 6 N. S. W. L. R. 212; 2 N. S. W. W. N. 32.—*AUS.*

**4016. ———.]—***ANON.* (1578), Moore, K. B. 115; 72 E. R. 477.

*Annotations:—Consd. Stevenson v. Lambard* (1802), 2 East, 575; *Swansea Corp'n. v. Thomas* (1882), 10 Q. B. D. 48.

——— *By statute.]—See Sub-sect. 1, C., post.*

#### B. Between What Persons.

**4017. Rector & succeeding incumbent.]—**Lease for years by a rector having ceased by his death, the succeeding incumbent received from the lessee a sum of money as the rent due for the whole year, in the course of which the lessor died. The exor. is entitled to an apportionment.—*HAWKINS v. KELLY* (1803), 8 Ves. 308; 32 E. R. 373, L. C.

*Annotations:—Refd. Aynsley v. Wordsworth* (1813), 2 Ves. & B. 331; *Oldham v. Hubbard* (1843), 2 Y. & C. Ch. Cas. 209.

**4018. Joint lessors—Whole rent reserved to one by mistake.]—**A. B. was the first mtgee. of Blackacre, & C. D. was the first mtgee. of Whiteacre & the second mtgee. of Blackacre. A. B. & C. D. demised both properties together, reserving the whole rent to A. B. The parties did not seem to have observed the distinction between their rights in respect of the two properties. The ct. relieved C. D. from the mistake, by ordering A. B. to pay him an apportionment of the whole rent in respect of Whiteacre.

In 1841, A. mtged. a wharf to B., & covenanted to lay out the insurance money in rebuilding the premises. A fire occurred in 1844, & A., having in 1845 purchased an adjoining slip of land, laid out the money in building, partly on both parcels. In 1846 A. mtged. the slip to C. who had notice of the first mtge. The claim of B. to have the benefit of the expenditure of the insurance money on the slip was rejected by the ct.—*HARRYMAN v. COLLINS* (1854), 18 Beav. 11; 23 L. T. O. S. 17; 18 Jur. 501; 2 W. R. 189; 52 E. R. 5.

*As between qualified heir & posthumous heir or remainderman.]—See DESCENT, Vol. XVIII., p. 11.*

*As between tenant in tail & remainderman.]—See, generally, SETTLEMENTS.*

*As between tenant for life & remainderman.]—See, generally, SETTLEMENTS; TRUSTS.*

*As between vendor & purchaser.]—See SALE OF LAND.*

#### C. Under Apportionment Act, 1834.

**4019. Construction of Act—"Instrument"—Whether instrument creating life interest or instrument reserving rent.]—**The "instrument" referred to in Apportionment Act, 1834 (c. 22), is not the instrument creating the periodical payments, but that creating a life interest therein.

Testator died in 1838, having by his will, given real estates to trustees, in trust, after keeping up his mansion, etc., to pay five-eighths of the net rents to his widow for life. The widow died in 1847, & rents were receivable on the next rent day, under leases created by testator anterior to Apportionment Act:—*Held*: the rents were apportionable.—*KNIGHT v. BOUGHTON* (1849), 12

**4013 II. ———.]—***BOULTON v. BLAKE* (1886), 12 O. R. 532.—*CAN.*  
*k. Property sold by mortgagee—Under power of sale—Tenancy determined between rent days.]—KINNEAR v. ASPDEN* (1892), 19 A. R. 468.—*CAN.*

### PART XV. SECT. 9, SUB-SECT. 1.—B.

**1. Tenants in common—Covenants for payment joint & several.]—**Where a lease is to tenants in common, but the covenants for payment of the

rent are joint & several, a surrender of the shares of one or more of the lessees causes an apportionment.—*MILLER v. YOUNG* (1882), 2 N. Z. L. R. 1.—*N.Z.*  
*m. Executor & remainderman.]—DENNIS v. HOOVER* (1896), 27 O. R. 376.—*CAN.*

*n. Grantees holding in severally—Joint & several covenant to pay entire rent—Assignee of one grantee & other grantees.]—DOONER v. ODLUM*, [1914] 2 I. R. 411.—*IR.*

Beav. 312; 19 L. J. Ch. 66; 15 L. T. O. S. 41; 50 E. R. 1081.

*Annotation*.—*Consd. Plummer v. Whiteley* (1859), John. 585.

**4020.** — “Assign”—Whether mortgagee not in possession included.]—A mtgee. who is not in possession is not an assign of the mtgor. within Apportionment Act, 1834 (c. 22), s. 2.

M., the tenant for life of real estate, granted to W., in consideration of an antecedent debt of £8,000, a yearly rentcharge of £960, to be issuing out of the estate for a term of one hundred years, if M. should so long live, with powers of entry & distress in the event of the rentcharge falling into arrear; & M. also demised the estate for a term of two hundred years, if he should so long live, to a trustee upon trust for the better securing the rentcharge. M. died when the rentcharge was in arrear, but before W. or the trustee had entered on the estate:—*Held*: W. was not entitled to be paid the arrears of the rentcharge out of the apportioned part of the rents for the period which elapsed between the quarter day last preceding M.'s death & the day on which he died.—*Re ANGLESEY'S (MARQUIS) ESTATE, PAGET v. ANGLESEY* (1874), L. R. 17 Eq. 283; 22 W. R. 507; *sub nom. PAGET v. ANGLESEA (MARQUIS), WATKINS' CLAIM*, 43 L. J. Ch. 437; 29 L. T. 721.

**4021.** — Rent—Whether mining royalties payable at irregular periods included.]—Apportionment Act, 1834 (c. 22), only applies to rents reserved at fixed periods, & does not apply to royalties in the nature of rents payable at uncertain periods; such as royalties payable upon the selling of ore got from a mine.—*St. AUBYN v. St. AUBYN* (1861), 1 Drew & Sm. 611; 30 L. J. Ch. 917; 5 L. T. 519; 9 W. R. 922; 62 E. R. 512.

*Annotations*.—*Consd. Llewellyn v. Rous* (1866), L. R. 2 Eq. 27. *Apld. Donaldson v. Donaldson* (1870), L. R. 10 Eq. 635. *Refd. Wheeler v. Tootel* (1867), L. R. 3 Eq. 571.

—*See, now*, Apportionment Act, 1870 (c. 35).

**4022.** Application of Act—Landlord determining tenancy by his own act.]—Pltf. agreed with F. to let him land on a building lease for ninety-eight years from Christmas 1835, at a peppercorn rent for three years, & than at £115 a year, payable quarterly; F. to build on the land & cover in eight messuages within the first three years, & to accept a lease, etc.; proviso for re-entry on default. F. entered, but did not build the houses; whereupon pltf. brought ejectment, & recovered possession on June 12, 1839. The demise in the ejectment was laid on Jan. 1, 1839:—*Held*: (1) pltf. could not, in *assumpsit* against F. on the agreement, recover rent from Dec. 25 to Jan. 1; for, *semble*: Apportionment Act, 1834 (c. 22), s. 2, as to apportionment of rents, does not apply to the case of a landlord determining the relation of landlord & tenant by his own act; (2) if it did, no rent was due here, the re-entry taking effect from the day of the demise, & having therefore put an end to the tenancy before a quarter's rent accrued; but the remedy was by action for mesne profits.

(3) After re-entry, pltf. agreed with a new tenant to let him the premises for the residue of F.'s term, at a peppercorn for the year ending Midsummer, 1840, £70 for the year ending Midsummer 1841, & £140 a year for the rest of the term. Pltf., in the above action, claimed, as damages, the difference between the rent which he would actually receive down to Midsummer 1841, & that which would have accrued down to the same period if F. had kept his agreement:—*Held*: the jury were not bound to award that amount, but might give their verdict on an estimate of pltf.'s real damage,

taking into consideration the increased rent secured to him by the second agreement.—*OLDERSHAW v. HOYT* (1840), 12 Ad. & El. 590; 1 Arn. & H. 1; 4 Per. & Dav. 307; 10 L. J. Q. B. 221; 4 Jur. 1012; 113 E. R. 935.

*Annotations*.—*As to* (1) *Consd. Bridges v. Potts* (1864), 17 C. B. N. S. 314; *Queen's Club Gardens Estates v. Bignell*, [1824] 1 K. B. 117. *As to* (3) *Consd. Wiggall v. School for Indigent Blind* (1882), 8 Q. B. D. 357; *Joynes v. Weeks*, [1891] 2 Q. B. 31; *Marshall v. Mackintosh* (1898), 78 L. T. 750. *Refd. Stephens v. Junior Army & Navy Stores* (1914), 111 L. T. 1055.

**4023.** — Successive interests created before Act—Date of lease immaterial.]—Testator, whose will came into operation before the passing of Apportionment Act, 1834 (c. 22), gave the rents of his real estates to his son after he should attain the age of twenty-one years, & directed personal estate to be invested in funds or securities, with power to invest in land. The son attained the age of twenty-one in July:—*Held*: he was entitled to receive the whole of the rents which became due in Sept. on the devised estates & on the purchased estates, without regard to the date of the leases under which the rents became payable.—*FLETCHER v. MOORE* (1857), 26 L. J. Ch. 530; 29 L. T. O. S. 173; 3 Jur. N. S. 458; 5 W. R. 421.

*Annotations*.—*Consd. Plummer v. Whiteley* (1859), John. 585. *Distd. Wardroper v. Cutfield* (1864), 3 New Rep. 410.

**4024.** — Successive interests created after Act—Leases created before Act.]—*KNIGHT v. BOUGHTON*, No. 4019, *ante*.

**4025.** — —.]—Apportionment Act, 1834 (c. 22), applies to all cases where either the lease reserving the rent, or the instrument, creating the life interest in it, has been executed since the passing of the statute.

Rent reserved by a lease granted after the Act, under a power in a settlement executed before the Act:—*Held*: to be apportionable between the exors. of the tenant for life under the settlement & the remainderman.—*LUMMEY v. WHITELEY* (1859), John. 585; 29 L. J. Ch. 247; 1 L. T. 230; 5 Jur. N. S. 1416; 8 W. R. 120; 70 E. R. 553.

*Annotations*.—*Consd. Wardroper v. Cutfield* (1864), 3 New Rep. 410. *Follid. Llewellyn v. Rous* (1866), L. R. 2 Eq. 27. *Consd. Heasman v. Pearce* (1869), L. R. 8 Eq. 599.

**4026.** — —.]—Apportionment Act, 1834 (c. 22), applies either where the instrument creating the life interest, or where the lease in respect of which the apportionment arises, bears date after the statute. Accordingly, where a lease was granted after the passing of the Act under a power in a settlement executed prior to the Act:—*Held*: the rent reserved by the lease was apportionable between the tenant for life & remainderman under the settlement.—*LLEWELLYN v. ROUS* (1866), L. R. 2 Eq. 27; 35 Beav. 591; 12 Jur. N. S. 580; 55 E. R. 1026.

*Annotation*.—*Consd. Heasman v. Pearce* (1869), L. R. 8 Eq. 599.

**4027.** — Leases created after Act—Though under powers created before Act.]—By indenture, dated in 1828, lands were settled on A. for life, & a power of leasing was given to A. Apportionment Act was passed in 1834. After 1834 A., under his power, granted leases of divers portions of the settled property. A. died in 1849:—*Held*: A.'s personal estate was entitled to a proportion of the rents of the lands of which he had granted leases under his power, between the last days of payment of rent & his death.—*LOCK v. DE BURGH, BURGHERSH (LORD) v. DE BURGH* (1851), 4 De G. & Sm. 470; 20 L. J. Ch. 384; 17 L. T. O. S. 302; 15 Jur. 961; 64 E. R. 917.

*Annotations*.—*N.F. Fletcher v. Moore* (1857), 26 L. J. Ch. 530. *Follid. Plummer v. Whiteley* (1859), John. 585. *Consd. Wardroper v. Cutfield* (1864), 3 New Rep. 410; *Heasman v. Pearce* (1869), L. R. 8 Eq. 599.

**Sect. 9.—Apportionment and severance of rent: Sub-sect. 1, C. & D.; sub-sect. 2, A., B., C. & D.]**

**4028.** ————.]—**PLUMMER v. WHITELEY**, No. 4025, *ante*.

**4029.** ————.]—**LLEWELLYN v. ROUS**, No. 4026, *ante*.

——— **Particular interests.**]—*See* **SETTLEMENTS; TRUSTS.**

**D. Under Apportionment Act, 1870.**

*See, generally, EQUITY, Vol. XX., pp. 280 et seq.*

**4030. Application of Act—Date of operation of instrument immaterial.]—**Above Act applies to all instruments, whether coming into operation before or not till after the passing of the Act.—*Re CLINE'S ESTATE* (1874), L. R. 18 Eq. 213; 30 L. T. 249; 22 W. R. 512.

**Annotations:—***Folld. Patching v. Barnett* (1880) 43 L. T. 50. *Reid. Lawrence v. Lawrence* (1884), 26 Ch. D. 795; *Re Meredith, Stone v. Meredith* (1898), 78 L. T. 492.

**4031.** ————.]—Testator by his will, dated in 1856, devised real estate to the use of his wife for life, with remainders over. Testator died in 1858 & his widow in 1879:—*Held*: the rents of which the widow was tenant for life were apportionable under above Act.—*PATCHING v. BARNETT* (1880), 49 L. J. Ch. 665; 43 L. T. 50; 28 W. R. 886; *on appeal* (1881), 51 L. J. Ch. 74, C. A.

**Annotations:—***Mentd. Astley v. Micklethwait* (1880), 15 Ch. D. 59; *Re Middleton, Thompson v. Harris* (1882), 19 Ch. D. 552; *Re Muffett, Jones v. Mason* (1888), 39 Ch. D. 534; *Re Copland, Mitchell v. Bain* (1895), 44 W. R. 94; *Re Jones, Elgood v. Kinderley, Elgood v. Jones*, [1902] 1 Ch. 92; *Bourne v. Swan & Edgar, Re Bourne's Trade Mks.*, [1903] 1 Ch. 211; *Re Trenchard, Trenchard v. Trenchard*, [1905] 1 Ch. 82; *Re Betts, Doughty v. Walker*, [1907] 2 Ch. 149.

**4032.** ———— **Will before & codicil after Act.]**—Testator seised in fee devised real estate by a will dated before above Act, & confirmed by a codicil dated after the Act:—*Held*: the rents were apportionable between the exor. & the devisee. *Semble*: the result would have been the same without the codicil.—*CAPRON v. CAPRON* (1874), L. R. 17 Eq. 288; 43 L. J. Ch. 677; 29 L. T. 826; 22 W. R. 347.

**Annotations:—***Consd. Constable v. Constable* (1879), 11 Ch. D. 681. *Reid. Pollock v. Pollock* (1874), 30 L. T. 779; *Patching v. Barnett* (1880), 43 L. T. 50. *Mentd. Thomas v. Howell* (1873), 22 W. R. 676; *Brownrigg v. Pike* (1882), 7 P. D. 61; *Re Bridger, Brompton Hospital for Consumption v. Lewis*, [1893] 1 Ch. 44.

**4033.** ————.]—Testator by will dated before above Act, after disposing of his residuary personalty, devised the undisposed of rents of real estate. He made a codicil subsequently to above Act:—*Held*: such rents were apportionable.—*CONSTABLE v. CONSTABLE* (1879), 11 Ch. D. 681; 48 L. J. Ch. 621; 40 L. T. 516.

**Annotations:—***Reid. Patching v. Barnett* (1880), 43 L. T. 50; *Re Lucas, Parish v. Hudson* (1885), 54 L. T. 30. *Mentd. Re March, Mander v. Harris* (1884), 27 Ch. D. 166; *Re Bridger, Brompton Hospital for Consumption v. Lewis*, [1894] 1 Ch. 297.

**4034.** ———— **To liabilities as well as rights.]**—Debtor was from year to year of a farm in Norfolk at £300 a year, payable half-yearly on Apr. 6 & Oct. 11, & at the date of the order of adjudication was under notice to quit on the following Oct. 11. The trustee in the bkcp. did not disclaim the tenancy. Upon the expiration of the notice to quit a valuation of growing

crops, tillages, etc., was made between the landlord & the trustee as outgoing tenant. The balance of arrears of rent far exceeded the amount of the valuation:—*Held*: (1) the landlord, upon proof of the custom of the country prevailing in Norfolk, was entitled to set off the amount of the valuation due by him to the outgoing tenant, against the whole balance of the arrears of rent; (2) upon the authority of *Swansea Bank v. Thomas*, No. 4056, *post*, that above Act not only apportioned rights but liabilities as well.—*Re WILSON, Ex p. HASTINGS (LORD)* (1893), 62 L. J. Q. B. 628; 10 Morr. 219; 5 R. 455.

**Annotations:—***Folld. Re Howell, Ex p. Mandleberg*, [1895] 1 Q. B. 844. *Appld. Rochester (Bp.) v. Le Fanu*, [1906] 2 Ch. 513.

**Whether accruing rent liable to be garnisheed.]—***See* No. 4045, *post*.

**SUB-SECT. 2.—AS BETWEEN LANDLORD AND TENANT.**

**A. In General.**

**4035. At common law—No apportionment in respect of time—Tenancy at will.]**—If H. holds land at will rendering rent quarterly the lessor may determine his will when he pleases; but if he determines it within a quarter he shall lose the rent which should have been paid for that quarter. So the lessee may determine when he pleases, but then he must pay the quarter's rent (*HOLT, C.J.*).—*LEIGHTON v. THEED* (1701), 2 Salk. 413; 1 Ld. Raym. 707; 91 E. R. 359; *sub nom. LAYTON v. FIELD, Holt, K. B.* 415; 3 Salk. 222.

**4036.** ————.]—Tenant for life leases for years, rendering rent half-yearly, & dies in the middle of the half-year; equity will not apportion the rent, as to time.—*JENNER v. MORGAN* (1717), 1 P. Wms. 392; 24 E. R. 439, L. C.

**4037.** ————.]—Suppose a tenant for life makes a lease for years & dies the day before the rent is due, the rent is lost both to the exor. & the reversioner, & the law being so, equity will not relieve, though it seems a hard case (*per CUR.*).—*HAY v. PALMER* (1728), 2 P. Wms. 501; 24 E. R. 835.

**Annotation:—***Mentd. Reynish v. Martin* (1746), 3 Atk. 330.

**4038.** ————.]—With respect to [the] argument that the rent may be apportioned, there is in *Viner's Abridgment*, title Apportionment, a long list of instances in which the rent may be apportioned; but they all relate to cases in which there has been some division of the land into distinct portions. There is no instance in which the apportionment is made in respect of time (*LITLEDAL, J.*).—*SLACK v. SHARPE* (1838), 8 Ad. & El. 366; 3 Nev. & P. K. B. 390; 1 Will. Woll. & H. 496; 7 L. J. Q. B. 225; 2 Jur. 839; 112 E. R. 870.

**Annotations:—***Reid. Briggs v. Sowry* (1841), 8 M. & W. 729. *Mentd. Maples v. Popper* (1856), 18 C. B. 177; *Colles v. Evanson* (1865), 19 C. B. N. S. 372.

——— **Where lease surrendered.]—***See* No. 4050, *post*.

**4039. Crown lease—Rent apportionable—If profits accrue de die in diem.]—***R. v. FARMERS OF CUSTOMS* (1628), Litt. 140; 124 E. R. 177.

**PART XV. SECT. 9, SUB-SECT. 1.—D.**

**a. Devisee & tenant—Rent due at testator's death.]—**Since Apportionment Act, 1870, c. 35, a devise of the testator's estate in fee does not, *per se*, pass that portion of the current gale of rent, which had accrued due at the time of his death.—*ROSEINGRAVE v.*

*BURKE* (1873), 7 I. R. Eq. 186.—*IR. p. Assignee of tenant—By way of mortgage—Apportionment from date of assignment.]—*GLASS v. PATTERSON, [1902] 2 I. R. 660.—*IR. a. Tenant's liability ceasing—By eviction.]—*ELVIDGE v. MELDON (1889), 24 L. R. Ir. 91.—*IR.*

**PART XV. SECT. 9, SUB-SECT. 2.—A.**

**f. Adverse holding of parts of premises—Exclusion of lessee—No apportionment—Although agreement made as to abatement.]—**KELLY v. IRWIN (1867), 17 C. P. 351.—*CAN.*

*B. By Statute.*

*See, generally, EQUITY, Vol. XX., pp. 280 et seq.*

**4040. Under Apportionment Act, 1834—Rent payable quarterly.**—Term ending between two rent days.]—*PEERS v. SNEYD* (1853), 17 Beav. 151; 51 E. R. 990.

**4041. Under Apportionment Act, 1870.]—Rent as between landlord & tenant is apportionable under Apportionment Act, 1870 (c. 35).**—*HARTCUP & Co. v. BELL* (1883), 1 Cab. & El. 19.

**4042. — Rent accrued due before application of Act—Rent payable in advance.]—Pltf. let a house to deft. at a yearly rent payable quarterly in advance. By the terms of the agreement, if the rent should be in arrear for fourteen days, or on breach by deft. of any of the clauses of the agreement, pltf. was to be at liberty to re-enter on giving notice. A quarter's rent being in arrear, pltf. gave the required notice, & re-entered. In an action to recover the unpaid rent:—*Held*: Apportionment Act, 1870 (c. 35), does not apply to rent, annuities, dividends, & other payments in the nature of income, which have accrued due before the happening of the event by reason of which it is proposed to apply the Act; the Act, therefore, does not apply to rent payable in advance; & pltf. was entitled to recover the whole amount.**—*ELLIS v. ROWBOTHAM*, [1900] 1 Q. B. 740; 69 L. J. Q. B. 379; 82 L. T. 191; 48 W. R. 423; 16 T. L. R. 258, C. A.

*Annotation:—Mentd. Re Muirhead, Muirhead v. Hill*, [1916] 2 Ch. 181.

**4043. — Whether due date affected.]—This was a creditor's petition for the winding up of a co., petitioner being the landlord of the co.'s premises. The lease of the premises reserved rent payable on the usual quarter days, & the alleged debt upon which petitioner based his claim for a winding-up order was the proportion of rent calculated at the rate of £1,850 *per annum* from Christmas last to the date of the presentation of the petition, although the quarter's rent due from Christmas would not be actually payable till Lady Day next:—*Held*: Apportionment Act, 1870 (c. 35), which provides that rent shall, like interest on money lent, be considered as accruing from day to day, does not alter the date at which it becomes due.**—*Re UNITED CLUB & HOTEL CO., LTD.* (1889), 60 L. T. 665; 5 T. L. R. 368; 1 Meg. 186.

**4044. — Release by will of rent "due."]**—A testator directed his exors. "to forgive to my tenant all rent or arrears of rent which may be due & owing from him at the time of my decease." The rent was due at Lady Day & Michaelmas. Testator died in Feb.:—*Held*: the effect of the clause in the will was to forgive to the tenant the rent due at the quarter day preceding testator's death, & Apportionment Act, 1870 (c. 35), did not affect the bequest so as to entitle the tenant to be forgiven the rent down to the day of testator's death.—*Re LUCAS, PARISH v. HUDSON* (1885), 55 L. J. Ch. 101; 54 L. T. 30, C. A.

*Annotation:—Consd. Re Ford, Myers v. Molesworth*, [1911] 1 Ch. 455.

**4045. — Whether accruing rent liable to be garnished.]—Notwithstanding Apportionment Act, 1870 (c. 35), s. 2, rent cannot, before it is payable, be attached under a garnishee order as a debt owing or accruing due.**—*BARNETT v. EASTMAN* (1898), 67 L. J. Q. B. 517.

*Annotation:—Mentd. Edmunds v. Edmunds*, [1904] P. 362.

**— In bankruptcy & winding up of company.]—***See Sub-sect. 2, E., post.*

*C. On Surrender of Demised Premises.*

**4046. Surrender of part.]—WALKER'S CASE**, No. 3930, *ante*.

**4047. —.]—SMITH v. MALINGS**, No. 3938, *ante*.

**4048. — By assignee of whole—Liability of original lessee.]—BAYNTON v. MORGAN**, No. 4167, *post*.

**4049. Surrender of whole.]—WENTWORTH v. ABRAHAM** (1827), Litt. 61; 124 E. R. 137.

**4050. —.]—A. demised to B. the first & second floor of a house for a year, at a rent payable quarterly. During a current quarter, some dispute arising between the parties, B. told A. that she would quit immediately. The latter answered, she might go when she pleased. B. quitted, & A. accepted possession of the apartments:—*Held*: A. could neither recover the rent, which, by virtue of the original contract, would have become due at the expiration of the current quarter; nor rent *pro rata*, for the actual occupation of the premises for any period short of the quarter.**—*GRIMMAN v. LEGGE* (1828), 8 B. & C. 324; 2 Man. & Ry. K. B. 438; 6 L. J. O. S. K. B. 321; 108 E. R. 1063.

*Annotations:—Consd. Slack v. Sharpe* (1838), 8 Ad. & El. 366; *Phene v. Popplewell* (1862), 12 C. B. N. S. 334. *Reid. Thomas v. Williams* (1834), 3 L. J. K. B. 202; *Dodd v. Acklom* (1843), 6 Man. & G. 672; *Morrison v. Chadwick* (1849), 7 C. B. 266; *Furnival v. Grove* (1860), 8 C. B. N. S. 496. *Mentd. Gore v. Wright* (1858), 8 Ad. & El. 118; *Ackland v. Lutley* (1839), 9 Ad. & El. 879; *Collis v. Evanson* (1865), 12 L. T. 672.

*D. On Assignment or Sub-letting.*

**4051. On assignment of whole—Whether rent apportioned.]—An action of covenant lies against the assignee of a lessee of an estate for a part of the rent, as in such case the action is brought on a real contract in respect of the land, & not on a personal contract. & in case of eviction the rent may be apportioned, as in debt or replevin. *Aliter* in covenant against the lessee himself who is liable on his personal contract.**

Covenant will lie against the assignee of part of an estate for not repairing his part, for it is divisible & follows the land (LORD ELLENBOROUGH, C.J.).—*STEVENSON v. LAMBARD* (1802), 2 East, 575; 102 E. R. 490.

*Annotations:—Consd. Badeley v. Vigurs* (1854), 4 E. & B. 71; *Swansea Corp. v. Thomas* (1882), 10 Q. B. D. 48; *United Dairies v. Public Trustee*, [1923] 1 K. B. 499. *Reid. Doe d. Vaughan v. Meyler* (1811), 2 M. & S. 276; *Holgate v. Kay* (1841), 1 Car. & Kir. 341; *Baynton v. Morgan* (1888), 22 Q. B. D. 74; *Matthey v. Curling*, [1922] 2 A. C. 180. *Mentd. Harris v. Morrice* (1842), 10 M. & W. 260; *Norval v. Pascoe* (1864), 4 New Rep. 390.

**— By trustee in bankruptcy.]—See No. 4056, *post*.**

**4052. On assignment of part.]—JOHNSON v. GLENHAM** (1583), Ch. Cas. in Ch. 169; 21 E. R. 98.

**4053. —.]—GODDARD'S CASE** (1591), Owen, 10; 74 E. R. 862.

**4054. — Calculation of apportionment.]—Where, premises having been let at a rent, the lessee assigns part of the premises to another, the value of the respective parts with reference to which the apportionment of the reserved rent is to be calculated is the value at the date of the severance, not that at the date of the lease granted.**—*SALTS v. BATTERSBY*, [1910] 2 K. B. 155; 79 L. J. K. B. 937; 102 L. T. 730.

*Annotation:—Reid. Mitchell v. Mosley*, [1914] 1 Ch. 438.

**PART XV. SECT. 9, SUB-SECT. 2.—B. t. R. S. O., 1914 (c. 156), s. 4.—Rent accruing from day to day.]—While under the common law rent is not due**

**for any intermediate broken period, & the rent accruing is forfeited by a re-entry before the gale day, that result has been changed by the above sect.**

**providing that all rent is to be regarded as accruing from day to day.**—*CROZIER v. TREVARTON* (1914), 7 O. W. N. 111; 32 O. L. R. 79; 22 D. L. R. 199.—*CAN.*

*Sect. 9.—Apportionment and severance of rent: Sub-sect. 2, D., E. & F.; sub-sect. 3, A., B., C. & D.]*

**4055. On sub-letting—Whether rent apportioned.]**—Pltf. occupied two parcels of land on the understanding that he was to let off a portion when he could. After paying the stipulated rent for more than a year, he let off a portion of each parcel to A. & B. separately, & continued to hold the residue. Pltf. not having paid any rent subsequently, the landlord distrained:—*Held*: as the letting off to A. & B. was by the assent of pltf. & the landlord, in pursuance of the original holding, the rent was apportionable & the landlord entitled to distrain.—*FLESHER v. TROTMAN* (1862), 6 L. T. 218, Ex. Ch.

*E. In Bankruptcy and Winding Up.*

**4056. Lease assigned by trustee in bankruptcy—Right of landlord to sue trustee for apportioned rent.]**—The residue of a term under a lease having become vested in the trustee of the lessee, who was a liquidating debtor, the trustee assigned over during a current quarter. In an action, brought after the expiration of the quarter against the trustee by the lessor, to recover a proportionate part of the quarter's rent up to the time of the assignment over by him:—*Held*: Apportionment Act, 1870 (c. 35), applied, & the lessor was entitled to recover.—*SWANSEA BANK v. THOMAS* (1879), 4 Ex. D. 94; 48 L. J. Q. B. 344; 40 L. T. 558; 43 J. P. 494; 27 W. R. 491, D. C.

*Annotations:—Consd. Hopkinson v. Lovering* (1883), 11 Q. B. D. 92; *Re Wilson, Ex p. Hastings* (1893), 62 L. J. Q. B. 628. *Apld. Rochester (Bp.) v. Le Fanu*, [1906] 2 Ch. 513. *Reid. Hartcup v. Bell* (1883), Cab. & El. 19; *Re Howell, Ex p. Mandelberg*, [1895] 1 Q. B. 844.

**4057. Right of landlord to prove in company winding up—For rent accrued due up to appointment of liquidator.]**—Where a co. in liquidation continued in the possession of leasehold premises for the purpose of carrying on their business:—*Held*: the rent of the premises must be apportioned under Apportionment Act, 1870 (c. 35), the landlord of the premises being entitled to prove jointly with the other creditors for so much rent as became due up to the date of the presentation of the petition for winding up, when a provisional liquidator was appointed, & being entitled to distrain for the full rent due after that day. *Qu.*: whether there would be any such apportionment in a case where the landlord sought to proceed by re-entry instead of by distress.—*Re SOUTH KENSINGTON CO-OPERATIVE STORES* (1881), 17 Ch. D. 161; 29 W. R. 662; *sub nom. Re SOUTH KENSINGTON CO-OPERATIVE STORES, LTD., Ex p. SEYMOUR*, 50 L. J. Ch. 446; 44 L. T. 471.

*Annotations:—Apld. Rochester (Bp.) v. Le Fanu*, [1906] 2 Ch. 513. *Reid. Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322. *Mentd. Re London Metallurgical Co., Ex p. Parker* (1895), 72 L. T. 421; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373.

**4058. Right of landlord to distrain—For rent accrued due up to adjudication.]**—Where a tenant becomes bkpt. during the currency of a quarter, so much of the quarter's rent as is apportionable to the part of the quarter prior to the adjudication is, by Apportionment Act, 1870 (c. 35), "rent accrued due prior to the date of adjudication"

within Bkpcy. Act, 1883 (c. 52), & the landlord is entitled upon the expiry of the quarter to distrain upon the goods of the bkpt. for the same.—*Re HOWELL, Ex p. MANDLEBERG & Co.*, [1895] 1 Q. B. 844; 64 L. J. Q. B. 454; 72 L. T. 472; 43 W. R. 447; 11 T. L. R. 370; 39 Sol. Jo. 452; 2 Mans. 192; 15 R. 372.

*Annotation:—Apld. Rochester (Bp.) v. Le Fanu*, [1906] 2 Ch. 513.

**4059. —For rent accruing due after appointment of liquidator—Company continuing in possession.]**—*Re SOUTH KENSINGTON CO-OPERATIVE STORES, No. 4057, ante.*

*F. On Eviction of Tenant.*

**Eviction from whole of demised premises.]**—*See No. 3894, ante.*

**Eviction from part of demised premises.]**—*See Nos. 3938–3941, ante.*

### SUB-SECT. 3.—SEVERANCE OF RENT.

#### A. In General.

**4060. Whether binding on lessee.]**—Rent may be apportioned by the act of the lessor & the assent of the lessee.

One seised of lands in fee, & also of lands held by copy of court roll in fee, made one entire demise of the lands for years, rendering one entire rent. Afterwards the lessor surrendered the copyhold land to the use of C. & his heirs, & at another time granted the reversion of the freehold lands to C. in fee, & the lessee attorned. Afterwards, the rent being in arrear, C. brought an action of debt for the whole rent:—*Held*: he might well do so, although he comes to the reversion by several conveyances & at several times.—*COLLINS & HARDING'S CASE* (1597), 13 Co. Rep. 57; Cro. Eliz. 622; Moore, K. B. 544; 77 E. R. 1467.

**4061. —**Two messuages were conveyed to such uses as A. should appoint, & in default of appointment to A. for life, & after the determination of that estate in his lifetime to B. for the life of A., in trust for A. & his assigns; with remainder to A. in fee. A. leased both these messuages to a tenant at an entire rent of £65 10s. for a term of years, & during the continuance of that term, contracted to sell the reversion of one of the messuages to C. In the contract the messuage was described on lease, together with another, & that the apportioned rent in respect of it was £40. A. & B. afterwards conveyed the reversion of both houses, & the entire rent of £65 10s. unto D. to certain uses, viz., as to the said messuage which A. had contracted to sell, & the yearly rent of £40, together with all powers & remedies reserved for recovering the rent of £65 10s. to such uses as A. should appoint; & as to the other messuage & the residue of the entire rent to the use of A. in fee. A. afterwards appointed the messuage which he had contracted to sell, & the apportioned rent to the vendee:—*Held*: the latter did not acquire the same rights & remedies against the lessee as he would have acquired if the rent had been legally apportioned by a jury, the lessee for the

### PART XV. SECT. 9, SUB-SECT. 3.—A.

**4060 I. Whether binding on lessee.]**—Where on the consent of all the shareholders, landlords, a tenant in an undivided property has agreed to pay the different sharers the rent of the tenure in proportion to their respective shares, & can be & has been sued for the rent of a particular share, it is not open to

such tenant to cease from paying the proportionate fraction of the rent due in accordance with his agreement, except on the consent of the owner of that particular share.—*LOOTFULHUCK v. GOPEE CHUNDER MOJOMDAR* (1880), 1 L. R. 5 Calc. 941; 6 C. L. R. 402.—*IND.*

a. How calculated—Gift of part of

farm subject to rent—Whether by value or acreage.]—Where a gift of part of a farm, subject to an entire rent, described it as "containing about ninety-eight acres subject to the proportion of rent same bears to the whole," & the gift of the other part of the farm was described it as "containing about twenty acres subject to the proportion of rent to which the entire of said

term not being bound by an apportionment made without his consent.—*BLISS v. COLLINS* (1822), 5 B. & Ald. 876; 1 Dow. & Ry. K. B. 291; 106 E. R. 1411.

*Annotations*:—*Fold. Swansea Corp'n. v. Thomas* (1882), 10 Q. B. D. 48. *Refd. Henniker v. Turner* (1825), 6 Dow. & Ry. K. B. 72.

**Mining leases.**—*See MINES.*

**4062. Mode of apportionment—By jury.**—*BLISS v. COLLINS*, No. 4061, *ante*.

**4063.** ———.]—In replevin against the assignee of the reversion of part of the premises demised, deft. may avow at common law, stating the facts specially, & leaving the apportionment of the rent to be made by the jury; or he may avow in the general form given by Distress for Rent Act, 1737 (c. 19), s. 22, as upon a holding at a certain rent, & if he avow, under the statute, for the entire rent, or with a deduction from the entire rent greater or less than the proportion properly belonging to his interest in the reversion, the judge at *Nisi Prius* may direct the avowry to be amended, either by converting it into an avowry at common law, or leaving it as an avowry under the statute, by describing the rent in conformity with the proportionate value of the respective particles or parts, into which the reversion has been divided. *Semble*: the judge, or the ct. substituted by consent of parties for the judge at *Nisi Prius*, may make such amendment, although first prayed for after the verdict is delivered, & before it is recorded.—*ROBERTS v. SNELL* (1840), 1 Man. & G. 577; 133 E. R. 462.

**4064.** ——— **Reference to master.**—*HOARE & Co. v. HOVE BUNGALOWS, LTD.*, No. 4072, *post*.

#### *B. On Division of Reversion.*

*See* Law of Property Act, 1925 (c. 20), s. 141.

**4065. General rule.**—*ANON.* (1523), Y. B. 14 Hen. 8, fo. 12, B.

*Annotation*:—*Refd. Smerdon v. Tucker* (1859), 7 C. B. N. S. 37.

**4066.** ———.]—If a man, seized in fee of a manor holden in moieties by socage & knight's service, & of a parsonage appropriate, leases them for an entire rent, & on his death devises the manor for life, remainder in tail; the remainderman, on a surrender to him of the estate for life, may distrain on the lessee for an apportionment of the rent; & a bar to his avowry must show the value of all the premises, & answer the rate of the apportionment.—*KWEE v. MOYLE* (1600), Cro. Eliz. 771; 78 E. R. 1002.

*Annotations*:—*Refd. Collins & Harding's Case* (1597), 13 Co. Rep. 57; *Smith v. Malings* (1607), Cro. Jac. 160; *Salts v. Battersby*, [1910] 2 K. B. 155.

**4067.** ———.]—A lease of one-third of a reversion & rent under the seal of the Ct. of Wards is good, & the rent being incident to the reversion is not thereby extinguished, but may be apportioned, & recovered by action of debt.—*WEST v. LASSELS* (1601), Cro. Eliz. 851; 78 E. R. 1077.

*Annotation*:—*Refd. Mitchell v. Mosley*, [1914] 1 Ch. 438.

**4068.** ———.]—*CLAWORTHY v. MITCHEL* (1622), Win. 49; 124 E. R. 42.

*Annotation*:—*Refd. Philpott v. Dobbinson* (1829), 3 Moo. & P. 320.

**4069.** ———.]—*BLISS v. COLLINS*, No. 4061, *ante*.

lands is subject," the proportion of the rent to be borne by the twenty acres & ninety-eight acres respectively is to be determined by their relative value, & not by acreage.—*O'CONNOR v. O'CONNOR* (1870), 19 W. R. 90.—*IR.*

#### **PART XV. SECT. 9, SUB-SECT. 3.—B.**

**4065 i. General rule.**—Where a tenant

leased premises at one entire rent, & his landlord died, having devised the premises among several persons:—*Held*: those persons might bring separate actions against the tenant for such part of the rent as each would be entitled to according to his respective share, without any other apportionment than a jury might make in each suit.—*HARE v. PROUDFOOT* (1834), 6 O. S. 617.—*CAN.*

**4070.** ———.]—Deft., being tenant of land under a lease for years granted by plffs. & containing the usual lessee's covenant to pay rent, assigned all her interest in the term. Subsequently plffs. granted their reversion in part of the demised premises. No rent having been paid by the assignees of deft., the plff. sued her for arrears of rent accrued due since the grant of their reversion in part of the premises, the sum claimed being a fair apportionment of the rent in respect of the other part, the reversion of which remained in plffs.:—*Held*: the covenant to pay rent was divisible; the rent could be apportioned, although the action was founded on a privity of contract only; & therefore plffs. were entitled to recover.—*SWANSEA CORPN. v. THOMAS* (1882), 10 Q. B. D. 48; 52 L. J. Q. B. 340; 47 L. T. 657; 47 J. P. 135; 31 W. R. 506.

*Annotation*:—*Refd. Baynton v. Morgan* (1888), 21 Q. B. D. 101.

#### *C. House and Chattels let at Single Rent.*

**4071. House subject to mortgage.**—*SALMON v. MATTHEWS*, No. 3646, *ante*.

**4072.** ———.]—A mtgor. & mtgee. of houses joined in making a lease of the houses & of furniture in them which belonged to the mtgor. at an inclusive rent payable to the mtgor. until the mtgee. should give notice to the contrary. The mtgee. entered into receipt of the rents, & a judgment creditor of the mtgor. obtained the appointment of a receiver of the interest of the mtgor. in the rent reserved by the lease. The mtgor. was under covenant not to remove the furniture from the houses without the mtgee.'s consent:—*Held*: the creditor was entitled to have the rent apportioned as between the houses & the furniture, so that the receiver could recover the amount apportioned to the furniture, & that it must be referred to a master to make the apportionment.—*HOARE & Co. v. HOVE BUNGALOWS, LTD.* (1912), 56 Sol. Jo. 686, C. A.

*See, generally*, Sect. 2, sub-sect. 4, *ante*.

#### *D. Other Cases.*

**4073. On establishment of right of common.**—*JEW (OR TEW) v. THIRKWELL (OR THACKWELL)*, No. 3927, *ante*.

**4074. House rebuilt beyond boundary by mistake.**—*HARRYMAN v. COLLINS*, No. 4018, *ante*.

**4075. Partial failure of consideration—Tenant prevented from entering on part of demised premises.**—A lessee of one hundred acres of land accepted the lease & entered upon the land. Upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, & that person kept possession of the eight acres, until half a year's rent became due, & excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder. It appeared from the dates of & averments in the pleadings, that the prior lease was for a term extending beyond the duration of the latter lease:—*Held*: the latter demise was wholly void as to the eight acres & the rent was not apportionable.—*NEALE v. MACKENZIE* (1836), 1

**b. Whether lessor may sue lessee for non-payment.**—Plffs. leased land to deft. for a term of years at the rent of £30, & afterwards during the term conveyed away the reversion in part of the land:—*Held*: the rent being entire, plff. could not apportion it, & maintain covenant against the lessee for non-payment.—*ST. ANN'S CHURCH, SACKVILLE (LECTOR) v. BACON* (1864), 6 All. 134.—*CAN.*

**Sect. 9.—Apportionment and severance of rent: Sub-sect. 3, D. Sect. 10: Sub-sects. 1 & 2, A., B., C. & D. (a).]**

**M. & W. 747; 2 Gale, 174; 6 L. J. Ex. Eq. 263; 150 E. R. 635, Ex. Ch.**

**Annotations:—***Refd.* Slack v. Sharp (1838), 7 L. J. Q. B. 225; *Harris v. Morrice* (1842), 10 M. & W. 260; *Bell v. Barchard* (1852), 16 Beav. 8; *Re Moore & Hulme's Contract* (1911), 106 L. T. 330; *Matthey v. Curling*, [1922] 2 A. C. 180. *Mentd.* *Watson v. Waud* (1853), 8 Exch. 335.

**4076. ———.]—WATSON v. WAUD, No. 3658, ante.**

**4077. Compulsory taking of portion of lease—Whether necessary to obtain lessor's consent to apportionment of rent—Land Clauses Act, 1845 (c. 18), s. 119.]—Where a portion of the land comprised in a lease is taken by a railway co. the lessee is not bound, under above sect., to procure the lessor's consent to the agreement with the co. for the apportionment of the rent.—*SLIPPER v. TOTTENHAM & HAMPSTEAD JUNCTION RY. CO.* (1867), L. R. 4 Eq. 112; 36 L. J. Ch. 841; 16 L. T. 446; 15 W. R. 861.**

**Annotation:—***Distd.* *Metropolitan Water Board v. Solomon*, [1908] 2 Ch. 214.

## SECT. 10.—RECOVERY OF RENT.

### SUB-SECT. 1.—DISTRESS.

*See, generally*, DISTRESS, Vol. XVIII., pp. 262–395.

**Issue of debentures by tenant company.]—See COMPANIES, Vol. X., p. 759, Nos. 4741–4743.**

**Company in liquidation.]—See COMPANIES, Vol. X., pp. 931, 967–969, 970, 1014, Nos. 6377, 6642–6667, 6674–6678, 7040, 7044.**

### SUB-SECT. 2.—ACTION FOR RENT.

#### A. When Action lies.

**4078. Express promise—Consideration or demise.]—ACTON v. SYMON, No. 3882, ante.**

**4079. ——— Tenancy on same terms as previous tenant.]—Promise if he would permit him to enjoy a house as L. did, to become his tenant as he was, a good promise to pay the rent.**

The promise to become his tenant as L. was, extends to pay the granting rent as L. ought to have done & the action will lie on this express promise notwithstanding there be a lease (*per CUR.*).—*CHAPMAN v. SOUTHWICKE* (1667), 1 Lev. 204; 83 E. R. 370.

**4080. ——— Note given for rent—Alternative action.]—Where a lessee makes an express promise to pay rent, or gives note for it, an action on the case will lie upon the note or the promise.—ANON. (1687), Freem. Ch. 100; 22 E. R. 1084.**

**4081. ———.]—A promissory note given & received for rent does not extinguish the claim for such rent, which is a debt of a higher degree than that arising upon the note.—DAVIS v. GYDE (1835), 2 Ad. & El. 623; 1 Har. & W. 50; 4 Nev. & M. K. B. 462; 4 L. J. K. B. 84; 111 E. R. 240.**

**Annotations:—***Refd.* *Parrott v. Anderson* (1851), 7 Exch. 93; *Palmer v. Bramley*, [1895] 2 Q. B. 405; *Henderson v. Arthur*, [1907] 1 K. B. 10. *Mentd.* *Baker v. Walker* (1845), 14 M. & W. 465; *Belshaw v. Bush* (1851), 11 C. B. 191; *Bramwell v. Eglington* (1864), 5 B. & S. 39; *Re Defries, Eicholz v. Defries*, [1909] 2 Ch. 423; *Allen v. Royal Bank of Canada* (1925), 41 T. L. R. 625.

*See, generally*, CONTRACT, Vol. XII., pp. 462 et seq.

**4082. ———.]—Quantum meruit will not lie for the use of a house if there be a demise proved; but *indebitatus assumpsit* lies where there is an express promise to pay rent grown due, proved.—VALET v. TYLER (1736), Lee temp. Hard. 282; 95 E. R. 182.**

**4083. On each non-payment—Distinct debts.]—On a promise to pay so much a year for a certain number of years, in consideration of occupying lands, several actions lie upon every non-payment.—HUNT v. SONE (1588), Cro. Eliz. 118; 78 E. R. 376.**

**4084. ——— Annual rent payable quarterly.]—MARLE v. FLAKE (1700), 3 Salk. 118; 91 E. R. 727.**

**Annotation:—***Refd.* *Williams v. Hayward* (1859), 1 E. & E. 1040.

**4085. Demise of land abroad—Action on privity of contract—Not on privity of estate.]—Debt for rent may be brought by a lessor against a lessee in the cts. at Westminster, on a demise of lands in Jamaica; for the action is, in this case, on the privity of contract, which is transitory, & not on the privity of estate, which is local.—WEY v. RALLY (1704), 6 Mod. Rep. 194; Holt, K. B. 705; 2 Salk. 651; 87 E. R. 948.**

**Annotations:—***Folld.* *Vincent v. Godson* (1853), 1 Sm. & G. 384. *Mentd.* *Mostyn v. Fabrigas* (1774), 1 Cowp. 161; *London Corp. v. Cole* (1798), 7 Term Rep. 583; *Companhia de Mocambique v. British South Africa Co., De Sousa v. British South Africa Co.*, [1892] 2 Q. B. 358.

———.]—*See* CONFLICT OF LAWS, Vol. XI., p. 346, Nos. 335, 336.

**4086. Effect of entry for forfeiture—Declaration in ejectment—Loss of right to recover.]—The service by lessor upon lessee of a declaration in ejectment for the demised premises, for a forfeiture, operates as a final election by the lessor to determine the term; & he cannot afterwards, although there has not been any judgment in the ejectment, sue for rent due.—JONES v. CARTER (1846), 15 M. & W. 718; 153 E. R. 1040.**

**Annotations:—***Apld.* *Dendy v. Nicholl* (1858), 4 C. B. N. S. 376; *Grimwood v. Moss* (1872), L. R. 7 C. P. 360. *Consd.* *Evans v. Wyatt* (1880), 43 L. T. 176; *Moore v. Ullocoats Mining Co.*, [1908] 1 Ch. 575. *Folld.* *Wheeler v. Koebler* (1914), Ltd., [1920] 1 Ch. 57. *Consd.* *R. v. Paulson*, [1921] 1 A. C. 271. *Apld.* *Works Comrs. v. Hull*, [1922] 1 K. B. 206. *Refd.* *Croft v. Lumley* (1858), 6 H. L. Cas. 672; *Clough v. L. & N. W. Ry.* (1871), L. R. 7 Exch. 26; *Toleman v. Portbury* (1872), L. R. 7 Q. B. 344; *Morrison v. Universal Marine Insce.* (1873), L. R. 8 Exch. 197; *Scarf v. Jardine* (1882), 7 App. Cas. 345; *James v. Young* (1884), 27 Ch. D. 652; *Coatsworth v. Johnson* (1885), Cab. & El. 642; *Ware v. Booth* (1894), 10 T. L. R. 446; *Serjeant v. Nash, Field*, [1903] 2 K. B. 304; *Dendy v. Evans* (1909), 79 L. J. K. B. 121; *Abram S.S. Co. v. Westville Shipping Co.*, [1923] A. C. 773; *Civil Service Co-op. Soc. v. McGrigor's Trustee*, [1923] 2 Ch. 347.

———.]—*See, also*, Part XXIV., Sect. 1, sub-sect. 2, post.

**4087. Agreement for lease—Action begun before end of term—When specific performance obtainable.]—Pltf. agreed to let certain premises to the deft. for seven years, but no lease was ever granted. Deft. entered into possession, & subsequently, with pltf.'s consent, assigned his interest in the agreement & premises. Before the expiration of the term pltf. commenced an action against deft. for rent, the action being heard after the expiration of the seven years provided for by the agreement:—*Held*: specific performance of the agreement could have been granted & the action was therefore maintainable.—GILBEY v. COSSEY (1912), 108 L. T. 607; 56 Sol. Jo. 363, D. C.**

## PART XV. SECT. 10, SUB-SECT. 2.—A.

**a. Effect of entry for forfeiture—Loss of right to recover.]—A. G. v. JOSEPHSON (1865), 4 N. S. W. S. C. R.**

(L.) 135.—AUS.

**d. Effect of distress—Goods remaining in landlord's possession.]—SMITH v. HAIGHT (1900), 4 Terr. L. R.**

387.—CAN.

**e. Effect of entry of squatter.]—FIELDS v. FIELD, [1918] 1 I. R. 140.—IR.**

*B. When Demand necessary.*

**4088. Covenant to pay—Not necessary.]—ANON.** (1586), *Godb.* 95; 78 E. R. 58.

**4089. Rent reserved—Not necessary.]—BAKER v. SPAIN** (1813), *Hob.* 8; 80 E. R. 158.

*Annotation:—Refd. Rowe v. Young* (1820), 2 BH. 391.

**4090. ———.]—DENE'S CASE** (1615), 1 Roll. Rep. 216; 81 E. R. 442.

**4091. Agreement distinguished from covenant—Demand necessary.]—ANON.** (1586), *Godb.* 95; 78 E. R. 58.

**4092. Bond to perform all covenants—Non-payment of rent.]—On bond to perform all covenants, etc. a breach cannot be assigned for non-payment of rent without showing a demand, except performance be pleaded.—SPECCOT v. SHERES** (1601), *Cro. Eliz.* 828; 78 E. R. 1055; *sub nom.* SPECKET v. SHORE, *Moore, K. B.* 636.

*Annotations:—Refd. Chapman v. Chapman* (1627), *Cro. Car.* 76; *Croucho v. Fastolfe* (1680), *T. Raym.* 418.

**4093. ———.]—POLSON v. WARREN** (1628), *Palm.* 490; 81 E. R. 1186.

**Demand required for re-entry.]—See Part XXIV., Sect. 1, sub-sect. 4, C., *post*.**

*C. Whether Entry by Tenant necessary.*

**4094. General rule—Letting into full possession necessary.]—Where premises are demised by indenture at an entire rent, & there is a covenant by the lessor to pay such rent, no action for rent arrear can be brought on such covenant, unless the lessee has been let into full possession of the premises demised.**

Where, in such an action, deft., in his plea, set forth the lease, & then averred that "he entered & was possessed" of the premises there-under, this would not estop him from proving, that, when he so entered he found some part of the said premises in the possession of a third party under an adverse title.—*HOLGATE v. KAY* (1844), 1 *Car. & Kir.* 341.

**4095. Whether occupation essential—Lease for term.]—ANON.** (1562), *Dal.* 44; 123 E. R. 259.

**4096. ———.]—BELLASIS v. BURBRICK** (1697), *Holt, K. B.* 199; 1 *Salk.* 209; 1 *Ld. Raym.* 170; 90 E. R. 1009; *sub nom.* BELASYSE v. BURBRIDGE, 1 *Lut.* 213.

*Annotations:—Consd. Eaton v. Jaques* (1780), 2 *Doug. K. B.* 455; *Williams v. Bosanquet* (1819), 1 *Brod. & Bing.* 238. *Refd. Birch v. Wright* (1786), 1 *Term Rep.* 378; *Denn d. Jacklin v. Cartright* (1803), 4 *East*, 29; *Doe d. Clarke v. Smaridge* (1845), 7 *Q. B.* 957.

**4097. ———.]—In *assumpsit* pltf. declared that, in consideration that he would permit deft. to occupy a house for four weeks, at ten guineas per week, deft. undertook to pay "the said rent" & pltf. recovered though deft. never took possession, & though no other promise was proved than that deft. said she would take the house upon the terms. The said rent, in such a declaration, means the said sum in gross. The letting & hiring is evidence of an express promise sufficiently to enable the party to bring *assumpsit*.—*GREGORY v. BADCOCK* (1804), 2 *Smith, K. B.* 18.**

**4098. ———.]—Lease at will.]—ANON.** (1562), *Dal.* 44; 123 E. R. 259.

**4099. ———.]—CALTHORPE v. ———** (1671), 1 *Vent.* 108; 86 E. R. 75.

*Annotation:—Refd. Homer v. Ashford* (1825), 3 *Bing.* 322.

**4100. ———.]—BELLASIS v. BURBRICK** (1697), *Holt, K. B.* 199; 1 *Salk.* 209; 1 *Ld. Raym.* 170; 90 E. R. 1009; *sub nom.* BELASYSE v. BURBRIDGE, 1 *Lut.* 213.

*Annotations:—Consd. Eaton v. Jaques* (1780), 2 *Doug. K. B.* 455; *Birch v. Wright* (1786), 1 *Term Rep.* 378; *Williams v. Bosanquet* (1819), 1 *Brod. & Bing.* 238. *Refd. Stomfl v. Hicks* (1697), 2 *Salk.* 413; *Denn d. Jacklin v. Cartright* (1803), 4 *East*, 29; *Doe d. Clarke v. Smaridge* (1845), 7 *Q. B.* 957.

**4101. ———.]—Under building agreement on terms of lease.]—A clause in a building agreement that until the lease is executed the intended lessee shall hold the land at the rent & subject to the conditions to be contained in the lease, creates a liability on the part of the intended lessee to pay the sum reserved by way of rent, although no tenancy has actually existed. Taking possession by the lessee is not a condition precedent to his liability.—*ADAMS v. HAGGER* (1879), 4 *Q. B. D.* 480; 41 *L. T.* 224; 43 *J. P.* 796; 27 *W. R.* 402, *C. A.***

**4102. ———.]—To liability of lessee on bond to secure rent.]—STROUD v. WILLIS** (1596), *Poph.* 114; *Cro. Eliz.* 362; 79 E. R. 1221.

*Annotations:—Mentd. Palmer v. Ekins* (1728), 2 *Str.* 817; *Lalson v. Tremere* (1834), 1 *Ad. & Kl.* 792.

**4103. ———.]—To liability of equitable mortgagee.]—FLIGHT v. BENTLEY, No. 3778, *ante*.**

**4104. ———.]—To liability of third party—Under covenant to pay rent.]—ANON.** (1621), *Win.* 27; 124 E. R. 23.

*D. By Whom Maintainable.**(a) Successors to Reversion.*

*See Law of Property Act, 1925 (c. 20), ss. 141, 142.*

**4105. Assignee—General rule.]—If the lessor grant over his reversion, he cannot have debt for rent due after the assignment, but the grantee may, for the privity of contract follows the estate of the land.—*WALKER'S CASE* (1587), 3 *Co. Rep.* 22 a; 2 *Wms. Saund.* 302, n.; 70 E. R. 676; *sub nom.* *WALKER v. HARRIS*, *Moore, K. B.* 351.**

*Annotations:—Refd. Humble v. Glover* (1594), *Cro. Eliz.* 328; *Overton v. Sydal* (1597), *Cro. Eliz.* 555; *Broom v. Hore* (1598), *Cro. Eliz.* 633; *Hollar v. Casebrooke* (1665), 1 *Keb.* 923; *Thursby v. Plant* (1669), 1 *Saund.* 237; *Windsor (Dean & Chapter) v. Gover* (1671), 2 *Saund.* 302; *Jenkins v. Hermitage* (1674), *Freem. K. B.* 377; *Cook v. Harris* (1697), 1 *Ld. Raym.* 367; *Re Russell Road Purchase-Moneys* (1871), *L. R.* 12 *Eq.* 78; *Swansea Corp'n. v. Thomas* (1882), 10 *Q. B. D.* 48. *Mentd. Marrow v. Turpin* (1599), *Cro. Eliz.* 715; *March v. Bruce* (1613), 2 *Bulst.* 151; *Wynne v. Boughiey* (1660), *O. Bridg.* 570; *Anon.* (1675), 2 *Mod. Rep.* 7; *Banker's Case* (1695), *Skin.* 601; *Roove v. Bird* (1834), 4 *Tyr.* 612; *Neale v. Mackenzie* (1835), 4 *L. J. Ex.* 185; *Morley v. Attenborough* (1849), 3 *Exch.* 506; *Elchholtz v. Bannister* (1864), 17 *C. B. N. S.* 708.

**4106. ———.]—ASHURST v. MINGAY** (1681), *T. Jo.* 144; 81 E. R. 1188.

**4107. ———.]—After assignment of lease—No right against original lessee.]—*WALKER'S CASE*, No. 4105, *ante*.**

**4108. ———.]—HUMBLE v. GLOVER** (1594), *Cro. Eliz.* 328; *Moore, K. B.* 351; 78 E. R. 577.

*Annotations:—Refd. Walker v. Harris, Walker's Case* (1587), 3 *Co. Rep.* 22 a; *Overton v. Sydal* (1597), *Cro. Eliz.* 555; *Hollar v. Casebrooke* (1665), 1 *Keb.* 923.

**4109. ———.]—Part of reversion.]—ARDES v. WATKINS, No. 4127, *post*.**

## PART XV. SECT. 10, SUB-SECT. 2.—B.

**1. Change of tenancy after demand made.—Whether new demand necessary.]—When the order to pay rent has been served on all tenants of the lands, & A. succeeds one of them in possession, it is not necessary to serve A. with the order to pay, for the purpose of obtaining an attachment for non-payment of**

rent.—*ROCHE v. COLLINS* (1849), 1 *Ir. Jur.* 282.—*IR.*

## PART XV. SECT. 10, SUB-SECT. 2.—D. (a).

**4105 I. Assignee—General rule.]—An assignee of the lessor's estate in lands can sue on a guarantee for payment of the rent & performance of the covenants by the lessee, given to the lessor, his**

heirs, exors., admors. & assigns.—*BERRYMAN v. M'CRUM* (1907), 42 *L. L. T.* 19.—*IR.*

**g. Heir—Accrual in lifetime of ancestor—No right of action.]—D'ARCY v. SHERRY** (1842), 4 *L. J. Q. R.* 690.—*IR.*

**h. ———.]—VAN DER BYL & CO. v. FINLAY & KIRN** (1892), 9 *S. C.* 178.—*S. AF.*

Sect. 10.—*Recovery of rent: Sub-sect. 2, D. (a), (b) & (c) i. & ii., & (d).]*

**4110. — Rent accruing after assignment.]—**WHITAKER v. HARROLD, No. 4184, *post*.

**4111. Heir.]—**ANON. (1490), Y. B. 5 Hen. 7, fo. 18, pl. 12.

*Annotations:—*Reid. Road v. Lawns (1561), 2 Dyer, 212 b; Spencer's Case (1583), 5 Co. Rep. 16 a; Robins v. Warwick (1661), 1 Keb. 72, 250.

**4112. Devisee.]—**ANON. (1490), Y. B. 5 Hen. 7, fo. 18, pl. 12.

*Annotations:—*Reid. Road v. Lawns (1561), 2 Dyer, 212 b; Spencer's Case (1583), 5 Co. Rep. 16 a; Robins v. Warwick (1661), 1 Keb. 72, 250.

**4113. —.]—**ANON. (1693), Skin. 367; 90 E. R. 163.

**4114. — Several devisees of part of rent—Actions for several proportions.]—**ARDES v. WATKINS, No. 4127, *post*.

**4115. — Reservation to executors, administrators & assigns.]—**SACHEVERELL v. FROGGATT, No. 3622, *ante*.

**Personal representatives.]—**See EXECUTORS, Vol. XXIII., p. 304, Nos. 3687, 3688.

#### (b) Assignee of Rent.

**4116. General rule—Assignee may enforce.]—**An assignee of rent reserved on a lease for years may bring an action for arrears of rent.—ROBINS v. COXE & WARWICK (1661), 1 Keb. 250; 1 Lev. 22; T. Raym. 11; 83 E. R. 928, Ex. Ch.

*Annotations:—*Folld. Allen v. Bryan (1826), 5 B. & C. 512. *Consd.* Williams v. Hayward (1859), 1 E. & E. 1040. *Reid.* Brownlow v. Hewley (1696), 1 Ld. Raym. 82.

**4117. — Against assignee of term.]—**The assignee of a rent reserved upon the assignment of a term may bring debt against the assignee of the assignee of the term.—BROWNLOW v. HEWLEY (1696), 1 Ld. Raym. 82; 1 Lut. 304; 91 E. R. 951. *Annotation:—*Mentd. Rowe v. Young (1820), 2 Bl. 391.

**4118. —.]—**(1) M. granted to J. a leasehold interest in certain premises, for the term of thirty years, to be computed from Mar. 10, 1839. On Nov. 10, 1846, W. demised to deft. the same premises for the term of twenty-three years, reserving a rent, & afterwards assigned his interest to pltf.:—*Held:* in an action by pltf. to recover arrears of rent, first, that by the deed a rent had been created, & it was assignable; secondly, pltf., who was the assignee of the party to whom the rent was reserved, could maintain an action for the recovery thereof; & thirdly, a privity was created between pltf. & deft., the same as if deft. had actually attorned to pltf., for, by the 4 & 5 Ann. c. 3, s. 9, attornment is unnecessary in such a case.

(2) By the deed entered into by deft. & J. licence & liberty was given to deft. to use, during the continuance of the demise, a certain railway, jointly with J. Pltf. had, after the assignment to him, & before the rent for which the action was brought became due, prevented deft. from using the railway:—*Held:* this constituted no answer to the action, as the rent issued out of the thing demised, & not out of the easement to use the railway.—WILLIAMS v. HAYWARD (1859), 1 E. & E.

1040; 28 L. J. Q. B. 374; 33 L. T. O. S. 344; 5 Jur. N. S. 1417; 7 W. R. 563; 120 E. R. 1200.

*Annotations:—*As to (1) *Reid.* Wedd v. Porter, [1916] 2 K. B. 91. As to (2) *Reid.* Evans v. Robins (1863), 11 L. T. 211; Chappell v. Mason (1894), 10 T. L. R. 404.

**4119. — Although no interest in reversion.]—**The assignee of a rent reserved by lease may maintain debt for the rent, although he may have no interest in the reversion.—ALLEN v. BRYAN (1826), 5 B. & C. 512; 4 L. J. O. S. K. B. 210; 108 E. R. 191.

*Annotation:—*Consd. Williams v. Hayward (1859), 1 E. & E. 1040.

**4120. —.]—**KNILL v. PROWSE, No. 3782, *ante*.

#### (c) Co-Owners.

See R. S. C., Ord. 16, r. 9.

#### i. Joint Tenants.

**4121. Right of survivor—Whole rent.]—**If two joint tenants make a lease at will, rendering rent, & one dies, all survives to the other; & if the lessee continues his possession, the survivor shall have an action for the whole rent for the privity.—HENSTEAD'S CASE (1594), 5 Co. Rep. 10 a; 77 E. R. 63.

*Annotation:—*Mentd. Manby v. Scot (1663), 1 Keb. 482.

**4122. Necessity for joinder of all lessors.]—**One joint tenant cannot avow for rent, nor maintain an action of debt for rent.—PULLEN v. PALMER (1694), Carth. 328; cited in 2 Lut. App. 1211; 5 Mod. Rep. 71, 150; 3 Salk. 207; 90 E. R. 792.

*Annotations:—*Consd. Leigh v. Shepherd (1821), 2 Brod. & Bing. 465. *Reid.* Gravenor v. Woodhouse (1824), 9 Moore, C. P. 148; Robinson v. Hoffman (1827), 3 C. & P. 234.

**4123. — Assignment by one joint tenant—Lease of tithes.]—***Qu.*: whether if one only of two joint tenants execute an assignment of a lease of tithes, the person claiming under that lease can support an action for not setting them out.—WYBURD v. TUCK (1799), 1 Bos. & P. 458; 126 E. R. 1009.

*Annotations:—*Mentd. Fell v. Wilson (1810), 12 East, 83; Welch v. Uppill (1819), 3 Moore, C. P. 330; Hulme v. Pardoe (1824), 13 Price, 684; Goode v. Howells (1838), 1 Horn. & H. 199; Shaw v. Kay (1847), 1 Exch. 412; Jervis v. Tomkinson (1856), 1 H. & N. 195.

**4124. — Notwithstanding severance of rent—Direction to pay in separate shares.]—**POWIS v. SMITH, No. 3793, *ante*.

**4125. — Mortgage of undivided share—Joinder of mortgagor & mortgagee.]—**MAGNAY v. EDWARDS, No. 4126, *post*.

**Right to distrain.]—**See DISTRESS, Vol. XVIII., p. 288, Nos. 235–241.

#### ii. Tenants in Common and Coparceners.

**4126. Tenants in common—Joint & several covenant.]—**Mtgor. & mtgee. of an undivided moiety of certain premises, jointly with the owner of the other moiety, demised the whole for twenty-one years to G., the latter covenanting with the three lessors jointly & severally to pay the rent reserved, but not saying to whom. G. entered, upon the premises, & afterwards became bkpt. His assignees having accepted the lease:—*Held:* defts. were liable in covenant at the suit of the

**41121. Devisee.]—**HUGHES v. BROOKE (1878), 43 U. C. R. 609.—CAN.

**k. Reversioner — After conveyance of his title—For arrears before conveyance.]—**Where a reversioner conveys his legal title, he cannot maintain an ejectment for non-payment of rent, for arrears due in his own time.—BLENNERHASSETT v. DAY (1812), 2 Ball & B. 104, 124, 134.—IR.

#### PART XV. SECT. 10, SUB-SECT. 2.—D. (c) i.

**41221. Necessity for joinder of all lessors.]—**Rent due to pltf. jointly with another cannot be sued for in a county ct. by pltf. alone, & where the non-joinder is not disclosed until trial deft. is entitled to a nonsuit.—McLAUGHLIN v. KNOWLES (1913), 41 N. B. R. 548;

12 E. L. R. 508.—CAN.

**4122 ii. —.]—**A landlord, one of several co-sharers, cannot sue a tenant of the joint estate for his separate share of the rent unless the tenant has paid or agreed to pay him separately.—GANGA NARAYAN DAS v. SARODA MOHAN ROY CHOWDHRY (1869), 3 B. L. R. A. C. 230; 12 W. R. 30.—IND.

three lessors for rent accruing while they were possessed of the premises.—*MAGNAY v. EDWARDS* (1853), 13 C. B. 479; 1 C. L. R. 141; 22 L. J. C. P. 170; 21 L. T. O. S. 103; 17 Jur. 839; 1 W. R. 331; 138 E. R. 1286.

*Annotation*:—*Mentd.* *Graham v. Furber* (1853), 2 C. L. R. 10.

**4127.** ———. *Whether entitled to sue separately—Claim for several proportions.*—Debt lies by an assignee of part of a reversion, & also by several devisees of part of a rent, for their several proportions.—*ARDES v. WATKINS* (1600), Cro. Eliz. 651; *Moore*, K. B. 549; 78 E. R. 890.

*Annotations*:—*Refd.* *Robinson v. Coxo & Warwick* (1661), 1 Keb. 153; *Williams v. Hayward* (1859), 1 E. & E. 1040. *Mentd.* *Goodwin v. Parker* (1670), Freem. K. B. 1; *Rivis v. Watson* (1839), 5 M. & W. 255.

**4128.** ———. *Tenants in common may sever in debt for rent.*—*BAKER v. BEMISFORD* (1663), 1 Keb. 509; 2 Sid. 9; 83 E. R. 1081.

*Annotations*:—*Consd.* *Kitchin v. Bunkley* (1663), 1 Keb. 572. *Mentd.* *Vaughan v. Browne* (1738), Andr. 328; *Curtis v. Vernon* (1790), 3 Term Rep. 587.

**4129.** ———. *One tenant in common cannot bring debt for his portion of the rent.*—*BLANCHARD v. DYER* (1685), 2 Show. 446; 89 E. R. 1033.

**4130.** ———. *Tenants in common of a reversion expectant upon a lease for years, upon which a rent is reserved, may join in debt for the rent, or sever.*—*MARTIN v. CROMPE* (1698), 1 Ld. Raym. 340; Comb. 474; 2 Salk. 444; 91 E. R. 1123, Ex. Ch.

*Annotations*:—*Refd.* *Foley v. Addenbrooke* (1813), 4 Q. B. 197; *Thomas v. Thomas* (1850), 5 Exch. 28; *Buckley v. Barber* (1851), 6 Exch. 164.

**4131.** ———. *Upon a lease by tenants in common the survivor may sue for the whole rent; although the reservation be to the lessors according to their respective interests. The action for rent by tenants in common is in its nature a joint action, & consequently the survivors may sue for the whole.*—*WALLACE & MORTIMER v. M'LAREN* (1828), 1 Man. & Ry. K. B. 516.

*Annotations*:—*Expld.* *Beer v. Beer* (1852), 12 C. B. 60. *Refd.* *Burne v. Cambridge* (1836), 1 Mood. & R. 539.

**4132.** ———. *Where it was proved that the contract, by which the party held who underlet to pltf., was made by the party with deft. on behalf of deft. & his two brothers as landlords:—Held: (1) to be no evidence in support of an avowry for rent in arrear upon a demise by deft. alone; (2) the judge was right in refusing to amend the avowry by stating the demise to be on behalf of the three, pltf. having offered to pay deft. one third of the rent, supposing the demise to be by the three tenants in common, which deft. had refused, contending the demise was solely by him.*—*BECKESON v. GREAVES* (1849), 14 L. T. O. S. 178.

**4133.** ———. *Right of survivor—Whether entitled to sue for whole rent.*—*WALLACE & MORTIMER v. M'LAREN*, No. 4131, *ante*.

**4134.** ———. *To a declaration in debt for arrears of rent, stating that pltf., & S. deceased, were seised in fee, & demised to deft. from year to year, rendering a certain rent to pltf. & S., which had fallen into arrear since the death of S., it is a good plea, on general demurrer, that pltf. & S. were tenants in common.*—*BURNE v. CAMBRIDGE* (1836), 1 Mood. & R. 539, N. P.

**4135.** *Coparceners—Cannot sue separately.*—One coparcener cannot sue separately for his portion of rents accruing to him & his fellows.—

*DECHARMS v. HORWOOD* (1834), 10 Bing. 526; 4 Moo. & S. 400; 3 L. J. C. P. 198; 131 E. R. 999.

(d) *Other Cases.*

**4136.** *Tenant making sub-lease of whole term—Assignment.*—When a termor assigns his whole term, rendering rent, he may maintain debt for the rent, but cannot distrain.—*FLOYD v. LANGFIELD* (1677), Freem. K. B. 218; 89 E. R. 155; *sub nom.* *LOYD v. LANGFORD*, 2 Mod. Rep. 174.

*Annotations*:—*Refd.* *Baker v. Gostling* (1834), 1 Bing. N. C. 19. *Mentd.* *Pluck v. Digges* (1831), 5 Bl. N. S. 31.

**4137.** ———. *NEWCOMB v. HARVEY* (1690), Carth. 161; 90 E. R. 699.

*Annotations*:—*Consd.* *Williams v. Hayward* (1859), 1 E. & E. 1040. *Refd.* *Pluck v. Digges* (1831), 5 Bl. N. S. 31; *Baker v. Gostling* (1834), 1 Bing. N. C. 19.

**4138.** *Lease in name of agent—Rent payable to principal—Action on covenant by principal.*—If A. being seised of land, give a letter of attorney to B. to make leases, & he grant a lease to C. in his own name, in which C. covenants to pay the rent to A. *Qu.*: whether A. can maintain an action of covenant against C. on his deed.—*LOWTHER v. KELLY* (1723), 8 Mod. Rep. 115; 88 E. R. 91.

**4139.** *Agreement by guardians on behalf of infant—Right of infant—Not of full age when action brought.*—Where A. & B. tutors dative appointed by a Scottish ct. as guardians of an infant, executed for & on his behalf a tack or agreement, *inter partes*, for a lease, whereby a salmon fishery, in Scotland, was demised to C., for four years, at a certain rent, covenanted to be paid to the infant:—*Held*: the infant might maintain an action of debt, in his own name upon the agreement, to recover arrears of rent, though he was no party to the agreement, nor proved to be of full age at the time of action brought.—*CARNEGIE v. WAUGH* (1823), 2 Dow. & Ry. K. B. 277; 1 L. J. O. S. K. B. 89.

*See, now*, R. S. C., Ord. 16, r. 16.

*See, further*, INFANTS, Vol. XXVIII., pp. 190 *et seq.*

**4140.** *Reversion transferred to new tenant—During continuance of yearly tenancy—Loss of right to sue yearly tenant.*—A. let a house to B. as tenant from year to year, & afterwards granted a lease by deed to C. of the house & other property for twenty-one years:—*Held*: this transferred the reversion of the house to C., & A. could not recover against B. for rent due after the lease.—*HARMER v. BEAN* (1853), 3 Car. & Kir. 307.

*Annotations*:—*Refd.* *Wordsley Brewery Co. v. Halford* (1903), 90 L. T. 89; *Horn v. Beard*, [1912] 3 K. B. 181; *Dale v. Hatfield Chase Corpn.*, [1922] 2 K. B. 282.

**4141.** *Action by lessee against sublessee—Surrender of lease by lessee—New tenancy by parol—Real Property Act, 1845 (c. 106), s. 9.*—Where a tenant's term is determined by notice to quit a demand of possession is not necessary before bringing an action for the recovery of possession.

The tenant of a farm underlet it to deft. on a yearly tenancy. He subsequently gave deft. notice to quit. During the currency of the notice he, by a parol arrangement with the owner of the farm & pltf., surrendered his reversion to the owner, who thereupon & as part of the same transaction granted to pltf. by parol a new tenancy from year to year to commence immediately & to run concurrently with, but subject to, the unexpired portion of deft.'s term. On the expiry of

PART XV. SECT. 10, SUB-SECT. 2.—  
D. (d).

1. *Action by committee of lunatic's*

*estate—For rent accruing after death of lunatic.*—The committee of a lunatic's estate cannot maintain an action for rent issuing out of the lunatic's freehold

estate, which has accrued after the death of the lunatic.—*FOOT v. LESLIE* (1885), 16 L. R. Ir. 411.—*IR.*

**Sect. 10.—Recovery of rent: Sub-sect. 2, D. (d), E. (a), (b), (c), (d) & (e), & F. (a), (b), (c), (d) & (e).]**

the notice to quit deft.'s rent was in arrear:—**Held:** by virtue of above sect. pltf. upon the grant to him of the new tenancy became entitled to the reversion expectant on deft.'s term notwithstanding that the grant was by parol, & was consequently entitled to sue deft. for the rent.—**PLUMMER & JOHN v. DAVID**, [1920] 1 K. B. 326; 89 L. J. K. B. 1021; 122 L. T. 493.

**See, now, Law of Property Act, 1925 (c. 20), s. 139.**

*E. Against Whom Maintainable.*

(a) *Lessee After Assignment.*

**See Part XXI., Sect. 10, sub-sect. 1, B., post.**

(b) *Assignee of Lease.*

**Liability during occupation.]—See Part XXI., Sect. 10, sub-sect. 3, B. (b), post.**

**Effect of reassignment.]—See Part XXI., Sect. 10, sub-sect. 4, post.**

(c) *Guarantor.*

**4142. Covenant by third party—That tenant will pay rent—Liability of guarantor.]—In articles of agreement executed between A. & E. whereby A. lets a house to E. & E. agrees to pay the rent; if B. a third person covenant therein for himself, etc., on behalf of E. that E. shall pay the rent, & sign the deed, an action of covenant, on non-payment by E. will lie against B.—**SALTER v. KIDLEY** (1688), 1 Show. 58; Carth. 70; Holt, K. B. 210; 89 E. R. 447.**

**Annotations:—Mentd. Bensley v. Burdon** (1830), 8 L. J. O. S. Ch. 85; **Hight d. Jefferys v. Bucknell** (1831), 2 B. & Ad. 278.

**4143. — Breach after death of covenantor—Devises not liable.]—B., as surety for J., became party to an indenture whereby A. leased land to J., at a rent payable by J., for a term determinable on A.'s death; & B. & J. covenanted jointly & severally for themselves & their heirs that B. & J., or one of them, or their heirs, exors., etc., should pay the rent reserved, & also a further rent, as liquidated damages, if the land were farmed contrary to the covenants of the lease. After B.'s death, rents of both kinds became due:—**Held:** B.'s devisees were not liable, under 3 Will. & Mar. c. 14, to an action of debt for any of the sum due.—**FARLEY v. BRIANT** (1835), 3 Ad. & El. 839; 1 Har. & W. 299; 5 Nev. & M. K. B. 42; 4 L. J. K. B. 240; 111 E. R. 632.**

**Annotations:—Mentd. Morse v. Tucker** (1846), 5 Hare, 79; **Re St. George Steam Packet Co., Ex p. Hamer's Devises** (1852), 21 L. J. Ch. 832.

**— Effect of variation of terms.]—See GUARANTEE, Vol. XXVI., p. 161, Nos. 1215, 1216.**

**4144. Guarantee to tenant—No agreement with landlord—Guarantor not liable.]—Pltf. let a house to J. on her sending him a letter addressed to her by deft. saying he would undertake to be responsible for the rent:—**Held:** there was no agreement between pltf. & deft.—**NASH v. SPENCER** (1896), 13 T. L. R. 78.**

**4145. Liability on bond—Confined to amount of**

**penalty.]—Where there is a bond for payment of rent, the bond is only a security to the amount of the penalty.—**WHITE v. SEALY** (1778), 1 Doug. K. B. 49; 99 E. R. 35.**

**Annotations:—Dtd. Lonsdale v. Church** (1788), 2 Term Rep. 388. **Reid. Knight v. Maclean** (1792), 3 Bro. C. C. 496.

**—.]—See BONDS, Vol. VII., p. 213, Nos. 551–572.**

(d) *Personal Representatives.*

**When representatives have not entered.]—See EXECUTORS, Vol. XXIV., pp. 639–641, Nos. 6651–6667.**

**When representatives have entered.]—See EXECUTORS, Vol. XXIV., pp. 641, 642, Nos. 6675–6678.**

**Occupation for purposes of administration.]—See EXECUTORS, Vol. XXIV., p. 692, No. 7173.**

**Defence of plene administravit.]—See EXECUTORS, Vol. XXIV., p. 734, Nos. 7618–7622.**

(e) *Other Cases.*

**4146. Trustees of building society—Action by assignees of bankrupt member—Notwithstanding indemnity by members.]—Bkpt. & defts. were members of a society formed for the purpose of building a certain number of houses; the expenses of the undertaking to be defrayed by monthly subscriptions of the members. Bkpt. had agreed to let to the co. the ground on which the houses were to be built; the leases to be made to & executed by defts., as trustees of the society, who were to be indemnified by the members for any loss or damage they might sustain in consequence of carrying the trusts into execution:—**Held:** under such circumstances, the assignees of bkpt. might sue the trustees, his co-partners, for breach of covenant in not paying rent.—**BEDFORD v. BRUNTON** (1834), 1 Bing. N. C. 390; 1 Scott, 245; 4 L. J. C. P. 97; 131 E. R. 1171.**

**Annotation:—Mentd. Wright v. Hickling** (1866), L. R. 2 C. P. 109.

**4147. Receiver appointed by debenture holders—Stables occupied by company.]—**JUSTICE v. JAMES** (1899), 15 T. L. R. 181, C. A.**

**—.]—See COMPANIES, Vol. X., p. 797, Nos. 5037–5039.**

**Receiver appointed by court.]—See, generally, RECEIVERS.**

**4148. Surviving lessees—Covenant joint & several—Breach after death of one.]—**TREVER v. NURSE** (1666), 2 Keb. 44; 84 E. R. 28.**

**Annotation:—Reid. Addison v. Gibson** (1847), 8 L. T. O. S. 467.

*F. Defences.*

(a) *Payment.*

**See R. S. C., Ord. 21, r. 1.**

**What amounts to—Payment to superior landlord.]—See Sect. 5, sub-sect. 2, ante.**

**4149. — Payment under threat of distress—To annuitant claiming under lessor.]—**TAYLOR v. ZAMIRA**, No. 3864, ante.**

**— Payment to mortgagee.]—See Sect. 5, sub-sect. 1, D., ante, & generally, MORTGAGE.**

**— Mode of payment.]—See Sect. 4, sub-sect. 5, ante.**

**PART XV. SECT. 10, SUB-SECT. 2.—**  
**E. (e).**

**4142 i. Covenant by third party—That tenant will pay rent—Liability of guarantor.]—**TAYLOR v. HORTOP** (1872),**

**22 C. P. 542.—CAN.**

**4142 ii. —.]—**GOPAL SINGH v. BHAWANI PRASAD** (1888), 1 L. R. 10 All. 531.—IND.**

**PART XV. SECT. 10, SUB-SECT. 2.—**  
**E. (e).**

**m. Members of athletic association.]—**FRANKS v. STORMONT** (1911), 20 O. W. R. 23; 3 O. W. N. 56; 24 L. L. R. 508.—CAN.**

(b) *Eviction.*

See Sect. 6, sub-sects. 1-3, *ante*.

(c) *Release.*

**4150. Release from all demands—No discharge of subsequent rent.]**—A release of all actions & demands made by a lessor to a lessee will not discharge the subsequent arrears of rent; but if a lessee assign all his term & make such a release to the assignee the growing payments are discharged.—*WHITTON v. BYE* (1618), Cro. Jac. 486; 79 E. R. 415; *sub nom.* *WOOTON v. BYE*, Poph. 136; *sub nom.* *MITTON v. BYE*, J. Bridg. 123.

*Annotations*:—*Folld.* *Henn v. Hanson* (1663), 1 Sid. 141. *Refd.* *Cartright v. Pingree* (1675), Freem. K. B. 398.

**4151.** ———. *—*—*—*.]—A release by pltf. of all demands does not necessarily release deft. from payment of rent reserved in a lease for years where the release was on a day before the rent was due.—*HENN v. HANSON* (1663), 1 Lev. 99; 1 Sid. 141; 1 Keb. 510; 83 E. R. 317.

*Annotations*:—*Consd.* *Austin v. Lippencott* (1673), 1 Mod. Rep. 99; *Trevil v. Ingram* (1673), 2 Mod. Rep. 281. *Refd.* *Hayes v. Bickerstaff* (1675), Freem. K. B. 194.

**4152.** ———. *—*—*—*.]—A release of all demands does not include rent which has not accrued due at the time of the release.—*TOTHIL v. INGRAM* (1677), 1 Vent. 314; 86 E. R. 202; *sub nom.* *TREVIL v. INGRAM*, 2 Mod. Rep. 281; *sub nom.* *INGRAM v. BRAY*, 3 Keb. 829; 2 Lev. 210.

**4153. What amounts to release—Covenant that lessee retain part of rent—Satisfaction of lessor's debt.]**—*JEDGER v. STANTON*, No. 3853, *ante*.

(d) *Covenant Invalid or Unenforceable.*

**4154. Validity of lease—General rule.]**—In debt for rent upon a lease deft. may deny its validity.—*DAY v. AUSTIN* (1595), Cro. Eliz. 398; 78 E. R. 642.

**4155.** ———. *Non-execution by lessor.]*—*SWATMAN v. AMHLER* (1852), 8 Exch. 72; 22 L. J. Ex. 81; 19 L. T. O. S. 312; 155 E. R. 1204.

*Annotations*:—*Distd.* *Wood v. Copper Miners' Co.* (1854), 14 C. B. 428. *Refd.* *Toler v. Slater* (1867), L. R. 3 Q. B. 42; *Merrall v. Foel*, Comrs. of England (1869), 17 W. R. 676; *Morton v. Woods* (1869), 38 L. J. Q. B. 81; *Dawes v. Dowling* (1874), 22 W. R. 770. *Mentd.* *Morgan v. Pike* (1854), 14 C. B. 473; *Hew v. Greek* (1864), 3 H. & C. 391.

**4156.** ———. *Void charitable uses—Grantee acquiring title by lapse of time.]*—On Mar. 10, 1747, a lease by deed of one acre of land for one hundred & fifty years, from Mar. 25, 1747, at a rent of 1s. a year, if demanded, was granted to persons in a parish in trust, that the lessees & the survivors or survivor, his exors., administrators, & assigns, might build & continue a workhouse upon the land for the better reception & employment, & for the lodging & entertainment only of all the poor people of the parish, & not to be let, mortgaged for money, or assigned to any other use, interest, or purpose whatever. If the inhabitants should discontinue the prescribed use of the building so to be erected, & should be willing to deliver it to the landlord, it should be lawful for them to do so, he paying the then value of the building. The deed was not enrolled. The last payment of rent was in 1776. In 1862 the property was sold to defts. by the parish officers as freehold. On action by the reversioner to recover 1s. rent:—*Held*: the lease was for charitable purposes, & failed to comply with the Mortmain Act, 1736 (c. 36), & was not saved from the effects of that statute by Poor Law Amendment Act, 1844 (c. 101), s. 73. The lease was therefore void *ab initio*, & Stat. Limitations began to run against the grantor,

if not from the time of the execution of the lease, at any rate from the time when rent ceased to be paid.—*WEBSTER v. SOUTHEY* (1887), 36 Ch. D. 9; 56 L. J. Ch. 785; 56 L. T. 879; 52 J. P. 36; 35 W. R. 622; 3 T. L. R. 628.

*Annotations*:—*Refd.* *Haigh & Baxter v. West* (1893), 68 L. T. 531. *Mentd.* *Re Verrall, National Trust for Places of Historic Interest or Natural Beauty v. A.-G.*, [1916] 1 Ch. 100.

**Premises let for illegal or immoral purpose.]**—*See CONTRACT*, Vol. XII., pp. 276, 277.

**Defence of Statute of Frauds—Promise to pay arrears & increase of rent.]**—*See CONTRACTS*, Vol. XII., p. 125, Nos. 830, 831.

**4157.** ———. *Failure to plead statute—Subsequent action on same agreement—Res judicata.]*—Pltf. brought an action in the county ct. to recover rent due under an agreement for a lease. Deft. set up the defence that there had been no concluded agreement, but the ct. entered judgment for pltf. Further rent having become due pltf. brought a second action in the county ct. Deft. gave notice of the special defence that there was no memorandum or note of the agreement sufficient to satisfy Stat. Frauds, s. 4. The county ct. judge was of opinion that the matter was *res judicata* & gave judgment for pltf.:—*Held*: as deft. might have set up the defence of the Stat. Frauds in the first action, & had omitted to do so, he was not entitled to reply upon it in the subsequent action, & the decision of the county ct. judge was therefore right.—*HUMPHRIES v. HUMPHRIES*, [1910] 2 K. B. 531; 79 L. J. K. B. 919; 103 L. T. 14, C. A.

*Annotation*:—*Folld.* *Cooke v. Rickman*, [1911] 2 K. B. 1125.

— *What contracts within statute.]* — *See Part II.*, Sect. 4, sub-sect. 1, *ante*.

**4158. Absence of consideration—Failure to plead—Subsequent action on same agreement—Res judicata.]**—Pltf. sued deft. in the K. B. Div. for rent alleged to be due under an agreement, & judgment was signed under R. S. C., Ord. XIV., for a part of the sum claimed which deft. admitted that she owed. In a subsequent action in the county ct. between the same parties for further rent under the same agreement, deft. raised the defence that there was no consideration for the agreement:—*Held*: deft. having admitted in the first action that rent was due from her under the agreement was estopped from raising in the second action the defence of no consideration for the agreement.—*COOKE v. RICKMAN*, [1911] 2 K. B. 1125; 81 L. J. K. B. 38; 105 L. T. 896; 55 Sol. Jo. 668, D. C.

(e) *Bond for Recovery of Debt.*

**4159. General rule.]**—*ACTON v. SYMON*, No. 3882, *ante*.

**4160. Provision for postponement of payment—Bond to be given for payments postponed—Bond tendered after proceedings commenced—Stay of proceedings refused.]**—By a deed of lease it was stipulated that the lessees should be at liberty to retain a rent of £1,100 a year, or any part thereof, upon giving the lessor a bond to pay whatever they so retained, at the end of seventeen years, with interest. The lessees having omitted to pay the rent or give a bond, & the lessor having sued for the rent, the ct. refused to stay proceedings on affidavit that since the commencement of the suit the lessees had executed & tendered to the lessor, a bond for the amount retained & to be retained.—*JONES v. WINKFIELD* (1833), 10 Bing. 308; 3 Moo. & S. 846; 131 E. R. 923.

*See, also*, *BONDS*, Vol. VII., p. 192, Nos. 314-319.

**Sect. 10.—Recovery of rent: Sub-sect. 2, F. (f), G. & H.]**

**(f) Other Defences.**

**4161. Premises out of repair—Tenant under covenant to repair—No defence.]—**HORNDGE v. WILSON, No. 3859, *ante*.

**4162. Promise under duress—Consideration of withdrawing distress.]—**An agreement is not void because made under the influence of duress of goods.

Pltf. had distrained for £19 10s. due. Deft. signed an agreement, by which, in consideration of pltf. withdrawing the distress, he agreed immediately to pay £3 7s. 6d. in part payment, & the balance within a month; in default of which, pltf. to be at liberty to levy a distress, or take any other steps for the recovery of the same. Deft. being sued on this agreement, sought to avoid it on two grounds: that the distress was wrongfully made for £19 10s., the smaller sum of £3 7s. 6d. only being due, & that deft. entered into the agreement to prevent the sale of his goods; & that there was no consideration for the agreement, except in respect of £3 7s. 6d.:—**Held:** neither of these grounds of defence was an answer to the action.—**SKATE v. BEALE** (1840), 11 Ad. & El. 983; 3 Per. & Dav. 597; 9 L. J. Q. B. 233; 4 Jur. 766; 113 E. R. 688

**Annotations:—***Mentd.* Ashmole v. Wainwright (1842), 2 Q. B. 837; Wakelield v. Newbown (1844), 6 Q. B. 276; Gulliver v. Cosens (1845), 1 C. B. 788; Guthrie v. Abbot Mozuffer (1871), 14 Moo. Ind. App. 53; The Keroula (1886), 11 P. D. 92.

—**See** CONTRACT, Vol. XII., pp. 95, 96, Nos. 586–590.

**4163. Judgment by default in previous action—Defendant not estopped.]—**Deft., by allowing judgment to go against him by default in an action to which he has a good defence, is not estopped from pleading such defence in a subsequent action against him by the same pltf., if such defence be not inconsistent with any traversable averment in the declaration in the former action. Therefore where, in the first action, in which judgment by default was so obtained, the declaration was for non-payment of rent which had accrued due under an agreement to grant a lease, & pltf., in a

subsequent action, sued the same deft. for further rent under the same agreement, deft was held not to be estopped from pleading in such last action that a yearly tenancy had, by agreement between the parties, been substituted for deft.'s interest under the agreement declared on, & that such yearly tenancy had been duly put an end to before the accruing of pltf.'s cause of action.—**HOWLETT v. TARTE** (1861), 10 C. B. N. S. 813; 31 L. J. C. P. 146; 9 W. R. 868; 142 E. R. 673.

**Annotations:—***Expld.* Humphries v. Humphries, [1910] 2 K. B. 531. *Consd.* Cooke v. Rickman, [1911] 2 K. B. 1125. *Refd.* *Re* Hilton, *Ex p.* March (1892), 67 L. T. 594; *Re* South American & Mexican Co., *Ex p.* Bank of England, [1895] 1 Ch. 37.

**See** ESTOPPEL, Vol. XXI., pp. 144–146, Nos. 83–97.

**4164. Condition precedent not performed—Consent of superior landlord to trade—To be obtained by landlord.]—**Pltf. & defts. agreed that pltf. should let, & defts. take, certain premises, subject to the approval by the superior landlord of the lease; that pltf. should forthwith apply to the superior landlord for a licence to demise, & for deft. to carry on a certain trade, & that defts., “until the lease should be granted, should hold & occupy the premises at the annual rent of £130.”:—**Held:** the rent was not payable until the required consents had been obtained.—**BROOK v. FLETCHER** (1877), 37 L. T. 100; 41 J. P. 759.

**4165.—Proportion of license duty deducted from rent—Proportion to be determined before action.]—**The rent of certain licensed premises being in arrear, the landlord commenced an action under Ord. 14 to recover possession & money due. The lessee admitted the arrears of rent, but said that he was entitled under Finance Act, 1922 (c. 8), s. 2, to deduct from the rent the proportion payable by the landlord of the excess license duty he had paid, which amounted to more than the rent due:—**Held:** deft. had a right to have the proportion of the increase in duty payable by the landlord determined before the landlord was entitled to proceed with his action.—**LEWIS v. HUGHES**, [1916] 1 K. B. 831; 85 L. J. K. R. 1019; 114 L. T. 643; 80 J. P. 265; 60 Sol. Jo. 367, C. A. **Annotation:—***Mentd.* Bowling v. Camp (1923), 128 L. T. 342.

**PART XV. SECT. 10, SUB-SECT. 2.—F. (f).**

**n. Non-performance by lessor of collateral obligations—Whether a defence.]—**MENAR v. MCFARLANE (1833), 3 O. S. 287.—**CAN.**

**o. ———.]—**Covenant for rent due on a lease of a mill alleging that although pltf. had performed all things in the lease on his part, yet the rent remained unpaid. Plea, that pltf. permitted the dam & race to be out of repair, contrary to his covenant in the lease contained; without this, that pltf. had performed the lease on his part as alleged:—**Held:** no defence. **WILKES v. STEELE** (1857), 14 U. C. R. 570.—**CAN.**

**p. ———.]—**After a tenant has gone into possession his obligations to pay rent does not depend upon the lessor's performance of any collateral obligations assumed by him, & nothing short of something done by the landlord which amounts to an eviction will discharge the tenant from his obligation to pay rent. Accordingly the tenant is not discharged from such obligation by the landlord's breaches of his covenants to keep in repair & heat.—**CROSS v. PIGGOTT** (1922), 32 Man. L. R. 362; 69 D. L. R. 107; [1922] 2 W. W. R. 662.—**CAN.**

**q. ———.]—****BOYLE v. MONK** (1857), 7 I. C. L. R. 279.—**IR.**

**r. ———.]—**In an action by a

landlord for rent, the tenant pleaded that, through the neglect & default of the landlord, the premises had become unfit for habitation, & the tenant quitted the premises before any of the rent claimed had accrued:—**Held:** a bad plea.—**MURRAY v. MACE** (1874), 1 R. 8 C. L. 396.—**IR.**

**t. ———.]—****HILDIGE v. O'FARRELL** (1880), 6 L. R. Ir. 493.—**IR.**

**u. ———.]—****HUMPHREY v. MACKAY** (1883), 10 L. (Cl. of Sess.) 617; 20 Sc. L. R. 416.—**SCOT.**

**b. ———.]—****HAIG & CO., LTD. v. BOSWALL-PRESTON**, [1915] S. C. 339; 1 S. L. T. 26.—**SCOT.**

**c. Mortgage by landlord—Previous to demise.]—**A tenant cannot set up as a bar to the demand of his landlord for rent, that the landlord, or one under whom the landlord claimed, had previous to the demise mortgaged the premises in fee to a third person, unless the tenant has been evicted by the mtgee., or paid the rent to the mtgee. under notice, & to avoid eviction.—**JOPLIN v. JOHNSON** (1844), 2 Kerr, 541.—**CAN.**

**d. ———.]—****FAIRBAIRN v. HILLIARD** (1867), 27 U. C. R. 111.—**CAN.**

**e. ———.]—****After demise.]—****PERDUE v. HAYS** (1871), 31 U. C. R. 111.—**CAN.**

**1. Implied acceptance of assignees**

**as tenants.]—**In covenant for rent, a plea relying on pltf.'s acceptance of the assignees as his tenants, & on his receipt of prior rent, not the rent sued for, from them, as relieving deft., the lessee, from any further liability, is a bad plea, as being no defence to an action on an express covenant.—**STINSON v. MAGILL** (1850), 8 U. C. R. 271.—**CAN.**

**g. Mistake as to position of property.]—****TALBOT v. ROSSIN** (1863), 23 U. C. R. 170.—**CAN.**

**h. Void lease.]—****FINLAYSON v. ELLIOTT** (1874), 21 Gr. 325.—**CAN.**

**k. ———.]—**It is part of the equitable jurisdiction of the ct. to enforce payment of rent when the lease is void.—**BRITISH COLUMBIA BOARD OF TRADE BUILDING ASSOCN., LTD. v. LIABILITY v. TUPPER & PETERS** (1901), 8 B. C. R. 291.—**CAN.**

**l. ———.]—****HICKEY v. SCIUTTO** (1903), 10 B. C. R. 187.—**CAN.**

**m. ———.]—****LAUDER v. PELTIER** (1909), 11 W. L. R. 333.—**CAN.**

**n. Action for arrears of rent—No account furnished.]—**Pltf. claimed arrears of rent over several years arising under a lease; it was objected that an account should be furnished:—**Held:** the objection should be overruled.—**HARRISON v. FARGHER** (1844), Bluet, 280.—**I. of M.**

**o. Demand improperly made.]—**In

**4166. Cancellation of lease—After accrual of rent—No bar to action.]**—An action of debt for rent may be maintained, notwithstanding the cancellation of the deed of demise by mutual consent after entry, & after the rent accrued due.—*WARD (LORD) v. LUMLEY* (1860), 5 H. & N. 87; 29 L. J. Ex. 322; 1 L. T. 376; 24 J. P. 150; 8 W. R. 184.

*Annotations:—*Consd. *Shaw v. Lomas* (1888), 59 L. T. 477. *Reid. Oakley v. Monck* (1866), 4 H. & C. 251.

**4167. Surrender of part of premises—By assignee—Liability of lessee not extinguished.]**—(1) Pltf. demised premises to deft. for a term of years by deed containing a covenant by deft. for the payment of the rent reserved. Deft. assigned the term, & his assignee surrendered a portion of the premises to pltf. In an action on the covenant pltf. claimed to recover the amount of the apportioned rent for the part of the premises not surrendered:—*Held*: the liability of deft. on the covenant was not extinguished by the surrender of part of the demised premises, but he still remained liable thereon, at any rate to the amount claimed.

*Qu.*: whether he remained liable to the extent of the whole of the rent originally reserved.

(2) Then it is said that there has been what is equivalent to an eviction from part of the premises. What has really happened is that, the lessee having assigned his lease to an assignee, to whom by so doing he has given authority to surrender in the sense that he cannot object to his so doing, such assignee has surrendered part of the premises to the landlord. How in any sense can that be said to amount to an eviction by the lessor, a term which implies for this purpose something wrongfully done by the lessor against the will of the lessee (*LORD JESHER, M.R.*).—*BAYNTON v. MORGAN* (1888), 22 Q. B. D. 74; 58 L. J. Q. B. 139; 53 J. P. 166; 37 W. R. 148; 5 T. L. R. 99, C. A.

*Annotation:—*Consd. *Matthey v. Curling*, [1922] 2 A. C. 180.

**Effect of surrender.]**—See Part XXIV., Sect. 2, *post*.

**Distress held but unsold.]**—See *DISTRESS*, Vol. XVIII., pp. 350, 351, Nos. 878–882.

**Re-entry for forfeiture.]**—See No. 4086, *ante*.

#### G. What may be Recovered.

**4168. Arrears as damages.]**—*ACTON v. SYMON*, No. 3882, *ante*.

**4169. Damages in addition to arrears—Whether proof of title to reversion necessary.]**—In an action of covenant for non-payment of ten half-years' arrears of rent, there being no traverse of pltf.'s reversion, it is not necessary to give evidence of the time at which pltf. became entitled to the

reversion in order to recover more than nominal damages.—*MACKENZIE v. PHILLIPS* (1845), 6 L. T. O. S. 120.

**4170. Interest on arrears—Not recoverable.]**—Interest on arrears of rent & an apportionment, as between landlord & tenant, disallowed.—*PEERS v. SNEYD* (1853), 17 Beav. 151; 51 E. R. 990.

**4171. — Money paid into court—Abuse of process of court.]**—Rent was due from the N. E. co. to the H. & S. co. & the lessee co. gave the lessor co. notice that the money would be paid into ct., where upon the lessor co. gave the lessee co. notice that unless the amount were paid interest would be claimed, under Civil Procedure Act, 1833 (c. 42), s. 28. The money was paid into ct., & the lessor co. presented a petition for its payment out, & that the lessee co. should pay interest thereupon:—*Held*: the lessor co. were entitled to interest on the amount paid into ct., as such payment, which was an abuse of the process of the ct., had defeated their right to interest under the statute, sect. 28 giving a title to interest in respect of a debt for which an action is brought.—*HULL & SELBY RY. Co. v. NORTH EASTERN RY. Co.* (1854), 5 De G. M. & G. 872; 24 L. J. Ch. 109; 24 L. T. O. S. 164; 3 W. R. 129; 43 E. R. 1109, L. J.J.

*Annotation:—*Consd. *Re East of England Banking Co.* (1868), L. R. 6 Eq. 368.

**4172. — Lessee in occupation under agreement for lease—Delay of lessor in completing title.]**

—Where the lessor has not shown a good title to grant the lease until after the grant of the lease, interest on arrears of rent does not begin to accrue until the time of good title shown.—*CANADIAN PACIFIC RY. Co. v. TORONTO CORPN.*, [1905] A. C. 33; 74 L. J. P. C. 15; 91 L. T. 703; 21 T. L. R. 44, P. C.

**Action by successors to reversion.]**—See No. 4169, *ante*, No. 4184, *post*.

**Action for double rent.]**—See Part XXIV., Sect. 10, *post*.

#### II. Counterclaim.

**4173. Damages for libel—Not connected with subject-matter of action—Inadmissible.]**—In an action for rent the ct. refused to allow deft. to set up a counterclaim for damages for a libel not connected with the subject-matter of the action.—*ROTHERHAM v. PRIEST* (1879), 49 L. J. Q. B. 104; 41 L. T. 558; 28 W. R. 277, D. C.

**4174. Damages for insanitary condition—Amount recovered less than rent due—Plaintiff not deprived of costs.]**—*WRIGHT v. SHAW* (1887), 3 T. L. R. 686, C. A.

See SET-OFF.

an action for rent deft. admitted the debt but averred that no proper demand had been made for it. Pltf.'s agent met deft. in the street & made a demand there instead of at the house:—*Held*: deft. had waived his right by not objecting when met in the street.—*CLARKE & STOWELL v. KELLY* (1846), Bluest, 302.—I. of M.

**p. —.]**—The tenant was in arrears of rent, for which repeated demands had been made. The defence set up was insufficiency of notice & demand:—*Held*: the lessor was not bound to make a formal demand, but merely an effectual demand.—*PROWSE v. PRENDERGAST* (1887), 7 Nfld. L. R. 205.—NFLD.

**q. Lease by gas company—Covenant to supply gas—Breach of covenant.]**—*KILMARNOCK GAS LIGHT CO. v. SMITH* (1872), 11 Macph. (Ct. of Sess.) 58; 45 Sc. Jur. 43.—SCOT.

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#### PART XV. SECT. 10, SUB-SECT. 2.—G.

**r. Interest on arrears—Whether recoverable.]**—*RAMJEEBUN BOSE v. TRIPPOORA DASSEE* (1863), Marsh. 396; 2 Hay, 449.—IND.

**t. —.]**—It is in the discretion of the ct. to allow interest on arrears of rent.—*RAJA SATTYANAND GHOSAL v. ZAHIR SIKDAR* (1871), 6 B. L. R. App. 119.—IND.

**u. —.]**—*JOHOORY LALL v. BULLAB LALL* (1879), 1 L. R. 5 Calc. 102; 4 C. L. R. 349.—IND.

**v. —.]**—*THAKUR GANESH BAKHSH v. THAKUR HANIHAR BAKHSH* (1904), 20 T. L. R. 401.—IND.

**w. Assignment of right to recover rent—Subsequent suit for arrears of rent.]**—*LALLAH GOUR NARAIN v. KARON LALL THAKOOR* (1863), Marsh. 363; 2 Hay, 447.—IND.

**d. Acceptance by landlord of lower than decretal rate of rent—Whether balance recoverable.]**—Where a decree has declared a certain rate of rent payable, the landlord is not prevented, by the mere fact that he has not insisted on the rent being paid at that rate, but has accepted a lower one, from recovering at the rate given by the decree.—*SYND MAZZUMALLY KHAN v. PIRTHEE SINGH* (1868), 3 Agra, 263.—IND.

**e. Where property removed off premises before rent due.]**—Where property is removed off the premises of a bkpt. a few days before a year's rent becomes due, & the landlord thereby loses his remedy by distress, the ct. will direct that he be paid one gale in full, & be at liberty to prove for the other.—*Re CLENDENNING* (1854), 23 L. T. O. S. 40.—IR.

*Sect. 10.—Recovery of rent: Sub-sect. 2, I. & J.; sub-sect. 3, A. & B. (a).]*

*I. Pleading.*

**4175. Landlord's title—Seised of reversion—When interest terminated before writ.]—**A declaration in debt for rent on a lease, stating that pltf. is yet seised of the reversion, when it appears that at the time of the writ the lease was determined, is not erroneous, if he was seised when the cause of action accrued.—*OFLEY v. PARADINE* (1806), Cro. Jac. 117; 79 E. R. 102.

**4176. — Action by personal representative—Must show will.]—***VULGAR v. HIGGINS* (1821), Palm. 173; 81 E. R. 1032.

**4177. — Must show chattel interest of testator.]—**In covenant on a lease "yielding & paying £10 at Michaelmas if demanded, or within ten days after," no statement of a demand is necessary. An administrator, suing for rent due since testator's death, must show that his testator had a chattel interest.—*NORRIS v. ELSWORTH* (1878), 1 Freem. K. B. 403; 89 E. R. 346.

*See, further, EXECUTORS, Vol. XXIII., pp. 228, 229; Vol. XXIV., pp. 721, 722.*

**4178. — Need not show title to fee simple.]—***SIMONS v. PASHLEY* (1886), Comb. 27; 90 E. R. 322; *sub nom. SEAMOUR v. PASLEY*, 2 Show. 484.

*Annotation:—Distd. Silly v. Dally* (1698), 1 Ld. Raym. 331.

**4179. — Possession of premises—Need not show estate.]—**In debt for rent on two demises, one for seven years, the other at will, it is sufficient for pltf. to declare that he was possessed of the premises, without showing what estate he had.—*PARKER v. HARRIS* (1692), 4 Mod. Rep. 76; 1 Salk. 262; *Holt, K. B.* 411; 87 E. R. 272; *reversg. S. C. sub nom. HARRIS v. PARKER* (1690), 2 Vent. 270.

*Annotations:—Mentd. Thomkins v. Pincent* (1702), 7 Mod. Rep. 96; *Selwood v. Methlyn* (1729), 1 Barn. K. B. 254; *Bourne v. R.* (1837), 2 Nev. & P. K. B. 248; *It. v. Bourne* (1837), 7 Ad. & El. 58; *Gregory v. Brunswick* (1846), 3 C. B. 481; *Pollitt v. Forrest* (1848), 11 Q. B. 962.

**4180. — Action brought on title.]—**Where a title is to be shown in the declaration.

Where the action is brought on the title, there the title must be shown (*HOLT, C.J.*).—*WILLET v. BOSCOMB* (1708), 11 Mod. Rep. 179; 88 E. R. 974.

*Annotation:—Consd. Harris v. Beavan* (1828), 4 Bing. 646.

**4181. Claim to rent—Must show date when due.]—**A declaration for rent must show when the rent was in arrear.—*SLACK v. BOWSAL* (1623), Cro. Jac. 668; 79 E. R. 578.

**4182. — Date at which year expired.]—**Debt on a lease for rent reserved at Michaelmas & Lady Day must show at which feast the year expired; but the omission is aided by a verdict.—*PYE v. BRERETON* (1685), 3 Mod. Rep. 70; 87 E. R. 45.

**4183. — £3 for a year at Lady Day.]—**Breach, that £3 for a year at Lady Day last was arrear, etc., well, on general demurrer.—*STAGG v. HIND* (1694), 1 Salk. 139; 91 E. R. 129.

*Annotation:—Reid. R. v. Blissex* (1756), Say. 304.

**4184. — By assignee—Must show accrual after assignment.]—**A declaration in covenant for rent set out an indenture of the year 1820, by which, after the recital of a mtge. deed of 1818, containing an assignment by Y. of certain premises

to S. for the residue of a term of five thousand years, subject to redemption on payment by Y. to S. of £1,200, with interest, demised the premises to L. for a term at the request of Y, he, L., covenanting for himself, his assigns, etc., to pay the rent during the term demised, & the continuance of the recited mtge. to S., & after payment & satisfaction of the mtge. to Y., his exors., etc. It was then stated that in 1821 S. assigned to G., subject to L.'s lease; & that G. assigned one moiety to pltf. on Dec. 15, 1843, & the other on Feb. 18, 1835; that L.'s term became vested in debt, & that after debt. became possessed of the residue of such term on Mar. 25, 1844, two years' rent became in arrear to pltf. Plea, that before the rent became due S. was paid & satisfied the principal & interest due on the mtge. out of moneys arising from the sale of part of the premises; & that S. by indenture acknowledged the payment out of such moneys, & released Y. from all claims, etc.:—*Held*: (1) the covenant in the declaration to pay Y., etc., until payment & satisfaction of the mtge. ran with the land, & did not become a covenant in gross till the happening of the event; (2) the payment of the mtge. money was a condition in defeasance, which ought to have been pleaded by debt.; (3) it sufficiently appeared in the declaration that the rent became due after the assignments to pltf., because on demurrer the dates of the assignments must be taken to be true, & on Mar. 25, 1844, pltf. was entitled to half a year's entire rent, & a moiety of the other year & a half year's rent; & that the ct. below having power to assess the damages, the declaration was good.—*WHITAKER v. HARROLD* (1847), 11 Q. B. 103; 17 L. J. Q. B. 343; 12 Jur. 395; 116 E. R. 437, Ex. Ch.; *affg. S. C. sub nom. HARROLD v. WHITAKER* (1846), 11 Q. B. 147.

*Annotations:—Generally, Mentd. Ryalls v. Brammall* (1848), 1 Exch. 734; *Ryalls v. R.* (1849), 11 Q. B. 795; *Graham v. Gibson* (1850), 4 Exch. 768.

**Occupation by tenant.]—***See* Sub-sect. 2, C., *ante*.

**4185. Joinder of claims—Rent & use & occupation.]—**Where debt. took possession of premises under a demise for three years from Christmas, 1839, & continued to occupy them until July 27, 1841, when he quitted them, having paid rent to the Midsummer previous:—*Held*: in an action brought to recover the rent which subsequently accrued due, that pltf. was not entitled to have a count on the demise & also a count for use & occupation, but that he must make his election.—*ARDEN v. PULLEN* (1842), 9 M. & W. 430; 1 Dowl. N. S. 612; 11 L. J. Ex. 382; 152 E. R. 182.

**4186. — Rent & claim to remove cloud on title.]—**A claim for rent in arrear & a claim to remove clouds on the title to demise raised by the tenant are not objectionable on the ground of multifariousness, & may therefore be included in the same plaint.—*MAHARAJAH RAJUNDUR KISHWUR SING, BAHADOOR v. SHEOPURSUN MISSEER* (1866), 10 Moo. Ind. App. 438; 14 W. R. 521; 91 E. R. 1038, P. C.

*J. Practice.*

*See, generally, PRACTICE.*

**4187. Service out of jurisdiction—Defendant domiciled in Scotland—Rent of land in England.]—**R. S. C., Ord. 11, r. 1, does not enable the ct. or

**PART XV. SECT. 10, SUB-SECT. 2.—I.**

**1. Landlord's title—Onus on landlord to prove.]—***CUNNINGHAM v. DUANE* (1851), 9 U. C. R. 274.—*CAN.*

*g. Claim to rent—Assignment &*

*acceptance of rent from assignee—How pleaded.]—*A lessee sued in debt for rent & pleading an assignment & acceptance of the rent by the lessor from the assignee need not make proof of the deed of assignment.—

*McCULLOCH v. JARVIS* (1850), 8 U. C. R. 267.—*CAN.*

*h. Monthly rent—Three months' arrears—Whether three plaints.*—*Re GORDON v. O'BRIEN* (1886), 11 P. R. 287.—*CAN.*

a judge to allow service out of the jurisdiction of a writ in an action for non-payment of rent due under a lease of land in England against defts. who are domiciled or ordinarily resident in Scotland.—*AGNEW v. USHER* (1884), 14 Q. B. D. 78; 54 L. J. Q. B. 371; 51 L. T. 576; 33 W. R. 126, D. C.; *on appeal*, 51 L. T. 752, C. A.

*Annotations*:—*Distd. Kaye v. Sutherland* (1887), 20 Q. B. D. 147; *Tassell v. Hallen*, [1892] 1 Q. B. 321.

**Special indorsement of writ.**—*See* No. 4346, *post*, & generally, PRACTICE.

### SUB-SECT. 3.—ACTION FOR USE AND OCCUPATION.

#### A. Conditions Precedent to Action.

**4188. Whether attornment necessary.—To legal owner of reversion.—Lease by equitable owner.**—An action for use & occupation is maintainable without attornment upon 4 & 5 Ann. c. 16, ss. 9 & 10, by the trustees of one whose title the tenant, deft., had notice of before he paid over his rent to his original landlord; though the tenant had no notice of the legal title being in pltf's. on the record.—*LUMLEY v. HODGSON* (1812), 16 East, 99, 104 E. R. 1026.

*Annotations*:—*Consd. Standen v. Christmas* (1847), 10 Q. B. 135. *Refd. Stephens v. Callanan & Salway* (1823), 12 Price, 158; *Mortimer v. Preedy* (1838), 1 Horn & H. 157; *Cooke v. Moylon* (1847), 16 L. J. Ex. 253.

**Entry & occupation.**—*See* Sub-sect. 3, B., *post*. **Relation of landlord & tenant.**—*See* Sub-sect. 3, C., *post*.

**Legal estate.**—*See* Sub-sect. 3, D. (a), *post*.

#### B. Entry and Occupation.

##### (a) In General.

*See* Distress for Rent Act, 1737 (c. 19), s. 14.

**4189. General rule.**—(1) In an action for the use & occupation of a house for six months it is *prima facie* sufficient for pltf. to show an occupation of the house by deft., as his tenant for the preceding six months, since the continuance of the tenancy is to be presumed until the contrary appear.

(2) It is not sufficient in such case for deft. to prove that the keys had been previously delivered to a servant at pltf.'s house, & a subsequent declaration on the part of pltf. that the keys had been lost or mislaid.—*HARLAND v. BROMLEY* (1816), 1 Stark. 455, N. P.

**4190. Beneficial occupation.**—The lessee of a house underlet the same at Lady Day to A., as tenant from year to year, & before the end of the half year, put workmen into the house with A.'s consent, for the purpose of repairing a party wall, but the inconvenience occasioned thereby was so great that A.'s lodgers quitted the house, & he was obliged to take lodgings for his own family elsewhere, & after paying the rent up to Midsummer Day, he remained in possession carrying on his trade till July 5, & then quitted, without notice to his landlord:—*Held*: the latter could not maintain an action for use & occupation for the second half year which had thus commenced, the jury finding that there had been no beneficial occupation.—*EDWARDS v. HETHERINGTON* (OR *ETHERINGTON*) (1825), 7 Dow. & Ry. K. B. 117; Ry. & M. 268.

*Annotations*:—*Distd. Izon v. Gorton* (1839), 7 Scott, 537. *Appld. Smith v. Marrable* (1843), 11 M. & W. 5. *Dbld. Hart v. Windsor* (1844), 12 M. & W. 68. *Distd. Surplice v. Farnsworth* (1844), 7 Man. & G. 576.

**4191. ———.**—*Declaration alleged that pltf. agreed to grant & let, & deft. to take, a messuage, with exclusive licence to shoot & sport over a*

manor, & to fish in the waters thereof during the term, to hold the messuage, right, liberties, & premises, for the term, at a rent; that pltf. let the messuage, right, liberties, & premises to deft., who entered into & upon the same, & became & was possessed thereof for the term: breach, non-payment of rent. Plea, that the messuage was small, & taken by deft. solely for the enjoyment of the right over the manor, which was extensive; & that the agreement was not sealed by either party. Verification. On special demurrer, for that the plea amounted to the general issue:—*Held*: deft. was entitled to judgment; & the demise being partly of an incorporeal hereditament, & not under seal, no rent could be recovered on such demise; & the declaration could not be treated as a claim of compensation for use actually had of the subject of demise, since it alleged only his entry & possession, & not an occupation.—*BIRD v. HIGGINSON* (1835), 2 Ad. & El. 690; 1 Har. & W. 61; 4 Nev. & M. K. B. 505; 4 L. J. K. B. 124; 111 E. R. 267; *on appeal* (1837), 6 Ad. & El. 824, Ex. Ch.

*Annotations*:—*Refd. R. v. Hockworthy* (1837), 7 Ad. & El. 492; *Thomas v. Fredricks* (1847), 10 Q. B. 775; *Cannon v. Rimington* (1852), 12 C. B. 514; *Brown v. Peto*, [1900] 2 Q. B. 653. *Mentd. Worley v. Harrison* (1835), 3 Ad. & El. 669; *Haysoiden v. Staff* (1836), 6 Nev. & M. K. B. 659; *Upward v. Knight* (1839), 7 Scott, 311; *Latton v. Davis* (1841), 1 Gal. & Dav. 21; *Doe d. Morgan v. Powell* (1844), 7 Man. & G. 980; *Howell v. Rodbard* (1849), 4 Exch. 309; *Thames Haven Dock Co. v. Brymer* (1850), 5 Exch. 696; *Partridge v. Gardner* (1851), 6 Exch. 621.

**4192. — Actual or constructive.**—By an instrument in writing B. agreed to grant, seal, & execute to D. a legal & effectual lease of premises for a term of years, at a certain annual rent, & subject to covenants by D., to pay the rent & taxes, to keep the premises in repair & to paint them every third year, & leave them in good repair at the end of the term; & D. agreed to accept the lease upon the above terms & in the meantime, & until such lease should be made & executed, to pay the rent, & to hold the premises subject to the covenants above mentioned:—*Held*: an action may be maintained for use & occupation, if a party hold premises under a contract or agreement, & actual occupation is not necessary.—*PINERO v. JUDSON* (1829), 6 Bing. 206; 3 Moo. & P. 497; 8 L. J. O. S. C. P. 19; 130 E. R. 1259.

*Annotations*:—*Appld. Atkins v. Humphrey* (1846), 2 C. B. 654. *Refd. Doe d. Pearson v. Ries* (1832), 8 Bing. 178; *Warman v. Faithful* (1834), 3 Nev. & M. K. B. 137; *Woolley v. Watling* (1837), 7 C. & P. 610; *Izon v. Gorton* (1839), 7 Scott, 537; *Jones v. Reynolds* (1841), 1 Q. B. 506; *Doe d. Bailey v. Foster* (1846), 3 C. B. 215; *Anderson v. Mid. Ity.* (1861), 3 E. & E. 614; *Shine v. Dillon* (1867), 15 W. R. 847.

**4193. ———.**—[An action for use & occupation, under Distress for Rent Act, 1737 (c. 19), s. 14, does not lie where there has not been an actual entry by the lessee.—*LOWE v. ROSS* (1850), 5 Exch. 553; 19 L. J. Ex. 318; 15 L. T. O. S. 303; 155 E. R. 242.

*Annotation*:—*Expld. Towne v. D'Heinrich* (1853), 13 C. B. 892.

*See, also*, No. 4189, *ante*.

**4194. — Whether "holding" sufficient.—Without occupation.**—*PINERO v. JUDSON*, No. 4192, *ante*.

**4195. ———.**—[Pltf. declared against A. & B. as exors., alleging that they as exors. were indebted to him for the use & occupation of certain messuages held of him by them as exors. under a demise to testator, & that, in consideration of the premises, they as exors. promised to pay. Plea, by A., that B. never was exor., nor ever



to you when our tenancy expires, reasonable wear & tear being allowed us." In an action for use & occupation, it appeared that A. entered & occupied the premises on Sept. 27, but there was not any evidence that B. had done so, who suffered judgment by default in the action:—*Held*: the jury were justified in finding that both defts., A. & B., were liable in the action.—*GLEN v. DUNGEY* (1849), 4 Exch. 61; 18 L. J. Ex. 359; 13 L. T. O. S. 284; 154 E. R. 1125.

**4211.** ———.]—In an action against assignee of a lease, some only of the lessees having executed the assignment, but deft. & another assignee having executed, & the other having entered:—*Held*: deft., on a plea in bar denying that the estate of lessees had come to him, was liable as assignee. Also, the joint assignee having entered & occupied with deft.'s privity, he was liable for use & occupation.

Occupation by a co-tenant is sufficient to sustain use & occupation (*WIGHTMAN, J.*).—*ELECTRIC TELEGRAPH CO. v. MOORE* (1861), 2 F. & F. 363 N. P.

**4212. Exceptions to rule—Entry by one executor.]**—One of two exors. of a deceased tenant for a term of years entered into the demised premises:—*Held*: such entry did not enure as the entry of the two exors., so as to make them both liable in an action for use & occupation.—*NATION v. TOZER* (1834), 1 Cr. M. & R. 172; 4 Tyr. 561; 3 L. J. Ex. 234; 149 E. R. 1041.

*Annotations*:—*Apld.* *How v. Kennett* (1835), 3 Ad. & El. 659. *Consd.* *Lowe v. Ross* (1850), 5 Exch. 553. *Refd.* *Fox v. Waters* (1810), 12 Ad. & El. 43; *Packer v. Gibbins* (1841), 10 L. J. Q. B. 224. *Mentd.* *Hawkins v. Williams* (1862), 10 W. R. 692.

**4213. Co-tenant holding over.]**—A. let premises to four persons, B., C., D., & E., for a year certain, ending at Midsummer, 1839, with a proviso that if, a month at least before the termination of the year, a request were made to him to that effect, A. would grant them a lease for seven, fourteen, or twenty-one years. The lessees were directors of a joint stock bank, & occupied the premises for the purpose of its business. B. ceased to be a director in Jan. & C. in Mar. 1839. On May 31 the solr. of the directors applied to A. to renew the tenancy for another year to the then directors; but no agreement to that effect was finally executed. On June 20, the solr. applied for a renewal of the agreement for a quarter of a year; to which pltf., on June 23, replied "that he should consider of it." Nothing further passed between the parties, but at the Michaelmas following the premises were delivered up to A.:—*Held*: the four original lessees were liable to A. in an action for use & occupation, for the rent of the quarter from Midsummer to Michaelmas.—*CHRISTY v. TANCRED* (1840), 7 M. & W. 127; H. & W. 50; 10 L. J. Ex. 228; 4 Jur. 1064; 151 E. R. 706.

*Annotations*:—*Dbtd.* *Christy v. Tancred* (1842), 9 M. & W. 438. *Consd.* *Henderson v. Squire* (1869), L. R. 4 Q. B. 170.

**4214. ——— With assent of defendant.]**—*CHRISTY v. TANCRED*, No. 4213, *ante*.

**4215. ——— Without consent of defendant.]**—Where premises are let for a certain term to A. & B., & A. holds over after the expiration of the term, upon a special verdict, the ct. will not infer that such holding over was with B.'s assent, so as

to render him liable in an action for use & occupation for such time as A. continues to hold over. If such assent is not stated in the special verdict, the ct. will award a *venire de novo* for the purpose of ascertaining the fact one way or the other.

*Qu.*: whether, where premises are let for a certain term to A. & B., & B. holds over after the expiration of the term, without A.'s assent, both are liable for use & occupation during the time of such holding over by B.—*TANCRED v. CHRISTY* (1843), 12 M. & W. 316; 2 L. T. O. S. 190; 152 E. R. 1219, Ex. Ch.; *previous proceedings, sub nom.* *CHRISTY v. TANCRED* (1842), 9 M. & W. 438.

*Annotations*:—*Consd.* *Draper v. Crofts* (1846), 15 M. & W. 166. *Refd.* *Henderson v. Squire* (1869), L. R. 4 Q. B. 170.

**4216. ———.]**—A. & B. were tenants to pltf. of certain premises for a term of three years. B. never occupied the premises, but A., on the expiration of the term, held over. No assent of B. to the holding over was proved. An action for use & occupation having been brought by pltf. against A. & B., in which A. suffered judgment by default, pltf. tendered in evidence a letter written by his agent to B., after the expiration of the term, in which he demanded rent alleged to be due subsequently to the term: no answer was returned to this letter:—*Held*: as one tenant cannot bind his co-tenant by holding over without his assent, according to the doctrine of *Christy v. Tancred*, No. 4213, *ante*, which was in effect confirmed by the case of *Tancred v. Christy*, No. 4215, *ante*; & as there was no evidence of B.'s assent in this case, deft. B. was not liable for the rent, & therefore the letter to him, although admissible, was not entitled to much weight.—*DRAPER v. CROFTS* (1846), 15 M. & W. 166; 15 L. J. Ex. 92; 153 E. R. 807.

### iii. Other Cases.

*See Distress for Rent Act, 1737 (c. 19), s. 14.*

**4217. Presumption of continued occupation—**From occupation in preceding six months—*Notwithstanding delivery of key—Loss of key by plaintiff.]*—*HARLAND v. BROMLEY*, No. 4189, *ante*.

**4218. Goods left on premises—Seized under extent.]**—Where goods seized under an extent had been kept by the officers for a long time locked up on the premises pending a reference of the prosecutor's claim during which a subsequent arrear of rent accrues due to the landlord, the ct. refused to interfere in his behalf so far as to order the effects to be sold & the rent in arrear to be paid out of the produce. *Sembie*: his remedy is by action for use & occupation against the tenant or against the officer.—*R. v. HILL* (1818), 6 Price, 19; 140 E. R. 729.

**4219. ——— Re-entry for purposes of tenancy—**Work required by agreement.]—*BESWICK v. CHAPMAN* (1843), 1 L. T. O. S. 259.

**4220. Premises taken for use of another—Defendant paying for repairs.]**—Where, in an action for use & occupation, it was found that deft. said that he had taken the premises for which the action was brought, & that he afterwards paid for the repairs, but that his brother had continually occupied them, & paid the rent under a distress made by pltf., & no rent had ever been demanded from deft., & it was left to the jury whether deft.

### PART XV. SECT. 10, SUB-SECT. 3.— B. (b) iii.

1. Goods left on premises—By lessor—Whole floor occupied.]—*HEATON v. RODERICK* (1922), 67 D. L. R. 271.—*CAN.*

m. Temporary occupation for sale.]—*WILSON v. POLLOCK & Co.* (1827), 6 Sh. (Ct. of Sess.) 3.—*SCOT.*

n. Land taken for public purposes—Owners remaining in possession.]—Land taken for public purposes &

owners remained in occupation:—*Held*: they were not liable for use & occupation.—*MINISTER v. MATHIESON* (1903), 3 S. R. N. S. W. 298; 20 N. S. W. N. 113.—*AUS.*

o. Entry under agreement for sale

**Sect. 10.—Recovery of rent: Sub-sect. 3, B. (b) iii., C. (a) & (b).]**

took the premises for himself or his brother, & they found a verdict for deft., the ct. granted a new trial.—*CHOUMERT v. HASWELL* (1825), 3 L. J. O. S. C. P. 100.

**4221. Display of board.—For purpose of letting houses.]**—The putting up of a board for the purpose of letting houses by a person who built them & agreed to become tenant of them from a certain time, is sufficient to enable the person for whom they were erected to recover rent on a count for use & occupation. The putting up of the board is the assertion of a right of possession.—*SULLIVAN v. JONES* (1829), 3 C. & P. 579, N. P.

**4222. ———.]**—*ROBINS v. PHILLIPS* (1843), 2 L. T. O. S. 75, 151.

**4223. Temporary occupation for sale.—By trustees under deed of arrangement.]**—*How v. KENNETT*, No. 4199, *ante*.

**4224. Entry for purpose of inspection.—Holes dug to test value of ore.]**—(1) If a down be let by an instrument not under seal for the purpose of digging copper ore, an action for use & occupation may be maintained if deft. has ever taken possession: & if he has once taken possession he is liable to all subsequent rent until the determination of the tenancy, whether he has continued to work the minerals or not; but if deft. merely caused holes to be dug on the down, & had them filled up immediately, with a view merely to ascertain what sort of bargain he was about to make or had made, that would not be a taking of possession.

(2) In an action for use & occupation, a judgment in a former action for use & occupation between the same parties, given in favour of pltf., is evidence of deft.'s having occupied, but is not conclusive; & the jury ought to take into their consideration all the circumstances under which that judgment was obtained.—*JONES v. REYNOLDS* (1836), 7 C. & P. 335, N. P.; *subsequent proceedings*, 4 Ad. & El. 805.

**4225. Judgment for plaintiff in former action.—Not conclusive evidence.]**—*JONES v. REYNOLDS*, No. 4224, *ante*.

**4226. ——— Against co-occupiers.—No evidence against one co-occupier.—In respect of subsequent period.]**—(1) Where premises are let for a certain term to A. & B., & A. holds over after the expiration of the term, with B.'s assent, both are liable in an action for use & occupation, for so long as A. continues actually to occupy, but no longer. *Qu.*: whether both are so liable where A. holds over without B.'s consent.

(2) A judgment obtained by A. in an action of use & occupation, against B. & C., is no evidence to charge B. in a subsequent action brought by A. against him alone, for the use & occupation of the same premises for a subsequent period.—*CHRISTY v. TANCRED* (1842), 9 M. & W. 438; 11 L. J. Ex.

109; 152 E. R. 185; *on appeal*, *sub nom.* *TANCRED v. CHRISTY* (1843), 12 M. & W. 316, Ex. Ch.

*Annotations*:—*As to* (1) *Expld.* *Draper v. Crofts* (1846), 15 M. & W. 166. *As to* (2) *Refd.* *Henderson v. Squire* (1869), L. R. 4 Q. B. 170.

**4227. Cleaning & decorating premises.]**—A party who had agreed to rent a house, sent in a woman to clean the house, & workmen to paper one of the rooms:—*Held*: to be sufficient evidence of occupation to go to the jury, in an action for use & occupation.—*SMITH v. TWOART* (1841), 2 Man. & G. 841; 3 Scott, N. R. 172; 5 Jur. 388; 133 E. R. 984.

*Annotations*:—*Distd.* *Towne v. D'Heinrich* (1853), 13 C. B. 392. *Refd.* *Lowe v. Ross* (1850), 5 Exch. 552.

**4228. Entry to give directions.—Repairs carried out by landlord.]**—(1) In an action for the use of a house, there was no evidence that deft. had entered or occupied. The under-sheriff told the jury that a constructive occupation was sufficient, without explaining to them what that meant:—*Held*: a misdirection.

(2) Deft. agreed to rent the house, & pltf. to put it in repair before the occupation should commence, & he sent in workmen for that purpose. Deft. having gone on to the premises & given them directions:—*Held*: no evidence of such an entry as would support the action.—*TOWNE v. D'HEINRICH* (1853), 13 C. B. 892; 1 C. L. R. 335; 22 L. J. C. P. 219; 21 L. T. O. S. 128; 17 Jur. 1102; 1 W. R. 370; 138 E. R. 1454.

**4229. Evidence of constructive occupation.—Duty of court.]**—*TOWNE v. D'HEINRICH*, No. 4228, *ante*.

**4230. Entry under mistake as to right.]**—Where a stranger occupies property, under the erroneous belief that it is his wife's separate estate, or that he is entitled to occupy it, he will be charged with occupation rent accordingly.—*WRIGHT v. CHARD* (1859), 4 Drew. 673; 29 L. J. Ch. 82; 1 L. T. 138; 5 Jur. N. S. 1334; 8 W. R. 35; 62 E. R. 258; *on appeal* (1860), 1 De G. F. & J. 567, 1. J.

*Annotations*:—*Mentd.* *Johnson v. Gallagher* (1861), 3 De G. F. & J. 494; *London Chartered Bank of Australia v. Lempiere* (1873), L. R. 4 P. C. 572; *Kevan v. Crawford* (1877), 6 Ch. D. 29.

**4231. Letting for non-continuous period.—Occupation for fixed portion.]**—*SMALLWOOD v. SHEPPARDS*, No. 4316, *post*.

**Liability in respect of period without occupation.]**—*See* Sub-sect. 3, F. (b), *post*.

**Possession under contract of sale.]**—*See* SALE OF LAND.

**Agreement without entry.]**—*See* Nos. 4192, 4197, 4201, 4202, *ante*.

**Lease adopted by trustees in bankruptcy.]**—*See* BANKRUPTCY, Vol. V., p. 993, No. 8110.

**C. Relation of Landlord and Tenant.**

**(a) In General.**

*See* Distress for Rent Act, 1737 (c. 19), s. 14.

**4232. General rule.—Necessity for contractual relation.]**—In an action for use & occupation, it is

—*Refusal to complete.*—*PARKER v. ENGLAND* (1856), 3 All. 340.—*CAN.*

**p. Entry by creditor.—For liquidation purposes.]**—*GREEN v. GRIFFITHS* (1886), 4 S. C. 346.—*S. AF.*

**q. Insolvency of tenant.—Occupation by assignee.—Resumption by tenant.]**—*BLACKBURN v. LAWSON* (1877), 2 A. R. 215.—*CAN.*

**ART XV. SECT. 10, SUB-SECT. 3.—C. (a).**

**4232 i. General rule.—Necessity for contractual relation.]**—In an action for use & occupation, where it is quite evident that deft. did not occupy under pltf., or with his permission,

either express or implied, but under a third person, pltf. will be nonsuited.—*McDONALD v. BRENNAN* (1849), 5 U. C. R. 599.—*CAN.*

**4232 ii. ———.]**—Action for use & occupation can only be maintained where the relation of landlord & tenant exists.—*RADFORD v. MURRAY* (1852), 3 Nfld. L. R. 312.—*NFLD.*

**4232 iii. ———.]**—*McCALMONT v. MULHALL* (1858), 4 All. 200.—*CAN.*

**4232 iv. ———.]**—To maintain an action for use & occupation, there must be some evidence of a holding by permission of pltf. Therefore, where there is no evidence of any contract or negotiation, & it appears that at an

interview between the parties about the property deft. refused to make any arrangement, & claimed the title:—*Held*: the action would not lie.—*McCULLY v. WARD* (1863), 5 All. 505.—*CAN.*

**4232 v. ———.]**—*DUNCOMBE v. BURKE*, 20 C. L. T. 241.—*CAN.*

**4232 vi. ———.]**—*SHEO KARAN SINGH v. MAHARAJA PARBHU NARAIN SINGH* (1909), 1 L. R. 31 All. 276.—*IND.*

**4232 vii. ———.]**—*WYSE v. MEYERS* (1854), 4 I. C. L. R. 101.—*IR.*

**r. Failure of landlord to give land agreed upon.—Consequent non-execution**

not sufficient that plff. should show legal title in himself, & occupation by deft. He must show other circumstances, from which the relation of landlord & tenant between the parties may be inferred.—*PLACE v. ASHBY* (1831), 9 L. J. O. S. K. B. 174.

**4233.** ———.]—The action for use & occupation is established by Distress for Rent Act, 1737 (c. 19), s. 14; & according to the words of the statute, may be maintained "where the agreement is not by deed." Some agreement seems to be implied as the foundation; though it is well established that it need not amount to a formal demise, or even be express. To hold, then, that a corp'n. is within this statute, is to hold that it may be a party to an agreement not under seal, at least for the purpose of suing on it; & it would be rather strong to deny, at the same time, that it could be a party to it for the purpose of being sued on it. *LORD ELLENBOROUGH*, indeed, says, in *Rochester (Dean & Chapter) v. Pierce*, No. 4245, *post*, that the action for use & occupation does not necessarily suppose any demise. "It is enough that deft. used & occupied the premises by the permission of plff.; & a corp'n., as well as an individual, may, without deed, permit a person to use & occupy premises of which they are seised." But, call it by whatever name we please, permission or demise, it clearly binds the corp'n.; the party occupying & paying rent under it acquires rights from the corp'n., becomes their tenant from year to year, & can be ejected only by the same means as would be available for an individual landlord (*PATTESON, J.*).—*BEVERLEY v. LINCOLN GAS LIGHT & COKE CO.* (1837), 6 Ad. & El. 829; 2 Nev. & P. K. B. 283; Will. Woll. & Dav. 519; 7 L. J. Q. B. 113; 112 E. R. 318.

*Annotations* :—*Consd. Finlay v. Bristol & Exeter Ry.* (1852), 7 Exch. 409; *Recl. Cours. v. Merral* (1869), L. R. 4 Exch. 162. *Reid. Gibson v. Kirk* (1841), 1 Q. B. 850; *Doe d. Ponnington v. Taniero* (1848), 13 L. T. O. S. 204. *Mentd. Church v. Imperial Gas Light & Coke Co.* (1838), 6 Ad. & El. 846; *Gibson v. East India Co.* (1839), 5 Bing. N. C. 262; *Ludlow Corp'n. v. Charlton* (1840), 6 M. & W. 815; *Hall v. Swansea Corp'n.* (1844), 5 Q. B. 526; *Iley v. Frankenstein* (1844), 8 Scott. N. R. 839; *Paine v. Strand Union Grdns.* (1846), 8 Q. B. 326; *Diggle v. London & Blackwall Ry.* (1850), 5 Exch. 442; *Moss v. Sweet* (1851), 20 L. J. Q. B. 167; *Clarke v. Cuckfield Union Grdns.* (1852), Bull. Ct. Cas. 81; *Smith v. Hull Glass Co.* (1852), 16 Jur. 695; *Henderson v. Australian Royal Mail Steam Navigation Co.* (1855), 5 E. & B. 409; *Smart v. West Ham Grdns.* (1855), 24 L. J. Ex. 201; *Lawford v. Billerley R. C.* (1903), 72 L. J. K. B. 554.

**4234.** ———.]—*CHURCHWARD v. FORD*, No. 4276, *post*.

**4235.** ———.]—*CRACKNELL v. DAVY, DAVY v. CRACKNELL*, No. 4282, *post*.

**4236.** ———.]—*Re JOHNSON, Ex p. HYDE v. CASH* (1897), 41 Sol. Jo. 368.

**4237. Effect of establishing tenancy—Onus of showing determination on defendant.]**—If the tenancy be established by plff. in the action for use & occupation, it is thrown on deft. to show that the tenancy was afterwards determined, or that the landlord has accepted another person as his

tenant.—*WARD v. MASON* (1821), 9 Price, 291; 147 E. R. 96.

**4238.** ———.]—*HARLAND v. BROMLEY*, No. 4189, *ante*.

**4239. Tenant at sufferance—Continuing in occupation after death of tenant for life.]**—Where plff. was entitled to a cottage after his mother's death, & deft. had resided in it with the mother, rent free, until her death, & had since continued in possession, & had paid no rent:—*Held*: plff. might recover in an action for use & occupation.—*HELLIER v. SILLCOX* (1850), 19 L. J. Q. B. 295; 15 L. T. O. S. 88; 14 Jur. 573.

*Annotations* :—*Expld. & Distd. Churchward v. Ford* (1857), 2 H. & N. 446. *Consd. A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508. *Refd. Phillips v. Homfray* (1883), 24 Ch. D. 439.

**Effect of express demise.]**—See Sub-sect. 3, C. (f), *post*.

(b) *When Relationship inferred.*

See Distress for Rent Act, 1737 (c. 19), s. 14.

**4240. Letter from plaintiff claiming rent—Produced by defendant in action of ejectment.]**—Where a deft. takes possession of premises on the death of a former tenant & an action of ejectment is brought against him without giving notice to quit; if, to defend himself from that action, he produces a letter from plff. treating him as tenant & claiming rent that will be conclusive evidence of his tenancy to plff. in an action for use & occupation, though he alleged that he produced it only for the purpose of showing that he was tenant in possession.—*TOWNSEND v. DAVIS* (1801), For. 120; 145 E. R. 1132.

**4241. Marriage of occupant—Continued occupation by husband—Husband not liable.]**—A. having an equitable title to a house, under an agreement for the lease of it, permits his mistress to occupy it, it is afterwards agreed between them that she shall take up the bills which he has accepted, in part-payment of the purchase-money, & that the lease shall be assigned to her; she remains in possession & does not take up the bills, & marries deft., who occupies the house, A. cannot recover against deft. for use & occupation.—*KEATING v. BULKLEY* (1818), 2 Stark. 419, N. P.

**4242. Rent accruing before & after marriage.]**—An action of *assumpsit* for the use & occupation of a house is not maintainable against the husband alone, if his wife held under a yearly tenancy before marriage, the rent being payable half-yearly, where part of such rent was due from the wife *dum sola*, & the remainder accrued after the coverture.—*RICHARDSON v. HALL* (1819), 1 Brod. & Bing. 50; 3 Moore, C. P. 307; 129 E. R. 642.

See, generally, *HUSBAND & WIFE*, Vol. XXVII., pp. 175 *et seq.*

**4243. Declaration by defendant—"Prove your right & I'll pay you rent."]**—A person having title to land sued for use & occupation against A., who had received possession from a third

*of lease—Prospective lessee in possession.]*—*BARBOUR v. PINN* (1870), 1 V. R. (Law) 222.—AUS.

*t. Repudiation of ownership by landlord—Subsequent demand by landlord.]*—*OSBORNE v. JONES* (1857), 15 U. C. R. 298.—CAN.

*a. Conveyance by landlord to third party—Rent payable to—Refusal of tenant to recognise as landlord.]*—*CONNELL v. HAMMOND* (1851), 2 All. 120.—CAN.

*b. Unregistered lease—Occupation must be proved.]*—An unregistered lease of land under Land Transfer Act is

equivalent to an agreement to lease, & it is therefore necessary in suing for rent to show that there was use & occupation or the payment of rent.—*EDGEUMBE v. HAMILTON BOROUGH (MAYOR, ETC.)* (1902), 21 N. Z. L. R. 599.—N.Z.

*c. Occupation by insurance company—Under unsealed agreement.]*—A co. incorporated by warrant under Mutual Fire Insurance Act is not a "trading" co., so that in the absence of an agreement under seal a landlord cannot recover against the co. as tenant from year to year & by taking possession

& paying the equivalent of a rent no tenancy is created, but only a liability for use & occupation.—*RICHARDSON v. URBAN MUTUAL FIRE INSURANCE CO.* (1916), 34 W. L. R. 586; 10 W. W. R. 733; 28 D. L. R. 12; 26 Man. L. R. 372.—CAN.

*d. Occupation by assignee of tenant—Assignee not accepted by landlord.]*—Where a tenant from year to year at a rent assigns his estate, the landlord, who has never accepted the assignee as tenant, may recover the rent from the original lessee in an action for use & occupation.—*SHINE v. DILLON* (1867), 15 W. R. 847.—R.

**Sect. 10.—Recovery of rent: Sub-sect. 3, C. (b), (c) & (d).]**

person:—*Held*: the declaration of A., "I don't consider the land is yours, but prove the right, & I'll pay you rent," would not support *assumpsit* for use & occupation.—*CRIPPS v. BLANK* (1827), 9 Dow. & Ry. K. B. 480; *sub nom.* *CRIPPS v. JEFFERSON*, 5 L. J. O. S. K. B. 178.

**4244. Party without legal estate—No tenancy implied.]—***MORGELL v. PAUL*, No. 4285, *post*.

*See, also*, Sub-sect. 3, D. (a), *post*.

**4245. Legal title in plaintiff—Occupation by defendant—By permission of plaintiff.]—**The action for use & occupation does not necessarily support any demise. It is enough that deft. used & occupied the premises by the permission of pltf. (*LORD ELLENBOROUGH, C.J.*).—*ROCHESTER (DEAN & CHAPMAN) v. PIERCE* (1808), 1 Camp. 466.

*Annotations:—Consd.* *Beverley v. Lincoln Gas Light & Coke Co.* (1837), 6 Ad. & El. 829; *Re De Keyser's Royal Hotel, De Keyser's Royal Hotel v. Lt.*, [1919] 2 Ch. 197. *Refd.* *Hull v. Vaughan* (1818), 6 Price, 157; *Stafford Corp'n. v. Till* (1827), 4 Bing. 75; *Finlay v. Bristol & Exeter Ry.* (1852), 7 Exch. 409; *Lowe v. L. & N. W. Ry.* (1852), 18 Q. B. 632; *Ecol. Comrs. v. Merrall* (1869), 11 R. 4 Exch. 162. *Mentd.* *Arnold v. Poole Corp'n.* (1842), 2 Dowl. N. S. 574; *Fishmongers' Co. v. Robertson* (1843), 5 Man. & G. 131.

**4246. ———.]—**If there be no contract in writing, a contract may be raised by reason of permission & benefit enjoyed (*DENMAN, C.J.*).—*BLUNDELL v. DRUMMOND* (1848), 14 Jur. 573, *n.* *Annotation:—Refd.* *Heller v. Silcox* (1850), 14 Jur. 573.

**———— Purchaser let into possession before completion.]—***See* SALE OF LAND.

**4247. ———.]—***CRIPPS v. BLANK*, No. 4243, *ante*.

**4248. ———.]—***PLACE v. ASHBY*, No. 4232, *ante*.

**4249. ———.]—***JENKINS v. HILL* (1854), 22 L. T. O. S. 274; 2 W. R. 268.

**4250. ——— Payment of rent.]—***JENKINS v. HILL* (1854), 22 L. T. O. S. 274; 2 W. R. 268.

**4251. ———.]—***CHURCHWARD v. FORD*, No. 4276, *post*.

**4252. Correspondence relating to rent.]—***BERKS v. RHODES* (1837), 1 Jur. 513.

**4253. Refusal to pay rent—On ground of notice to quit.]—**In an action for use & occupation the only evidence to show that pltf. was landlord of the premises was, that he went to deft., who was the tenant, & said that he had bought the premises, whereupon the tenant wished him joy of the purchase, & that on pltf. sending to demand rent the tenant refused to pay because he had had notice to quit, & an action brought against him, but said he would give up the premises to pltf. at the expiration of the notice:—*Held*: this was evidence to go to the jury; but the judge intimated that it would be dangerous to act on such slight evidence, & that if pltf. had the legal title to the property, he ought to show that.—*STEPHENS v. LYNN* (1838), 8 C. & P. 389, N. P.

**4254. Effect of payment into court—Admission of relation—Loss of right to dispute title.]—**In an action for use & occupation, payment of money into ct. by deft. admits the contract, & therefore it is not open to him to contend that pltf. is without title, or that another co-pltf. should have joined in the action, although these facts may appear doubtful on pltf.'s own evidence.—*DOLBY v. ILES* (1840),

11 Ad. & El. 335; 3 Per. & Dav. 287; 9 L. J. Q. B. 51; 4 Jur. 432; 113 E. R. 443.

*Annotation:—Refd.* *Standen v. Christmas* (1847), 10 Q. B. 135.

**4255. Agreement for rent.]—***HEAD v. ORME* (1849), 14 L. T. O. S. 181.

**4256. Payment of annual sum.]—**Deft. & his predecessors in estate had paid to pltf. & their predecessors, overseers of the poor of the township of S., an annual sum of £0 14s. 8d., expressed to be for rent for common lands. It was admitted that deft. was in possession of the lands out of which the rent issued, but they were not identified, & no evidence was given of their extent or value. Deft. would not produce his deeds:—*Held*: there was evidence on which a jury might find for pltf. on a count for use & occupation.—*HARDON v. HESKETH* (1859), 4 H. & N. 175; 32 L. T. O. S. 258; 7 W. R. 186; 157 E. R. 804.

*Annotation:—Mentd.* *Gardner v. Hodgson's Kingston Brewery Co.*, [1901] 2 Ch. 198.

*(c) Tenant Holding over.*

*See* Distress for Rent Act, 1737 (c. 19), s. 14.

**4257. General rule.]—**A tenant holding over after notice to quit is liable to an action for use & occupation only for the period of time during which he continues in possession (*PARKE, J.*).—*JENNER v. CLEGG* (1832), 1 Mood. & R. 213. *Annotations:—Refd.* *Hurley v. Hanrahan* (1867), 15 W. R. 990. *Mentd.* *Williams v. Stiven* (1846), 9 Q. B. 14.

**4258. ———.]—**Notice to quit was given, & it expired at Lady Day, 1840; the tenant held on till Lady Day, 1841, but since the former period there had been no payment of rent, nor any other overt act to show that a new tenancy was created. The landlord distrained for rent due at Lady Day, 1841:—*Held*: the distress was not justifiable; the landlord ought to have sued for use & occupation.—*ALFORD v. VICKERY* (1842), Car. & M. 280; *subsequent proceedings* (1844), 2 L. T. O. S. 420.

**4259. Right of successor to reversion—Against person claiming under original lessee.]—**A. being seized of an ancient mill, together with a stream of water diverted out of a river, & flowing from thence unto her mill, & B. being possessed of other mills, together with a stream of water diverted out of the same river, above the stream of A., by means of a head weir, & flowing from thence through the lands of A. down to B.'s mills, as appurtenant to the same: B. erected upon other lands below the lands of A., & near the said watercourse, two other mills, whereby it becoming necessary for him, B., to have a larger supply of water, he widened & deepened his watercourse in the soil of A., & raised & heightened the head weir, & thereby diverted the greatest part of the water into the watercourse for the use of his mills, so that the water was prevented from flowing down to the mill of A. so copiously as it had formerly done, & thereby A.'s mill became of no use. A. having recovered damages in one action against B. on this account, & having afterwards brought a second action for subsequent damages, in order to prevent all further disputes B. agreed to take a grant from A. of the use & benefit of the watercourse so widened & deepened, & of the liberty of diverting the water out of the river. By lease reciting these facts, A., in consideration of £1,500 paid by B., demised to B. the use of the water-

**PART XV. SECT. 10, SUB-SECT. 3.—**  
C. (c).

**4257 i. General rule.]—***McFARLANE v. BUCHANAN* (1862), 12 C. P. 591.—*CAN.*

**4257 ii. ———.]—***TORONTO CITY v. WARD* (1908), 18 O. L. R. 214; 13 O. W. R. 312.—*CAN.*

**4257 iii. ———.]—***SURNOMOYEE v. DENONATH GIR SUNNYASEE* (1883),

1 L. R. 9 Calc. 908; 13 C. L. R. 69.—*IND.*

**4. Holding over after notice of intention to quit—Offer of keys before end of first quarter.]—***BOWMAN v. AVERY* (1847), 3 Kerr, 587.—*CAN.*

course so widened & deepened as aforesaid, & the free liberty of diverting so much of the water of the river into & along the watercourse as should be necessary for the use of B.'s mills *habendum* for the use of ninety-nine years, if three persons therein named should so long live, at an annual rent. Soon after the execution of this deed A.'s mill was destroyed. B. or those claiming under him, continued to enjoy the watercourse & the use of the water during the term, & paid the rent. The lease having determined by the death of the last surviving *cestui que vie*, the person claiming under the grantee continued to enjoy the watercourse in the manner described in the grant, & paid rent for it. The reversion in the lands, upon which A.'s mill formerly stood, having vested in C., it was held that the latter might maintain *indebitatus assumpsit* for the use & occupation of the watercourse & the water running therein, against the persons who claimed under B.—*DAVIS v. MORGAN* (1825), 4 B. & C. 8; 6 Dow. & Ry. K. B. 42; 107 L. R. 962.

**4260. Sub-tenant holding over—Liability of tenant**  
**—Underlease exceeding period of lease.]—**Defts. took certain premises of pltf. for nine months, at a rent certain, with the option, at the end of that time, of taking a lease for seven, fourteen, or twenty-one years. Before the expiration of the nine months, defts. let the premises to a co. for six months, who actually occupied them for that period:—*Held*: at the end of a year from the expiration of the nine months, defts. were liable to pltf., in an action for use & occupation, for a year's rent.—*WARING v. KING* (1841), 8 M. & W. 571; 11 L. J. Ex. 49; 151 E. R. 1166.

**4261. Tenant at sufferance.]—**By indenture of lease, dated June 26, 1810, between A., the father of pltf. & B., the father of deft., reciting a former lease of July 27, 1801, made between S. & M. his wife, & A., which recited that M. was entitled to moiety of lands in West Fen, & to two-thirds for life or for some other estate of freehold, & that A. was entitled to the other moiety & the other third part, respectively, or some other share of the same lands, for some estate of freehold, etc.; & by which S. & M. his wife demised the moiety & two-third parts respectively of M. to A. for forty years from Apr. 5, 1801, A. demised to B., amongst other premises, the lands of which M. was by the recital in the lease of 1801, said to be entitled to two-thirds & himself, A., to one-third, of the lands in West Fen, for the remainder of the term of forty years, except the last ten days. A. died in 1813, & B. in 1818, leaving pltf. & deft., their respective representatives. Deft. continued in the occupation of the lands in West Fen down to the time of the trial, he & his father having regularly paid rent to pltf. & his father down to Lady Day, 1841, when the lease of 1801 expired. In debt for use & occupation of an undivided third part of the lands in West Fen, since Lady Day, 1841:—*Held*: the recital in the lease of 1801 was *prima facie* evidence that A. was entitled to one-third of the lands in West Fen, in fee, & pltf. had a right to treat deft. as a tenant at sufferance of such undivided third part, for the period during which he held on after the expiration of the lease, & to sue him for use & occupation in respect thereof.—*BAYLEY v. BRADLEY* (1848), 5 C. B. 306; 16 L. J. C. P. 206; 136 E. R. 932.

*Annotation*:—*Refd.* Leigh v. Dickeson (1884), 15 Q. B. D. 60.

**4262. —.]—**Where one tenant in common has by lease demised his interest to his co-tenant in common, if the tenant in common who was lessee continues in occupation as tenant at sufferance after the expiration of the lease, he will be liable in an action for use and occupation at the suit of his co-tenant in common who was lessor.—*LEIGH v. DICKESON* (1884), 15 Q. B. D. 60; 54 L. J. Q. B. 18; 52 L. T. 790; 33 W. R. 538, C. A. *Annotations*:—*Mentd.* *Re* Jones, Farrington v. Forrester, [1893] 2 Ch. 461; *Re* Cook's Mortgage, Lawledge v. Tyndall (1896), 65 L. J. Ch. 654; Hill v. Hickin, [1897] 2 Ch. 579; Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc., [1899] 1 Q. B. 161; Kerrick v. Mountstevens (1899), 48 W. R. 141; *Re* Coulson's Trusts, Prichard v. Coulson (1907), 97 L. T. 754.

**4263. Accidental holding over—Detention of key**  
**—After quitting premises.]—**Where a tenancy from year to year has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant, who has quitted the premises & removed his goods, for two days beyond the expiration of the term, does not amount to any evidence of use & occupation, so as to render him liable for another quarter.—*GRAY v. BOMPAS* (1862), 11 C. B. N. S. 520; 5 L. T. 841; 142 E. R. 899.

*Annotation*:—*Mentd.* Schroder v. Ward (1863), 13 C. B. N. S. 410.

**4264. Tenant in common under demise from co-tenant.]—***LEIGH v. DICKESON*, No. 4262, *ante*.

**Co-tenant holding over.]—***See* Nos. 4213, 4215, 4226, *ante*.

**Holding over after notice to quit—Alternative of increased rent.]—***See* No. 4301, *post*.

**Period for which damages recoverable.]—***See* No. 4260, *ante*, No. 4318, *post*.

(d) *Occupation by Substituted Tenant.*

*See* Distress for Rent Act, 1737 (c. 19), s. 14.

**4265. No express substitution—Whether liable.]**

—Where premises had been let to B. for a term determinable by a notice to quit, & pending such term C. applies to A., the landlord, for leave to become the tenant instead of B., & upon A. consenting, agrees to stand in B.'s place, & offers to pay rent:—*Held*: though B.'s term had not been determined either by a notice to quit or a surrender in writing, A. might maintain an action for use & occupation against C., & the latter could not set up B.'s title in defence to that action.—*PHIPPS v. SCULTHORPE* (1817), 1 B. & Ald. 50; 106 E. R. 19.

*Annotations*:—*Consd.* Mathews v. Sawell (1818), 2 Moore, C. P. 262. *Refd.* Thomas v. Cook (1818), 2 B. & Ald. 119; Hyde v. Moakes (1832), 1 L. J. K. B. 71; Beard v. Davidson (1843), 1 L. T. O. S. 646. *Mentd.* Doe d. Huddleston v. Johnston (1825), M'Cle. & Yo. 141.

**4266. —.]—**A., the landlord of premises, sued B. as assignee of a lease, for rent due, with a count for use & occupation. At the trial, A. put in the lease, which was a lease to W., who had taken the benefit of the Insolvent Debtors' Act. It was proved, that B. had occupied the premises, & had treated A. as landlord, & had paid rent to him; but that the lease had never been assigned:—*Held*: A. could not recover against B., either for the rent or for the use & occupation.—*HYDE v. MOAKES* (1832), 5 C. & P. 42; 1 L. J. K. B. 71.

**4267. Whether occupant under new letting—As assignee of lease—Question for jury.]—**The Company of Proprietors of Drury Lane Theatre in 1836 leased the counters of the saloon of the theatre & the privilege of selling fruit, etc., to C. for seven years. She died in 1837, & her son deft. soon after applied to the committee of the

PART XV. SECT. 10, SUB-SECT. 3.—C. (d).

1. *Whether occupant substituted tenant—Question for jury.]—*DARCH v. McLEOD (1859), 16 U. C. R. 614.—*CAN*
2. *Substituted tenant not accepted by lessor.]—*SHINE v. DILLON (1867), 1 R. 1 C. L. 277.—*IR.*

**Sect. 10.—Recovery of rent: Sub-sect. 3, C. (d), (e), (f) & (g), & D. (a).]**

theatre to become tenant on the same terms & they accepted him. He occupied down to Jan. 1843, & paid rent down to the latter part of 1841. In an action for use & occupation:—**Held:** (1) it was a question for the jury whether deft. had occupied as assignee of the lease to his mother, or upon a fresh taking upon the same terms as the lease, & if the latter, he was liable to the present action; (2) he would be so liable, although in Apr. 1843, he & his brother had taken out letters of administration to C., therein described as a *feme covert* at the time of her death, & also to her husband, who had survived her; (3) it was no ground for reducing the damages, that in 1841 plffs. had let the theatre to M. "subject to the rights" of deft., & that M. had made regulations as to the theatre & its saloon which caused a loss of profit to deft. unless those regulations were made by the authority of plffs., or of persons acting for them & by their authority.—**THEATRE ROYAL DRURY LANE CO. OF PROPRIETORS v. CHAPMAN** (1843), 1 Car. & Kir. 14; 1 L. T. O. S. 312, 359.

(c) *Occupation in Anticipation of Lease.*

*See Distress for Rent Act, 1737 (c. 19), s. 14.*

**4268. General rule—Occupier liable.]—**Agreement to grant a lease to S. when S. should have erected certain buildings on the premises to be demised. No covenant to pay rent before the execution of the lease. S. after the buildings are erected, holds the premises, subject to the terms in the lease, but is liable in *assumpsit* for use & occupation.—**BANISTER v. USBORNE** (1796), Peake, Add. Cas. 76, N. P.

**4269. ———.]—**An occupation of premises, pending the execution of a lease, constitutes the relation of landlord & tenant, & will entitle the latter to sue the former upon a *quantum valebat*, although no distress for rent can be made.—**HAMERTON v. STEAD** (1824), 3 B. & C. 478; 5 Dow. & Ry. K. B. 206; 3 L. J. O. S. K. B. 33; 107 E. R. 811.

*Annotations:—***Refd.** Anderson v. Mid. Ry. (1861), 3 E. & E. 614. **Mentd.** Knight v. Bennett (1826), 3 Bing. 361; Doe d. Biddulph v. Poole (1848), 17 L. J. Q. B. 143.

**4270. ———.]—****Rents received from sub-tenants.]—**Where deft., in expectation of a lease by indenture, which he had agreed to take from plff., procured attornments from some of the tenants, & received rents from others:—**Held:** liable for use & occupation.

The receiving the rents & profits from the undertenants was proof of use & occupation by deft. (**BAYLEY, B.**).—**NEAL v. SWIND** (1832), 2 Cr. & J. 377; 149 E. R. 161; *sub nom.* NEALE v. SWEENEY, 2 Tyr. 464.

*Annotation:—***Refd.** Lowe v. Ross (1850), 15 L. T. O. S. 303.

**4271. ———.]—**A. proposed to B., the owner of a warehouse, that A. should occupy it as a packer, & pay B. £75 a year & as much more as half the profits came to, & a written agreement was to be drawn up between them or a term of five years. A. was let into possession provisionally, & with a view to the intended agreement. When the agreement was drawn up, A. refused to sign it; A. had occupied the warehouse for ten weeks. It was found by the jury that A. was let into possession without any agreement, & provisionally

with a view to an intended agreement:—**Held:** A. was liable in an action for use & occupation to pay B. a reasonable sum for the time he occupied the warehouse.

There was a treaty going on between the parties, & an agreement in writing proposed, & deft. was let into possession with a view to his entering into the agreement. Until the agreement was entered into, & while he was in possession on the faith of the intended agreement, he was a tenant at will, & was liable to pay plff. a fair compensation for the property for the time he occupied it (**ERLE, J.**).—**COGGAN v. WARWICKER** (1852), 3 Car. & Kir. 40; 19 L. T. O. S. 350, N. P.

*Annotation:—***Refd.** Dawes v. Dowling (1874), 31 L. T. 65.

**4272. ———.]—**A. entered on & enjoyed for a time, certain shooting belonging to B. in the expectation that a lease would be executed. They could not come to terms, no lease was signed, & at the end of six weeks A. left, & refused to pay any rent:—**Held:** although there was no agreement, yet A. was liable in an action for use & occupation, inasmuch as he had enjoyed the beneficial occupation of the premises.—**DAWES v. DOWLING** (1874), 31 L. T. 65; 22 W. R. 770.

**4273. ———.]—****License to assign refused.]—****FAWKNER & ROGERS v. BOOTH** (1893), 9 T. L. R. 558; *varied*, 10 T. L. R. 83, C. A.

**4274. Exception to rule—Lease not accepted through default of lessor—Interested person not made party.]—**In an action on an agreement for not accepting a lease, if it appear that there was a person who had an interest in the premises, & it be not proved at the trial that such person was a party to the lease tendered, plff. cannot recover. Neither, under such circumstances, is he entitled to recover for use & occupation, though deft. may have received rent from the undertenants.—**RUMBALL v. WRIGHT** (1824), 1 C. & P. 589, N. P.

(f) *Effect of Express Demise.*

*See Distress for Rent Act, 1737 (c. 19), s. 14.*

**4275. General rule—Action not defeated by demise not under seal—Effect of Distress for Rent Act, 1737 (c. 19), s. 14.]—****GIBSON v. KIRK**, No. 4319, *post*.

**4276. ———.]—**An action for use & occupation is one of contract, & is founded on the relation of landlord & tenant; it therefore requires evidence of an occupation by the permission of, & under a contract with, plff.: & though the title on the part of plff. & occupation by deft. may, in the absence of any other evidence, be a *prima facie* case from which such a contract may be inferred, yet where the letting has been by another party, plff. will not be allowed to recover. So where he fails to prove title or actual contract with himself. & where the letting has been by another party, mere notice by plff., even though he has the title, to pay the rent to him, will not convert the occupation into an occupation by his permission & under a contract with him; for such notice, unless assented to by the tenant, does not create a new contract, & can only enable the party to bring ejectment to recover possession of the premises.

The action for use & occupation existed before Distress for Rent Act, 1737 (c. 19), & the statute only made this difference, that whereas before, if a demise or letting appeared, plff. was nonsuited,

**PART XV. SECT. 10, SUB-SECT. 3.—C. (e).**

**4268 i. General rule—Occupier liable.]—****HENRY v. VANCE** (1845), 8 I. L. R. 205.—**IR.**

**PART XV. SECT. 10, SUB-SECT. 3.—C. (f).**

**h. Lease under seal.]—****BOULTON v. DEFRIES** (1846), 2 U. C. R. 432.—**CAN.**

because he should have declared upon it, the statute provided that pltf. should not be nonsuited on that ground; the statute did not give the action; it existed before; & inasmuch as before the statute a contract had to be made out, so must it be made out still (*BRAMWELL, B.*).—*CHURCHWARD v. FORD* (1857), 2 H. & N. 446; 26 L. J. Ex. 354; 5 W. R. 831; 157 E. R. 184.

*Annotations*:—*Refd.* Sloper v. Saunders (1860), 29 L. J. Ex. 275; Phillips v. Homfray (1883), 24 Ch. D. 439; A.-G. v. De Keyser's Royal Hotel, [1920] A. C. 508. *Mentd.* Howe v. Scarrott, Sharp v. Scarrott (1859), 4 H. & N. 723.

**4277. Unstamped agreement—No action.**—Where premises have been demised by an agreement in writing, but not on stamped paper, pltf. is bound to give the writing in evidence; & if not stamped at the trial, pltf. shall be nonsuited, & shall not be allowed to go use & occupation generally.—*BREWER v. PALMER* (1800), 3 Esp. 213, N. P.

*Annotations*:—*Consd.* Strother v. Barr (1828), 5 Bing. 136; Hughes v. Budd (1840), 8 Dowl. 478. *Refd.* Ramsbottom v. Tunbridge (1814), 2 M. & S. 434; Teall v. Auty (1820), 4 Moore, C. P. 542; It. v. Holy Trinity & St. Margaret, Hull (1827), 1 Man. & Ry. K. B. 444; Fenn d. Thomas v. Griffith (1830), 8 L. J. O. S. C. P. 218; It. v. Merthyr Tydvil (1830), 8 L. J. O. S. M. C. 114; Davys v. Davies (1831), 1 L. J. Ex. 10; Spencer v. Collins (1837), 1 Jur. 21.

**4278. Agreement under seal—Not amounting to demise.**—If there is an agreement by deed to demise a house, by words not amounting to an actual demise, the party may maintain an action for use & occupation.—*ELLIOTT v. ROGERS* (1801), 4 Esp. 59, N. P.

**4279. Premises to be repaired by landlord—No rent payable pending repairs—Occupation abandoned on failure to repair.**—A. entered into an agreement in writing with B. to take certain premises, at a certain yearly rent, the premises to be put into repair by B., & the rent not to be payable until the repairs were completed. A., by his tenant, occupied the premises for six months, & then quitted, the stipulated repairs not having been done:—*Held*: B. was entitled to maintain an action for use & occupation, as upon an implied agreement to pay so much as the occupation might be reasonably worth.—*SMITH v. ELDRIDGE* (1854), 15 C. B. 236; 2 C. L. R. 855; 23 L. T. O. S. 161; 139 E. R. 412; *previous proceedings*, 23 L. T. O. S. 270, N. P.

*Annotations*:—*Consd.* Dawes v. Dowling (1874), 31 L. T. 65. *Distd.* Fox v. Slaughter (1919), 35 T. L. R. 668.

**4280. ——— Entry under agreement.**—Defts., by a written agreement, let premises to pltf. for three years, certain repairs to be done by defts., & the rent to be payable quarterly, the first payment to be made on the date of the completion of the repairs. Pltf. was given possession under the agreement, & after nine months the repairs were still uncompleted. No rent had been paid & defts. distrained for it. In an action in which pltf. obtained damages for wrongful distress defts. counterclaimed for use & occupation:—*Held*: as pltf. went into possession under the agreement of tenancy & not under an implied agreement to pay what the premises were reasonably worth defts. failed in their counterclaim for use & occupation.—*FOX v. SLAUGHTER* (1919), 35 T. L. R. 668; 63 Sol. Jo. 704.

**4281. Deed not delivered—Not operating as lease.**—A lease of premises from pltf. to P., containing the usual words "signed, sealed & delivered," was executed by both parties, pursuant to a previous agreement to let, in which the annual

rent was stated to be £55, & by which it was agreed that P. should pay £100 for pltf.'s goodwill & fixtures, & that the lease should not be delivered, but remain in pltf.'s possession until the whole of the £100 was paid. P. paid £50 of that sum & entered into possession & carried on the business of a baker, pltf. keeping possession of the lease. P. became bkpt. without paying the remaining £50, the lease still remaining with pltf. Deft. became assignee in bkpy. In an action for use & occupation, it appearing that deft. had accepted the tenancy:—*Held*: the evidence warranted the jury in finding that there had been no delivery of the deed so as to operate as a lease, & until the payment of the remaining £55 only a tenancy from year to year existed, & therefore, deft. was liable for rent in an action for use & occupation.—(*GUDGEN v. BESSER* (1856), 6 E. & B. 986; 26 L. J. Q. B. 36; 21 J. P. 196; 3 Jur. N. S. 212; 5 W. R. 47; 119 E. R. 1131.

*Annotations*:—*Refd.* Pattle v. Hornbrook, [1897] 1 Ch. 25. *Mentd.* Furness v. Meek (1857), 27 L. J. Ex. 34; Brewin v. Briscoe (1859), 2 E. & E. 116; Rogers v. Hadley (1863), 9 Jur. N. S. 898.

**4282. Void agreement—Grounds of fraud.**—Use & occupation is not maintainable where the express agreement is void by reason of fraud; but pltf. having paid the rent to the superior landlord, the count for money paid was supported.

Use & occupation is not maintainable without a contract.

Where a tenant from year to year, having no authority from his landlord to let in a new tenant, falsely represented to pltf. that he had, & thereby induced him to pay £100 for allowing him to enter into possession, & also to take the stock at a valuation; but the landlord refusing to accept him as tenant, he had to leave after a year's occupation, & it was left doubtful, on the evidence, whether, on the whole, pltf. had become a loser or gainer; & deft. had paid the first half of the year's rent to the landlord; the jury, in an action for the false representation, were directed that they were at liberty, finding for pltf., to give a sum less than the £100, or even nominal damages, & in a cross action by deft. against pltf. in that action for half a year's rent, they were directed to find for pltf. on a count for money paid.—(*CRACKNELL v. DAVY, DAVY v. CRACKNELL* (1858), 1 F. & F. 57, N. P.

**4283. ——— Infant lessee—Misrepresentation of age.**—Where a lease is set aside at the instance of the lessor on the ground that the lessee is an infant & obtained the lease on his representation that he was of full age, the lessor cannot recover damages for use & occupation.—(*LEMPRIERE v. LANGE* (1879), 12 Ch. D. 675; 41 L. T. 378; 27 W. R. 879.

*Annotations*:—*Consd.* Woolf v. Woolf, [1899] 1 Ch. 343. *Refd.* *Re Jones, Ex p. Jones* (1881), 18 Ch. D. 109; Leslie v. Shell, [1914] 3 K. B. 607. *Mentd.* Stocks v. Wilson, [1913] 2 K. B. 235.

**Lease by corporation not under seal.**—*See* CORPORATIONS, Vol. XIII., pp. 392, 393, Nos. 1176–1178.

(g) *Purchaser allowed into Possession.*

*See* SALE OF LAND.

D. *By Whom Maintainable.*

(a) *Necessity for Legal Estate.*

*See* Distress for Rent Act, 1737 (c. 19), s. 14.

**4284. General rule.**—(*COBB v. CARPENTER* (1809), 2 Camp. 13, n., N. P.

#### PART XV. SECT. 10, SUB-SECT. 3.—

D. (a).

k. *Application of rule.*—(*THOMPSON v. BENNETT* (1867), 17 C. P. 380.

—CAN.

l. — *Action by lessee against under-lessee—After ejectment of lessee.*—(*HARMAN v. HENDERSON* (1843), 5

I. L. R. 477.—IR.

m. ————(*BURROW & BEARD v. WILLIS* (1886), 4 N. Z. L. R. 401 (S. C.).—N.Z.

*Sect. 10.—Recovery of rent: Sub-sect. 3, D. (a) & (b), E. & F. (a).]*

**4285.** —.]—In the absence of an express tenancy, no tenancy can, in law, be implied as regards the character of landlord, except in favour of him who has the legal estate.

Where the legal estate is in trustees for the benefit chiefly, but not entirely, of one person, that one person cannot treat himself as the principal, & the trustees as his agents, so as to maintain an action in his own name for a breach of the tenancy.

Accordingly, where testator devised a term of five hundred years to a trustee, in trust, amongst other purposes, to raise £3,000, & £2,000, for a portion for his daughter, to cease on these purposes being satisfied, & then to his son A. in strict settlement, reserving to such son a power to make leases under his hand & seal, & to appoint a jointure; & an agreement was made for a lease by A. with deft. under which deft. held, during the life & after the death of A.: & by marriage settlement, a term of ninety-nine years, if A. should so long live, & subject to the larger term, was vested in trustees to pay an annual sum to pltf. (A.'s intended wife) & then to pltf. for life, & during the life of A. deft. attorned to the trustees under the marriage settlement, & paid them rent up to & after his death, & they gave receipts, & subsequent to the death of A., agreed to reduce the rent in the character of trustees:—*Held*: the tenancy under the agreement for a lease, not being in execution of the power, determined; the purposes for which the original term was created remaining unsatisfied, the trustees of the second term must be considered, subsequent to A.'s death, to have acted as agents for the estate generally, & therefore, pltf. could not maintain an action for use & occupation.—*MORGELL v. PAUL* (1828), 2 Man. & Ry. K. B. 303; 6 L. J. O. S. K. B. 200.

**4286. Application of rule—No right of action in beneficiary—Tenant by elegit.**—By an inquisition taken on an *elegit* against C., it was found that, at the time of the judgment, he was seised of certain lands in the occupation of B. In point of fact, these lands were vested in certain trustees in trust for C. & for raising a sum of money for A., but the trustees permitted C. to receive the rents:—*Held*: the tenant, by *elegit*, could not sue B. for the rent.—*HARRIS v. BOOKER* (1827), 4 Bing. 96; 12 Moore, C. P. 283; 5 L. J. O. S. C. P. 92; 130 E. R. 705.

*Annotation:—Refd. Lloyd v. Davies* (1849), 13 J. P. 182.

**4287.** — **Right in trustees.**—*MORGELL v. PAUL*, No. 4285, *ante*.

**4288.** —.]—The receiver of an estate, in which pltf. had an equitable interest, under a settlement vesting it in trustees, let deft. into possession of the premises under an agreement with himself, in writing, in which he described himself as agreeing, "on behalf of the estate," to let for a term of years. Pltf. declining to sanction any other than a yearly letting, a correspondence ensued between him & deft., in which the latter intimated that, as he could not get a lease, he should leave as soon as he could, & he did leave before he had been six months in possession:—*Held*: he was not liable to pltf., either in trespass or use & occupation; & *semble*: he was not liable at all.—*SLOPER v. SAUNDERS* (1860), 29 L. J. Ex. 275.

*Annotation:—Refd. Re De Keyser's Royal Hotel, De Keyser's Royal Hotel v. R., [1919] 2 Ch. 197.*

**4289.** — **Legal estate by estoppel—Payment of rent by tenant.**—Parochial trustees, under the authority of a local Act had built a workhouse on lands belonging to charity trustees in the

same parish, & in 1821 disputes arose between the two sets of trustees, as to whether any rent was payable therefore, & the question was brought before the Master of the Rolls by an amicable suit in 1821, who decreed that a certain rent should be paid by the parochial trustees, which was accordingly paid till 1833:—*Held*: use & occupation might be maintained for the rent in arrear from 1833, as the decision of the Master of the Rolls was binding upon the parties, & the payment of rent under the circumstances was an estoppel on the parochial trustees.—*ALLISON v. STARK* (1838), 9 Ad. & El. 255; 1 Per. & Dav. 183; 1 Will. Woll. & H. 719; 3 J. P. 178; 112 E. R. 1208; *sub nom. ALLISON v. STARK*, 8 L. J. M. C. 13.

*Annotations:—Generally, Mentd. Doe d. Norton v. Webster* (1840), 4 Per. & Dav. 270; *Gouldsworth v. Knights* (1843), 11 M. & W. 337; *Doe d. Kidney v. Benham, Doe d. Edney v. Billett* (1845), 7 Q. B. 976; *St. Nicholas, Deptford v. Skotchley* (1847), 8 Q. B. 394; *Cornish v. Cleffe* (1864), 11 L. T. 606.

**4290.** — — —.]—*DOLBY v. ILES*, No. 4254, *ante*.

**4291.** — **Receiver of estate—Vested in trustees.**—*SLOPER v. SAUNDERS*, No. 4288, *ante*.

#### (b) Other Cases.

*See Distress for Rent Act, 1737 (c. 19), s. 14.*

**4292. Grantee of annuity.**—*BIRCH v. WRIGHT*, No. 4327, *post*.

**4293. Assignee of reversion—Parol demise—Occupation before assignment.**—*Semble*: debt for use & occupation, on a parol demise, by the assignee of the reversion against the lessee, cannot be maintained for the occupation which took place before the assignment of the reversion.—*MORTIMER v. PREEDY* (1838), 3 M. & W. 602; 1 Horn & H. 157; 7 L. J. Ex. 174; 150 E. R. 1285.

*Annotations:—Refd. Standen v. Christmas* (1847), 10 Q. B. 135; *Smerdon v. Tucker, French v. Tucker, Bickley v. Tucker* (1859), K. & G. 305.

**4294.** — **Tenancy not terminated at time of assignment.**—*STANDEN v. CHRISTMAS*, No. 4555, *post*.

**4295. Lease by mortgagor after mortgage in fee—Legal & equitable estates assigned to same person—Assignee not bound by lease—Right to recover.**—B., after mortgaging premises in fee demised them by deed to deft. for thirty-one years. B. afterwards became bkpt., & died, & his assignees sold the premises to D.; & the mtgee., being paid off, by the direction of the assignees, conveyed to D. in fee, the assignees also being parties & joining in the conveyance. D., after receiving rent for two years, gave deft. notice to quit:—*Held*: the lease being good against B., by estoppel only, D. was not estopped by it in consequence of the assignees of B. having joined in the conveyance to him, & might bring ejectment & an action of debt for use & occupation.—*DOE d. DOWNE (LORD) v. THOMPSON, DOWNE (LORD) v. THOMPSON* (1847), 9 Q. B. 1037; 8 L. T. O. S. 408; 11 Jur. 1007; 115 E. R. 1572.

*See, also, No. 4343, post.*

**4296. Surviving trustee—Occupation since death of co-trustee.**—J. & pltf., being trustees under the will of W. in 1847, demised a house to deft. by indenture for four years ending at Michaelmas, 1851. J. died in Jan. 1848. An action for use & occupation having been brought by pltf. for rent accrued subsequently to Jan. 1848:—*Held*: pltf. was entitled to maintain the action, & was not bound to sue as surviving trustee.—*WHEATLEY v. BOYD* (1851), 7 Exch. 20; 21 L. J. Ex. 39; 18 L. T. O. S. 65; 155 E. R. 838.

**4297. Tenant after subdemise—Sublessee accepted by landlord—Refusal to exonerate tenant**

—**Right against subtenant.**—A., being tenant of B. of a house, sub-let it to C., & afterwards B. told A. that he had no objection to accepting C. as tenant, but that he would not exonerate A. from the rent:—*Held*: (1) as B. still held A. liable for the rent A. might sue C. for the rent as due from C. to him, in an action for use & occupation; (2) a verbal agreement between A. & C. for A. to grant C. a lease of the house & some ground at a joint increased rent, but which lease A. afterwards refused to execute, afforded no answer to an action for use & occupation of the house by A. against B.—*DAWSON v. LAMB* (1853), 3 Car. & Kir. 269, N. P.

**4298. Tenants in common—Receipts “on account of family.”**—Tenants in common may join in suing for use & occupation, a tenant holding under them. Pltfs. were children of L. The tenant paid rents to an agent of the family, who gave a receipt “on account of the family of the late Mrs. L.”:—*Held*: this was evidence of a joint letting, & of a tenancy to them jointly.—*LAST v. DINN* (1858), 28 L. J. Ex. 94.

**Auctioneer.**—See AUCTION & AUCTIONEERS, Vol. III., p. 40, Nos. 284, 285.

**Corporations.**—See CORPORATIONS, Vol. XIII., pp. 376, 414, Nos. 1068–1070, 1345.

**Parish officers.**—See POOR LAW.

**Mortgagee.**—See MORTGAGE.

#### E. Occupation of Incorporeal Hereditaments.

See Distress for Rent Act, 1737 (c. 19), s. 14.

**4299. Action will lie.**—*BIRD v. HIGGINSON*, No. 4191, *ante*.

**4300. — Fishing right.**—By agreement in writing pltf. let to deft., at a yearly rent, the right of fishing in a certain river with rod & line only. Deft. having so used the fishery:—*Held*: pltf. might recover the rent under an *indebitatus* count for the use & occupation of the fishery, & there was no objection to the particulars so describing his claim.—*HOLFORD v. PRITCHARD* (1849), 3 Exch. 793; 18 L. J. Ex. 315; 13 L. T. O. S. 74; 154 E. R. 1065.

*Annotation*:—*Refd.* Fitzgerald v. Firbank, [1897] 2 Ch. 96.

#### F. What may be Recovered.

##### (a) Amount.

See Distress for Rent Act, 1737 (c. 19), s. 14.

**4301. Tenant under notice to quit—Alternative of increased rent—Liable at increased rate—Holding over.**—If landlord gave tenant notice to quit, or pay such a rent, & tenant holds over, landlord may bring an action for use & occupation, & shall recover the rent specified in the notice.—*ANON.* (1773), Loftt, 153; 98 E. R. 584.

**4302. Rent fixed by agreement—Amount calculated by agreement.**—Though an agreement for use & occupation is void by the Stat. Frauds, nevertheless, if the tenant take possession of the premises under it, he becomes a tenant at will, & recourse may be had to the original agreement

to calculate the amount of rent.—*DE MEDINA v. POLSON* (1815), Holt, N. P. 47, N. P.

**4303. — — — — —**—*J.*—*GRETTON v. MEES*, No. 4340, *post*.

**4304. — Eviction from part of premises—Rent reserved disregarded—Amount fixed by jury.**—A. took a farm under an agreement from B. that A. should have the exclusive right of sporting over the manor in which it was situate, & should also occupy certain glebe land within the parish. A. entered into possession, but did not sign the agreement, & it appeared that B. had no power of conferring the right of sporting, nor could he procure the glebe land. In an action for the use & occupation of the farm:—*Held*: evidence was admissible to show the annual value of the land without such right which might be ascertained by the jury, independently of the amount of the rent reserved by the agreement.

Def't. in an action for use & occupation, as in an action of debt for rent, might show an eviction of the whole or of part; that, in case of an eviction of part, the jury must ascertain, independently of any agreement, what def't. ought to pay; & that an eviction of part of the subject-matter of the demise . . . having been clearly proved in the present instance the rule for a new trial must be discharged (*per cur.*)—*TOMLINSON v. DAY* (1821), 2 Brod. & Bing. 680; 5 Moore, C. P. 558; 120 E. R. 1128.

*Annotations*:—*Distd.* Neale v. Mackenzie (1836), 1 M. & W. 747. *Refd.* Slack v. Sharp (1838), 7 L. J. Q. B. 225.

**4305. — Lease of theatre counters—Profits reduced by subsequent regulations—Made without sanction of lessor.**—*THEATRE ROYAL DRURY LANE CO. OF PROPRIETORS v. CHAPMAN*, No. 4267, *ante*.

**4306. — New tenant substituted at increased rent—Agreement for new tenancy abandoned—Former rent not decisive.**—Tenant of premises at £47 a year received notice to quit; & the landlord agreed with another party for a holding to commence on the expiration of the current term, at £80 a year. Before the term expired, the new tenant, by consent of all parties, was admitted in place of the outgoing tenant; & the rent was paid at the rate of £47 to the end of the original term. Disputes arising on the new agreement, it was abandoned; but the new tenant continued to occupy:—*Held*: it was a question for the jury, in an action for use & occupation, what rent was fairly payable for the continued holding; no necessary inference arising, under the circumstances, from the former holding at £17.—*THETFORD CORPN. v. TYLER* (1845), 8 Q. B. 95; 15 L. J. Q. B. 33; 6 L. T. O. S. 124; 10 Jur. 68; 115 E. R. 810.

**4307. Rent of house & furniture—Apportionment—Mortgagee entering to house only.**—*SALMON v. MATTHEWS*, No. 3648, *ante*.

**4308. Bad state of drainage—Landlord liable to repair—No ground for reduction.**—*HEARD v. CAMPLIN*, No. 4333, *post*.

#### PART XV. SECT. 10, SUB-SECT. 3.—E.

**4299 l. Action will lie.**—*GALBRAITH v. GWYNNE* (1831), Hayes, 244.—*IR.*

#### PART XV. SECT. 10, SUB-SECT. 3.

##### —F. (a).

**n. Land occupied under mistake of title—Fixing occupation rent—Deduction of value of improvements.**—No occupation rent should be charged against one who has been in occupation of land under mistake of title, in respect of the increased value thereof arising from improvements which are not allowed him.—*MCGREGOR v. MCGREGOR*

(1884), 5 O. R. 617.—*CAN.*

**o. — — — — —**—*J.*—*MUNNIE v. LINDBAY* (1886), 11 O. R. 520.—*CAN.*

**p. How calculated—Value of use & occupation—Whether damages in addition recoverable.**—The action for use & occupation, the liability for which accrues *de die in diem*, is based upon the value of the occupation. If the owner desires to found a claim for damages in addition to that value, he must bring home to the tenant the fact that his remaining in possession will render him liable in special

damages.—*COHEN v. GODKIN*, [1924] 4 D. L. R. 350; 55 O. L. R. 436.—*CAN.*

**q. — — — — —**—*J.*—*LONDON & SOUTH AFRICAN EXPLORATION CO., LTD. v. NOONAN* (1887), 4 H. C. 357.—*S. AF.*

**r. Eviction from part of premises—Liability for value of part retained.**—In an action of debt for use & occupation, pltf. may recover the value of that part of the premises of which def't. retains the possession, although pltf. has evicted him out of the other part, & although the original contract between the parties was a written agreement for a rent certain.—*GRAND*

*Sect. 10.—Recovery of rent: Sub-sect. 3, F. (a), (b) & (c), & G. (a), (b) & (c).]*

**4309. Action by widow of lessor—Debt due before & after decease—Allocation of money received—To debt due to lessor.]**—In use & occupation to recover £42 8s. 10d., the balance of an account of £64, *pltf.* in her particulars of demand admitted the receipt of £21 2s. *Deft.* had occupied the premises under *pltf.*'s husband, & subsequently to his death had held them of *pltf.*:—*Held*: *pltf.* was entitled to show that part of the sum for which she had given credit in her particulars was to be ascribed to the debt due to the husband, & not to that which became due to herself since his death.—*MERCY v. GALOT* (1849), 6 Dow. & L. 656; 3 Exch. 851; 18 L. J. Ex. 347; 13 L. T. O. S. 167; 13 Jur. 412; 154 E. R. 1089.

**Rent not to commence pending repairs—Failure of landlord to repair.]**—See Nos. 4279, 4280, *ante*.  
**Action for double value.]**—See Part XXIV., *Sect. 10, post*.

(b) *In respect of What Period.*

See Distress for Rent Act, 1737 (c. 19), s. 14.

**4310. Period of occupation fixed by agreement—Liability irrespective of actual occupation.]**—*BAKER v. HOLTPZAFFELL*, No. 3966, *ante*.

**4311. ———.]**—A. agrees to purchase B.'s equitable interest in lands for a term of years at a specified rent. A. after paying the rent for several years & acknowledging that a further sum is due, cannot resist B.'s claim for such further rent in an action at law, by showing that he has not been able to use the lands.

*Qu.*: whether B. could recover for use & occupation.—*CONOLLY v. BAXTER* (1819), 2 Stark. 525, N. P.

*Annotation*:—*Refd.* *Nation v. Tozer* (1834), 1 Cr. M. & R. 172.

**4312. ——— Entry in broken quarter.]**—Assignees of a *bkpt.* having in a broken quarter entered into possession of land which the latter had agreed to take upon a building lease, upon the terms of paying the rent half yearly:—*Held*: use & occupation would lie against them for the whole year, though they had not occupied during all the time.—*GIBSON v. COURTHOPE* (1822), 1 Dow. & Ry. K. B. 205.

**4313. ———.]**—*JONES v. REYNOLDS*, No. 4224, *ante*.

**4314. ——— Option to take new term—Year's rent.]**—*WARING v. KING*, No. 4260, *ante*.

**4315. ———.]**—Where a party, entitled to a term in land, demises the land to another, at a weekly rent, for the whole of such term, & it is the intention of the two to create the relation of landlord & tenant, use & occupation may be brought for the whole of such term, although the lessee has given a week's notice to quit before the expiration of the term, & has quitted accordingly.

Such a demise will not be deemed an assignment, against the intention of the parties, though nothing be left in the party demising.—*POLLOCK v. STACY* (1847), 9 Q. B. 1033; 16 L. J. Q. B. 132; 8 L. T. O. S. 388; 11 Jur. 267; 115 E. R. 1570.

*Annotations*:—*Consd.* *Beardman v. Wilson* (1868), L. R. 4 C. P. 57. *Refd.* *Cottee v. Richardson* (1851), 7 Exch. 143.

**4316. ——— Non-continuous period.]**—*Pltf.* orally agreed to let a piece of waste ground to *deft.* for three successive Bank Holidays; *deft.* was to have exclusive possession of the ground on those

days, & to pay £45 for the use of the ground, paying an instalment of £15 for each of the three days. *Deft.* entered & occupied the land on the first of the three days, & after entry paid the first instalment of £15; he refused to occupy the ground on the other two days, or to pay to *pltf.* the balance of the rent. In an action by *pltf.* to recover the two remaining instalments, *deft.* contended that the claim was barred by Stat. Frauds, s. 4:—*Held*: there having been an entry for the purpose of occupation under an agreement for a single letting, although the period of the agreed letting was not continuous at a single rent, & a payment of rent on account of the entry, *pltf.*'s right to recover the balance was not affected by the fact that the agreement was not in writing, & the statute afforded no defence to the claim.—*SMALLWOOD v. SHEPPARDS*, [1895] 2 Q. B. 627; 64 L. J. Q. B. 727; 73 L. T. 219; 44 W. R. 44; 11 T. L. R. 586; 39 Sol. Jo. 735.

*Annotation*:—*Mentd.* *Ayers v. Hanson, Stanley & Prince* (1912), 66 Sol. Jo. 735.

**4317. ——— Rent payable yearly—Damages not recoverable before date of payment.]**—*COLLETT v. CURLING*, No. 3709, *ante*.

**4318. Period of occupation unfixed—Liable for actual occupation—Holding over.]**—Lessee of a term underlet the demised premises, & his undertenant held over for a portion of a year after the expiration of the term, against the will of the lessee, so that he could not give up possession to his lessor. During such holding over lessee distrained upon the undertenant for rent previously due:—*Held*: lessee was liable, in use & occupation, for the period of the undertenant's holding over, but not for a whole year's rent.—*IBBS v. RICHARDSON* (1839), 9 Ad. & El. 849; 1 Per. & Dav. 618; 8 L. J. Q. B. 126; 3 Jur. 102; 112 E. R. 1436.

*Annotations*:—*Refd.* *Tancred v. Christy* (1843), 12 M. & W. 316; *Levy v. Lewis* (1861), 9 C. B. N. S. 872; *Hurley v. Hanrahan* (1867), 15 W. L. R. 990; *Henderson v. Squire* (1869), 10 B. & S. 183; *Reynolds v. Bannerman*, [1922] 1 K. B. 719.

**4319. ——— Remuneration accruing from day to day.]**—Debt for use & occupation lies at common law, & is not defeated by proof of a demise, not under seal, reserving a certain rent, though Distress for Rent Act, 1737 (c. 19), s. 14, is confined to actions upon the case.

The obligation is coextensive with, & measured by, the enjoyment: as soon as the occupation ceases, the implied contract ceases; &, as no express time is limited, the remuneration must necessarily accrue from day to day. . . . The action of *deft.* for use & occupation was wanted only where the occupation was for no certain time at no fixed rent; for in all other cases the action of debt for rent was the known & appropriate remedy (*LORD DENMAN, C.J.*).—*GIBSON v. KIRK* (1841), 1 Q. B. 850; 1 Gal. & Dav. 252; 10 L. J. Q. B. 297; 6 Jur. 99; 113 E. R. 1357.

*Annotations*:—*Refd.* *Standen v. Christmas* (1847), 11 Jur. 694; *Alington v. Booth* (1856), 3 Jur. N. S. 50; *Shine v. Dillon* (1867), 15 W. R. 847.

**4320. ———.]**—*BLACKWELL v. BADGER & WORRELL* (1845), 5 L. T. O. S. 176.

**Rent to commence when repairs effected.]**—See Nos. 4279, 4280, *ante*.

(c) *Rent in Advance.*

See Distress for Rent Act, 1737 (c. 19), s. 14.

**4321. Not recoverable.]**—*ANGELL v. RANDALL*, No. 3750, *ante*.

*CANAL CO. (UNDERTAKERS) v. FITZSIMONS* (1828), 1 Hud. & B. 449; 1 Ir. L. Rec. 1st ser. 8, 181.—*IR.*

*t. Occupation after tenancy fallen in—Liability for full value.]*—*HURLEY v. HANRAHAN* (1867), 15 W. R. 990.—*IR.*

**PART XV. SECT. 10, SUB-SECT. 3.—**

**F. (b).**

*a. Premises occupied under proposed agreement—Agreement fallen through.]*—*BRENNAN v. JACK* (1882), 3 R. & G. 368.—*CAN.*

**PART XV. SECT. 10, SUB-SECT. 3.—**

**F. (c).**

**4321 i. Not recoverable.]**—Rent payable in advance by special agreement, cannot be recovered on the common count for use & occupation.—*TAYLOR*

*G. Defences.**(a) Eviction.*

See Distress for Rent Act, 1737 (c. 19), s. 14.

**4322. General rule—Right of action lost.]**—Where a tenant from year to year, at a rent payable half-yearly, quitted at the end of a current year without giving notice; & the landlord relet the premises, before the end of the next half-year, to another tenant:—*Held*: the landlord had evicted the first tenant, & could not maintain use & occupation against him for any rent subsequent to the period when he quitted.—*HALL v. BURGESS* (1826), 5 B. & C. 332; 8 Dow. & Ry. K. B. 67; 4 L. J. O. S. K. B. 172; 108 E. R. 124.

*Annotations*:—*Consd.* Upton v. Townend, Upton v. Greenlees (1855), 17 C. B. 30. *Reid.* Churchward v. Ford (1857), 5 W. R. 831.

**4323. Eviction from part—Surrender of remainder.]**—*SMITH v. RALEIGH*, No. 3934, *ante*.

**4324. — Whether defence to whole demand—Tenant in possession of residence.]**—*STOKES v. COOPER*, No. 3935, *ante*.

**4325. — — —.]**—*BURN v. PHELPS*, No. 3920, *ante*.

— **Damages recoverable.]**—See No. 4304, *ante*.

**4326. Eviction of sub-tenant.]**—*BURN v. PHELPS*, No. 3920, *ante*.

**4327. Rent due before eviction—No defence.]**—An action for use & occupation may be maintained by a grantee of an annuity after a recovery in ejectment against a tenant, who was in possession under a demise from year to year, for all rent in his hands at the time of notice by the grantee, & down to the day of the demise in the ejectment; but not afterwards.—*BIRCH v. WRIGHT* (1786), 1 Term Rep. 378; 99 E. R. 1148.

*Annotations*:—*Consd.* Pulteney v. Warren (1801), 6 Ves. 73; Wheeler v. Keeble (1914), Ltd., [1920] 1 Ch. 57; R. v. Paulson, [1921] 1 A. C. 271. *Mentd.* Denn d. Jacklin v. Cartright (1803), 4 East, 29; Cholmondeley v. Clinton (1820), 2 Jac. & W. 1; R. v. Hermonceaux (1827), 7 B. & C. 551; *Re* Brindley, *Ex p.* Hankey (1829), Mont. & M. 247; Doe d. Fisher v. Giles (1829), 5 Bing. 421; Buckworth v. Simpson (1835), 5 Tyr. 344; Doe d. Chadborn v. Green (1839), 9 Ad. & El. 658; Brydgos v. Lewis (1842), 3 Q. B. 603; Doe d. Clarke v. Smaridge (1845), 7 Q. B. 957; Standen v. Christmas (1847), 9 L. T. O. S. 169; Blundell v. Drummond (1848), 14 Jur. 573, n.; Cattley v. Arnold, Banks v. Arnold (1859), 1 John. & H. 651; R. v. St. Giles without Cripplegate (1863), 4 B. & S. 509; Willesdon Overseers v. Paddington Overseers (1863), 3 B. & S. 593; De Nicols v. Saunders (1870), 22 L. T. 661; Phillips v. Homfray (1883), 24 Ch. D. 433; Horn v. Beard, [1912] 3 K. B. 181; A.-G. v. De Keyser's Royal Hotel, [1920] A. C. 508.

**4328. — — —.]**—*SELBY v. BROWNE*, No. 3890, *ante*.

**4329. — — — Payment to party recovering judgment.]**—In an action of debt for use & occupation, under a plea of never indebted, deft. may show that A. had recovered a judgment in ejectment for the premises, & that he had attorned & paid the rent subsequently accruing due to A., to avoid being turned out of possession, but, with respect to rent previously due, he cannot, under the general issue, set up as a defence, that he has paid it to A.—*NEWPORT v. HARLEY* (1845), 14 L. J. Q. B. 242; 10 Jur. 333.

**Suspension of rent on eviction.]**—See Sect. 6, sub-sects. 1-3, *ante*.

*(b) Premises Unfit for Occupation.*

See Distress for Rent Act, 1737 (c. 19), s. 14.

**4330. General rule—Entry by landlord.]**—

*v.* WHITE (1841), Arm. M. & O. 241.—*IR.*

**PART XV. SECT. 10, SUB-SECT. 3.—**  
G. (c).

*b. Validity of plaintiff's title.]*—*LINDSAY v. CREIGHTON* (1882), 3 R. &

G. 290.—*CAN.*

*c. — — —.]*—Once it is shown in an action for use & occupation that the possession of deft. was adverse the action must fail.—*TUAPEKA HOSPITAL BOARD v. CRUICKSHANK & COLLINS* (1905), 24 N. Z. L. R. 744.—*N.Z.*

*EDWARDS v. HETHERINGTON (OR ETHERINGTON)*, No. 4190, *ante*.

**4331. — Repairs.]**—Where the agreement under which a party holds a house states that he "agrees to become tenant by occupying," it will be an answer to a claim of rent, in an action for use & occupation, if he shows that the house was not in such a reasonable & decent state of repair as to be fit for comfortable occupation.—*SALISBURY v. MARSHAL* (1829), 4 C. & P. 65, N. P.

*Annotations*:—*Distd.* Surplice v. Farnsworth (1844), 7 Man. & G. 576. *Reid.* Izon v. Gorton (1839), 7 Scott, 537; Hart v. Windsor (1844), 12 M. & W. 68.

**4332. Destruction of premises.]**—*BAKER v. HOLTPZAFFELL*, No. 3906, *ante*.

**4333. Badness of drainage—Landlord under duty to repair.]**—The badness of the drainage, which the landlord ought to repair, is no answer to an action for use & occupation.

*Semble*: it is not admissible evidence in such action to reduce the damages.—*HEARD v. CAMPLIN* (1850), 15 L. T. O. S. 437.

*(c) Other Defences.*

See Distress for Rent Act, 1737 (c. 19), s. 14.

**Premises let for illegal or immoral purpose.]**—See *CONTRACT*, Vol. XII., p. 276, 277.

**4334. Goods under distress remaining unsold.]**—Action for use & occupation. Plea, that pltf., before action, took & detained, as a distress for the rent, goods of value sufficient to satisfy the same:—*Held*: this plea was bad, for not showing that the rent was satisfied.—*LEAR v. EDMONDS* (1817), 1 B. & Ald. 157; 106 E. R. 58; *sub nom.* *DEARE v. EDMONDS*, 2 Chit. 301.

*Annotations*:—*Apld.* Lingham v. Warren (1820), 2 Brod. & Bing. 36; Hudd v. Ravenor (1821), 2 Brod. & Bing. 602. *Consd.* Leham v. Philpott (1875), L. R. 10 Exch. 242. *Reid.* Dawson v. Cropp (1845), 1 C. B. 961; Bagge v. Mawby (1853), 8 Exch. 641; Philpott v. Leham (1876), 35 L. T. 855.

— *J.*—See *DISTRESS*, Vol. XVIII., pp. 350, 351, Nos. 878-882.

**4335. Validity of plaintiff's title—Invalid lease from churchwardens.]**—Churchwardens only cannot execute leases, as a body corporate, of parish lands, under Poor Relief Act, 1818 (c. 12), s. 17. Where the occupier of a house paid rent to churchwardens, & the latter afterwards demised the house by lease for a term to A., with notice to the tenant that he must consider A. as his landlord. In an action for use & occupation:—*Held*: the tenant might impeach the lease, & show that the lessee had no title derived from the churchwardens.—*PHILLIPS v. PEARCE* (1826), 5 B. & C. 433; 8 Dow. & Ry. K. B. 43; 108 E. R. 162.

*Annotation*:—*Mentd.* Doe d. Higgs v. Cockell (1834), 6 C. & P. 525.

**4336. — Must show in whom title exists.]**—Evidence which simply negatives the title of a pltf. suing for use & occupation, to whom deft. has paid rent, is not an answer to pltf.'s *prima facie* case. Either a counter claim must be set up, or it must be shown in whom a good present title is.—*COCKERELL v. —* (1846), 7 L. T. O. S. 43.

— **Defendant estopped from impeaching.]**—See Part I., Sect. 3, sub-sect. 1, *ante*.

**4337. Holding determined by agreement.]**—In an action of debt for use & occupation, deft. may show, under "never indebted," that before the

*d. — — — Unauthorised possession of Crown lands.]*—*R. v. HARE, Ex p. YOUNG* (1883), 9 V. L. R. 38.—*AUS.*

*e. Non-performance by plaintiff of stipulated conditions.]*—Action for use & occupation. Equitable plea, that deft. entered upon an agreement, not

**Sect. 10.—Recovery of rent: Sub-sect. 3, G. (c), H., I., J. & K.; sub-sects. 4, 5 & 6. Sect. 11.]**

rent sought to be recovered became due, the holding had been determined by an agreement between the parties. A special plea is not necessary.—**WASHINGTON v. HARTIAN** (1841), 10 L. J. Q. B. 253; 6 Jur. 127.

**4338. Payment to assignor of reversion—Before notice of assignment.]**—To an action for use & occupation of certain furnished rooms of pltf., plea that before deft. held the rooms under pltf. he held the same under A. as tenant thereof to A.; that while deft. was such tenant of A. & before, etc., A. assigned to pltf. all her estate in the rooms, etc.; that the occupation in the declaration mentioned was a continuation of the tenancy under A. & that deft. paid to A. the money in the declaration mentioned, without any notice of the assignment, nor did deft. ever expressly promise pltf. to pay him the money in the declaration mentioned:—*Held*: the words "nor did deft. ever expressly promise" made the plea amount to the general issue; but the plea without those words was good.—**COOK v. MOYLAN** (1847), 1 Exch. 67; 16 L. J. Ex. 253.

*See, further, Sect. 4, sub-sect. 2, C. (b), ante.*

**4339. Payment to mortgagee of reversion—After notice.]**—In *assumpsit* for use & occupation, held, that under the issue of *non assumpsit*, deft. might give in evidence that pltf. had mortgaged the premises before deft. came into occupation, & that the mtgee. had given notice to deft. not to pay to pltf. any rent becoming due after such notice. Obedience to mtgee's notice as to rent due before the notice, must be specially pleaded.—**WADDLOVE v. BARNETT** (1836), 2 Bing. N. C. 538; 4 Dowl. 347; 1 Hodg. 395; 2 Scott, 763; 5 L. J. C. P. 145; 132 E. R. 210.

*Annotations:—Folld. Brook v. Biggs* (1836), 2 Bing. N. C. 572. *Consd. Newport v. Harley* (1845), 14 L. J. Q. B. 242; *Wilton v. Dunn* (1851), 17 Q. B. 294. *Refd. Evans v. Elliot* (1838), 9 Ad. & El. 342; *Selby v. Browne* (1845), 14 L. J. Q. B. 307; *Mountney v. Collier* (1853), 22 L. J. Q. B. 124. *Mentd. Hayselden v. Staff* (1836), 5 Ad. & El. 153.

**4340. Sequestration of vicarage.]**—Parish of H., previously in diocese of L., was by order in Council in 1836 transferred to diocese of W. In 1843 sequestration issued by Bishop of L. against vicar of H., under which sequestrator received rents to 1848. No other sequestration had at that time been issued by Bishop of W. into H. parish. In action for use & occupation by vicar of H. to recover rent of certain premises due Lady Day 1848:—*Held*: issue of sequestration was act of jurisdiction or authority by Bishop of L., to whose diocese the parish used to belong, & it was rendered valid by Ecclesiastical Jurisdiction Act, 1847 (c. 98), s. 8; & it ousted title of pltf., & being a continuing execution was good answer to action, & defence was admissible under plea of "never indebted."—**POWELL v. HIBBERT** (1850), 15 Q. B. 129; 19 L. J. Q. B. 347; 15 L. T. O. S. 158; 14 J. P. 622; 14 Jur. 866; 117 E. R. 407.

*Annotation:—Mentd. Phelps v. St. John* (1855), 10 Exch. 895.

**Occupation under express demise.]—See Sect. 10, sub-sect. 3, C. (f), ante.**

#### H. Pleading.

*See Distress for Rent Act, 1737 (c. 19), s. 14; & generally, PLEADING.*

in writing, for a lease under which no rent was to be paid until certain conditions were performed by pltf., which had never been so performed:—*Held*: a good legal defence.—**TORONTO**

**HOSPITAL (TRUSTEES) v. HEWARD** (1858), 8 C. P. 84.—**CAN.**

*1. Judgment in replevin.]—CROOKS v. BOWEN* (1852), 22 U. C. R. 219.—**CAN.**

**4341. Particulars of demise—Need not be set out.]**

—Debt will lie for use & occupation generally, without setting forth the particulars of the demise.

—**WILKINS v. WINGATE** (1794), 6 Term Rep. 62; 101 E. R. 436.

*Annotations:—Folld. King v. Fraser* (1805), 6 East, 348. *Consd. Gibson v. Kirk* (1841), 1 Q. B. 850. *Refd. Curtis v. Spitty* (1834), 1 Bing. N. C. 15; *Alington v. Booth* (1856), 3 Jur. N. S. 50.

**4342. ———.]**—Debt lies for the use & occupation generally, without stating any of the particulars of the demise.—**KING v. FRASER** (1805), 6 East, 348; 2 Smith, K. B. 462; 102 E. R. 1320.

*Annotations:—Consd. Kirtland v. Pounsett* (1809), 1 Taunt. 570; *Egler v. Marsden* (1813), 5 Taunt. 25; *Curtis v. Spitty* (1834), 1 Bing. N. C. 15; *Gibson v. Kirk* (1841), 1 Q. B. 850. *Refd. Alington v. Booth* (1856), 3 Jur. N. S. 50.

**4343. Action by surviving owner—Must show occupation under co-owners.]**—In an action by a surviving owner for the use & occupation of premises, it is not sufficient to allege that deft. held the premises by the sufferance & permission of the surviving owner only, where they were in fact held under two jointly.—**ISRAEL v. SIMMONS** (1818), 2 Stark. 356, N. P.

*See, also, No. 4296, ante.*

#### I. Set-Off.

*See Distress for Rent Act, 1737 (c. 19), s. 14.*

**4344. Payment of rates—Irregularly assessed.]**—**ROPER v. BUMFORD**, No. 3868, *ante*.

**4345. Part payment of premium—Agreement for lease.]**—**COLTON v. DORRELL**, No. 3871, *ante*.

*See, generally, SET-OFF.*

#### J. Practice.

**4346. Indorsement of writ—Whether liquidated demand.]**—Deft. appeared to a writ indorsed with a claim for a liquidated amount, & also with a claim for use & occupation of premises. Pltf. applied by summons for final judgment under R. S. C., Ord. 14, r. 1. At the hearing of the summons deft. objected that the writ was not specially indorsed within R. S. C., Ord. 3, r. 6, & the master adjourned it, giving pltf. leave to amend the indorsement by striking out the claim for use & occupation. A copy of the writ so amended was served, & upon the adjourned summons, there being no affidavit of merits, the master made an order for final judgment for the liquidated amount:—*Held*: deft. had not appeared to a writ specially indorsed under R. S. C., Ord. 3, r. 6; the application for final judgment was improper; the amendment "*nunc pro tunc*" was improper; & the order for judgment was made without jurisdiction.—**GURNEY v. SMALL**, [1891] 2 Q. B. 584; 60 L. J. Q. B. 774; 65 L. T. 754, D. C.

*Annotations:—Consd. Paxton v. Baird*, [1893] 1 Q. B. 139. *Refd. Roberts v. Plant*, [1895] 1 Q. B. 597. *Mentd. Gerrard v. Clowes* (1892), 67 L. T. 204.

**4347. Right to sign judgment on undisputed claim—Facts not supporting claim.]**—Pltf. alleged by his statement of claim that he was owner in fee of certain premises which he had, on Sept. 26, 1859, leased to M. for thirty-one years from Dec. 25, then next, at a yearly rent of £105 payable quarterly. The statement then set forth the covenants in the lease to pay rent, repairs, etc., & the condition for re-entry for breach of covenant; & alleged that in the year 1870 deft. took possession of & had since occupied the

**PART XV. SECT. 10, SUB-SECT. 3.—I.**

*E. Value of improvements.]—JULIAN v. LOUGHNANE* (1858), 8 I. C. L. 11. 138.—**IR.**

premises, & that subsequently he had become assignee of the lease, & had paid rent to pltf. in accordance with the terms of the lease from 1870 to Mar. 1874. The statement further alleged breaches of the various covenants, & pltf. claimed (a) possession of the premises; (b) £157 10s. for arrears of rent to Sept. 29, 1875, or for use & occupation; (c) damages for breaches of the covenants in the lease; (d) mesne profits from Sept. 29, 1875, to the date of recovery of possession. Deft. in his statement of defence denied that he was assignee of the lease, or that it ever became vested in him, or that he had broken the covenants in the lease. He admitted that the lease had been avoided, & that pltf. was entitled to possession of the premises; he also admitted that he was in possession up to Sept. 29, 1875, but alleged that he ceased to have possession from that date & he paid £25 into ct. to answer pltf.'s claim in respect of mesne profits:—*Held*: the facts as set out in the pleadings did not support the claim made by pltf. upon deft. for use & occupation of the premises up to Sept. 1875, & pltf. was not entitled to sign judgment, under R. S. C., Ord. 14, r. 4, for the amount he claimed in respect of such use & occupation.—*HANMER (LORD) v. FLIGHT* (1876), 36 L. T. 279, C. A.

*See, generally, PRACTICE.*

#### K. Costs.

**4348. Right of set-off—Against costs in action for trespass.**—A. brought an action of use & occupation against B. & recovered a verdict, & B. afterwards commenced an action of trespass against A. for seizing his cattle for rent due, & A. suffered judgment by default, & on a writ of inquiry B. received £1 more in damages than A. had obtained in his action:—*Held*: the costs of the one might be set off against the other, although it appeared that A. was insolvent & that his attorney would be thereby deprived of his security for costs.—*LOMAS v. MELLOR* (1820), 5 Moore, C. P. 95.

*See, generally, SET-OFF.*

**4349. Effect of payment into court—Of amount claimed before action brought—Action brought for larger sum—Defendant entitled to subsequent costs.**—Pltfs. claimed £37 from deft. for the use & occupation of a house & authorised him to pay the amount to a person whom they named. She called on deft. & he then expressed his readiness to pay the amount, but she, having also an interest in the property, refused to receive it. No actual tender was made. Pltfs. sued deft. for the use & occupation claiming £238. Deft. paid £37 into ct.:—*Held*: as soon as deft. expressed to the agent his readiness to pay the £37 there was a concluded agreement between him & pltfs. for that amount & pltfs. could not recover more.—*GRETTON v. MEES* (1878), 7 Ch. D. 839; 38 L. T. 506; 26 W. R. 607.

*See, generally, PRACTICE.*

#### SUB-SECT. 4.—RIGHT AFTER EXECUTION AGAINST TENANT.

**Payment by sheriff.**—*See EXECUTION*, Vol. XXI., pp. 522–524, Nos. 963–977.

**PART XV. SECT. 10, SUB-SECT. 5.**  
*h. Sale of judgment debtor's goods under execution—Goods purchased by landlord—Set-off of rent against price.*—Deft., having a claim for rent & a landlord's lien on certain goods be-

longing to a judgment debtor which were being sold by the sheriff under execution, bid in the goods at the sale. Thereafter the amount of rent due was adjusted between the sheriff & deft., & deft. sought to set off this

amount against the price of the goods sold:—*Held*: deft. was entitled to do so.—*INGRAHAM v. MCKAY* (1912), 12 F. L. R. 225; 8 D. L. R. 132; 49 C. L. J. N. S. 76; 46 N. S. R. 518.—*CAN.*

**Return of nulla bona—Where rent not provided.**—*See EXECUTION*, Vol. XXI., pp. 533, 534, Nos. 1080–1085.

**Execution followed by bankruptcy.**—*See BANKRUPTCY*, Vol. V., pp. 820, 829, 961, Nos. 6966–6968, 7041, 7875, 7876.

**Execution in county courts.**—*See COUNTY COURTS*, Vol. XIII., pp. 515, 517, Nos. 647, 665.

**Effect on landlord's right to distrain.**—*See DISTRESS*, Vol. XVIII., pp. 342–349, Nos. 779–870.

#### SUB-SECT. 5.—BY SET-OFF AND COUNTERCLAIM.

**4350. Action for arrears of rent—Counterclaim on outgoing valuation—Counterclaim in reply for further rent—Admissible.**—Pltf. brought an action to recover arrears of rent of a farm down to Midsummer, 1881. Deft. by his counterclaim, delivered after Sept. 29, claimed the amount due to him on a valuation as outgoing tenant. Pltf. in reply, "by way of set-off & counterclaim," claimed the quarter's rent due on Sept. 29, & also a sum paid by him for tithe rentcharge left unpaid by deft. On application by deft. to strike out this reply:—*Held*: pltf. was entitled to set up such counterclaim in reply.—*TOKE v. ANDREWS* (1882), 8 Q. B. D. 428; 51 L. J. Q. B. 281; 30 W. R. 659, D. C.

*Annotations*:—*Expld. Aleoy & Gandia Ry. & Harbour Co. v. Greenhill*, [1896] 1 Ch. 19. *Consd. Renton, Gibbs v. Neville*, [1900] 2 Q. B. 181.

**On bankruptcy of tenant—Set-off against outgoing valuation.**—*See BANKRUPTCY*, Vol. IV., pp. 394, 400, Nos. 3609, 3610, 3646.

*See, further, Sect. 5, ante; ACTION*, Vol. I., pp. 22, 23, Nos. 179–185; *SET-OFF*.

#### SUB-SECT. 6.—LOSS OF RIGHT BY LAPSE OF TIME.

*See LIMITATION OF ACTIONS.*

**Right to distrain.**—*See DISTRESS*, Vol. XVIII., pp. 328, 329, Nos. 622–628.

#### SECT. 11.—CONFLICTING CLAIMS TO RENT.

**4351. Indemnity to tenant—Remedy in case of ouster.**—If security be given to tenants on paying their rent, & they are afterwards ousted, they have no remedy until the mean profits are recovered.

If one pretending to have title to land give security to the tenants to save them harmless upon paying him the rent, & afterwards another recover in ejectment against them, they have no remedy upon the security until recovery of the mean profits, which is from the time of the action brought, & without an actual entry there can be no recovery of the profits (*per cur.*).—*ANON.* (1704), 6 Mod. Rep. 222; 87 E. R. 973.

**Right of tenant to interplead.**—*See INTERPLEADER*, Vol. XXIX., pp. 461, 462, Nos. 91–100.

**Duty of tenant to give notice to landlord.**—*See REAL PROPERTY.*

**4352. — Failure to give notice—Liability for three years "improved rent."**—*CROCKER v. FOTHERGILL*, No. 3527, *ante*.

## Part XVI.—Rates and Taxes.

### SECT. 1.—LIABILITY IN ABSENCE OF AGREEMENT.

#### SUB-SECT. 1.—RATES.

*See, generally, RATES & RATING.*

**4353. Right to deduct—From rent of current year.]—**ANDREW *v.* HANCOCK, No. 4390, *post*.

**4354. — Tenant of part of premises—Paying rates made on tenant of another part—Landlord's title subsequently accrued.]—**The local Act, s. 179, empowers the vestrymen of Marylebone to make rates, etc., upon persons who shall occupy, etc., any land, etc., according to the yearly rent, etc., to be entered in a book in which there are to be separate columns, one for the arrears & another for the names of the persons charged. By sect. 187, where houses are let in parts, etc., the lessor or lessee shall respectively be deemed the occupier, & liable to the payment of rates according to such proportion of the yearly rent. By sect. 188 every person occupying any such part shall be liable to the payment of the said rates, & the occupiers who shall pay such rates shall deduct the same out of the next rent. A tenant of part of a house in the parish of Marylebone, having paid rates which had been made on the occupier of another part who had quitted the premises:—*Held*: he was not entitled to deduct them as against a landlord whose title had not accrued until after the person rated had quitted the premises.—**LOBBAN *v.* COOK** (1858), 3 H. & N. 238; 27 L. J. M. C. 254; 31 L. T. O. S. 102; 22 J. P. 643; 6 W. R. 498; 157 E. R. 459.

**Whether liable to distress in respect of rates for whole premises.]—***See* DISTRESS, Vol. XVIII., p. 414, No. 1542; RATES & RATING.

**4355. Repayment of rent paid under mistake—Deduction from amount repaid.]—**BARBER *v.* BROWN, No. 3876, *ante*.

**4356. Consolidated rate—Portion payable by landlord.]—**(1) By a local Act, a single rate known as the consolidated rate was substituted for the several rates theretofore existing. By sect. 3 of the Act it was enacted that the consolidated rate meant the poor rate as by the Act authorised to be levied & collected; & by sect. 7 the poor rate was to be called the consolidated rate of the parish for which the same should be levied. By sect. 10: "One-eighth of the consolidated rate shall be borne by the owners of the property rated thereto, but in every case the whole rate shall be paid in the first instance by the occupiers of the property rated who are hereby empowered to deduct out of their rents the amounts paid by them on behalf of the owners: Provided," etc.:—*Held*: the consolidated rate to the extent of one-

eighth thereof was a landlord's rate & was not a tenant's rate within Union Assessment Committee Act, 1862 (c. 103), s. 15.

A hereditament in Newcastle was let to an occupier at a rent of £100 a year. The occupier at first paid all the rates imposed on him in respect of the hereditament, & deducted from the rent £7 being one-eighth of the consolidated rate, & paid £93 to his landlord. Afterwards by agreement with his landlord the terms of the tenancy were altered, so that the occupier paid a rent of £93 & paid the consolidated rate without deducting one-eighth or any other proportion therefrom. The hereditament was assessed at a gross estimated rental of £100. The occupier appealed against the assessment, claiming that £93, the annual rent free from the £7, the one-eighth aforesaid, which he contended was a usual tenant's rate, was the gross estimated rental of the hereditament. The rating authority confirmed the assessment. Upon a special case stated on the occupier's appeal to quarter sessions:—*Held*: the sessions were warranted in fixing the gross estimated rental at £100.—**SLAYTOR *v.* NEWCASTLE-UPON-TYNE ASSESSMENT COMMITTEE**, [1926] 1 K. B. 172; 95 L. J. K. B. 120; 134 L. T. 69; 89 J. P. 191; 42 T. L. R. 47; 23 L. G. R. 671, C. A.

#### SUB-SECT. 2.—TAXES.

##### A. Income Tax.

##### (a) Right to Deduct.

##### i. When Right Arises.

**4357. Only when tax actually paid.]—**Appl. demised to a coal co. all the minerals under a certain piece of land at a royalty to be measured by the quantity of mineral gotten, but the lease provided for the payment of a minimum yearly rent of £60, with a provision for distress. The surface was let for agricultural purposes to another tenant, who was assessed to the income tax in respect thereof. No work was done by the co. on these minerals, & they were not assessed in respect of them. Before paying the £60 to applt., the co. deducted the income tax thereon, claiming a right to do so either under Income Tax Act, 1842 (c. 35), s. 42, or under Customs & Inland Revenue Act, 1888 (c. 8), s. 24 (3). Applt. was assessed to income tax in respect of this £60:—*Held*: the co. were not entitled to deduct the tax, & applt. was properly assessed under Income Tax Act, 1842 (c. 35), s. 60, Sched. A. No. II., r. 6, in respect of profits arising from lands or hereditaments not in his actual possession or occupation.—

### PART XVI. SECT. 1, SUB-SECT. 1.

**4353 i. Right to deduct—From rent of current year.]—**Where an Act imposed on the tenant while in possession a liability to pay all rates:—*Held*: he was the person who ought to pay, & his remedy was to deduct what he had paid from the rent due, or to bring an action for it against his landlord.—**BROWN *v.* GROGAN** (1884), 5 N. S. W. L. R. 180.—**AUS.**

**4353 i. —.]—**Upon the true construction of Sydney Corporation (Amendment) Act, 1908, s. 11 (2), the right of a lessee to recover from the lessor, or to deduct from the rent, in respect of a rate imposed under that Act & paid by the lessee, is conditional

upon the proportional amount payable by the lessor having been determined by the comrs. of taxation upon an adjustment under Land Tax (Leases) Act, 1902, s. 4, & this is so although the lease is for less than thirty years.—**MICK SIMMONS, LTD. *v.* ROFE**, [1920] A. C. 379.—**AUS.**

**4353 iii. —.]—****ALDWELL *v.* HANATH** (1857), 7 C. P. 9.—**CAN.**

**4353 iv. —.]—**A tenant, not precluded by contract, is entitled to deduct from his rent a proportion of special sanitary rates assessed in rural districts under Public Health (Ireland) Act, 1874.—**MALTON *v.* WEST** (1877), 1 R. 11 C. L. 525.—**IR.**

**4353 v. —.]—****HENDERSON *v.* GURR** (1913), 32 N. Z. L. R. 785.—**N.Z.**

**k. In case of weekly tenancy.]—**In the absence of express agreement when premises are let to a weekly tenant, the landlord, as between the tenant & himself, is liable to pay the rates.—**DERMER *v.* CONNOLLY** (1905), 7 W. A. L. R. 243.—**AUS.**

### PART XVI. SECT. 1, SUB-SECT. 2.—A. (a) i.

**4357 i. Only when tax actually paid.]—****WYCHERLY *v.* FLYNN**, [1922] 2 L. R. 169.—**IR.**

**1. Only when payment compellable.]—**Assessment Act, 1877, s. 21, which,

**HILL v. GREGORY**, [1912] 2 K. B. 61; 81 L. J. K. B. 730; 106 L. T. 603; 6 Tax Cas. 39.

**Annotations**:—**Consd.** *Rossdale v. Fryer*, [1922] 2 K. B. 303. **Mentd.** *Howe v. I. R. Comrs.*, [1919] 2 K. B. 336; *Back v. Daniels*, [1925] 1 K. B. 526.

**4358.** —[—]—A tenant has no right to deduct landlord's property tax from the rent before paying the tax.—**BARNES v. KYFFIN** (1916), 32 T. L. R. 381.

**4359. Where tax paid—Pro tanto payment of rent.**—*Re STURMEY MOTORS, LTD., RATTRAY v. STURMEY MOTORS, LTD.*, No. 4377, *post*.

**4360.** —[—]—**Although landlord exempt.**—A tenant has a right to deduct from his rent the amount of property tax assessed upon & paid by him in respect of his landlord, although the landlord is not, in fact, liable to be assessed, & has before the payment claimed exemption, & that exemption has been subsequently allowed.—**SWATMAN v. AMBLER** (1854), 24 L. J. Ex. 185; 24 L. T. O. S. 243.

**4361.** —[—]—**For period prior to occupation.**—A tenant may pay the amount of landlord's property tax due upon the premises he occupies in respect of a period prior to his occupation, & having done so, is entitled to deduct the amount from his next payment of rent.—*Re HAYMAN, CHRISTY & LILLY, LTD. (No. 2), CHRISTY v. THE CO.*, [1917] 1 Ch. 545; 86 L. J. Ch. 389; 116 L. T. 467.

**On proof of payment.**—*See* Sub-sect. 2, A. (d), *post*.

## ii. How Exercised.

**4362. In action for rent—Deductions arranged out of court.**—In an action for use & occupation, the property tax will not be deducted at *Nisi Prius* from the rent due.

In such an action as this pltf. must recover the amount of the rent in arrear, & the parties must settle out of ct. the deductions to which the tenant is entitled. It is only on the production of a certificate of the tax being paid, that the landlord is bound to make the allowance (**LORD ELLENBOROUGH**).—**POCOCK v. EUSTACE** (1809), 2 Camp. 181, N. P.

**Annotations**:—**Distd.** *Baker v. Davis* (1813), 3 Camp. 474. **Consd.** *North London & General Property Co. v. Moy*, [1918] 2 K. B. 439.

**4363.** —[—]—**Where tax already paid.**—**TINCKLER v. PRENTICE**, No. 4431, *post*.

**4364.** —[—]—[—]—In an action for use & occupation, where the tenant has paid the property tax before action brought, he has a right to deduct it at the trial.—**BAKER v. DAVIS** (1813), 3 Camp. 474, N. P.

**Annotations**:—**Refd.** *Cumming v. Bedford* (1846), 15 M. & W. 438; *North London & General Property Co. v. Moy*, [1918] 2 K. B. 439.

**4365.** —[—]—[—]—To covenant for rent under an indenture, deft. pleaded, as to £2 0s. 10d., that, on Apr. 5, 1843, before any part of the rent became due £2 0s. 10d., being at the rate of 7d. for every 20s. of the annual value, was duly, & according to the form of the statute, assessed on the premises, in respect of the property thereof, for the year ensuing; that, on Aug. 28, 1844, before the commencement of the suit, deft., then being occupier & tenant, paid to C., then being collector, the £2 0s. 10d.; & deft. had never made any payment on account of the rent since the payment of the £2 0s. 10d.:—**Held**: the plea sufficiently showed that the assessment was made under Income Tax Act, 1842 (c. 35), &

it answered that part of the demand to which it was pleaded.—**FRANKLIN v. CARTER** (1845), 1 C. B. 750; 3 Dow. & L. 213; 14 L. J. O. P. 241; 5 L. T. O. S. 198; 9 Jur. 874; 135 E. R. 737.

**Annotations**:—**Consd.** *North London & General Property Co. v. Moy*, [1918] 2 K. B. 439. **Refd.** *Cumming v. Bedford* (1846), 15 M. & W. 438. **Mentd.** *Skinner v. Hunt*, [1904] 2 K. B. 452.

—[—]—**Proof of payment.**—*See* Sub-sect. 2, A. (d), *post*.

## iii. How Lost.

**4366. Omission to deduct—From next payment.**—

An occupier of lands having, during a course of twelve years, paid to the collector of taxes the landlord's property tax, & the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid:—**Held**: the occupier could not recover back from the landlord any part of the property tax so paid.—**DENBY v. MOORE** (1817), 1 B. & Ald. 123; 106 E. R. 46.

**Annotations**:—**Apld.** *Andrew v. Hancock* (1819), 1 Brod. & Bing. 37. **Consd.** *Cumming v. Bedford* (1846), 15 M. & W. 438. **Refd.** *Hales v. Freeman* (1819), 1 Brod. & Bing. 391; *Stubbs v. Parsons* (1820), 3 B. & Ald. 516; *Swatman v. Ambler* (1854), 24 L. J. Ex. 185; *Lamb v. Brewster* (1879), 4 Q. B. D. 220; *Beaufort v. I. R. Comrs.*, 1 R. Comrs. v. Anglesey, [1913] 3 K. B. 48; *Hill v. Kirshenstern*, [1920] 3 K. B. 556. **Mentd.** *Smith v. Alsop* (1824), M'Clo. 622; *Cave v. Mills* (1862), 7 H. & N. 913.

**4367.** —[—]—[—]—Where a tenant pays property tax assessed on the premises, & omits to deduct it in his next payment of rent, he cannot afterwards recover the amount as money paid to the use of the landlord.—**CUMMING v. BEDFORD** (1846), 15 M. & W. 438; 6 L. T. O. S. 396; 10 J. P. 442; 153 E. R. 921.

**Annotations**:—**Consd.** *North London & General Property Co. v. Moy*, [1918] 2 K. B. 439. **Refd.** *Beaufort v. I. R. Comrs.*, 1 R. Comrs. v. Anglesey, [1913] 3 K. B. 48; *Hill v. Kirshenstern*, [1920] 3 K. B. 556. **Mentd.** *Bedford v. Sutton Coldfield, Warden & Soc.*, *Silvester v. Bedford* (1857), 3 C. B. N. S. 449.

**4368.** —[—]—[—]—The person [so] paying the property tax who omits to deduct it from his next payment of rent has no right to deduct it subsequently. Thus plainly it is not a sum which he can say he paid for or on behalf of his lessor. If he has paid the whole rent without deduction, he has paid it voluntarily & cannot recover it (*per Cur.*).—**BEAUFORT (DUKE) v. INLAND REVENUE COMRS.**, *INLAND REVENUE COMRS. v. ANGLESEY (MARQUESS)*, [1913] 3 K. B. 48; 82 L. J. K. B. 865; 108 L. T. 902; 29 T. L. R. 534, C. A.

**Annotations**:—**Follid.** *Hill v. Kirshenstern*, [1920] 3 K. B. 556. **Consd.** *Northumberland (Duke) v. I. R. Comrs.*, [1920] A. C. 825. **Refd.** *Re Fife's Settlement, Trusts*, [1922] 2 Ch. 348. **Mentd.** *Shaw v. Storey v. I. R. Comrs.* (1913), 109 L. T. 559.

**4369.** —[—]—[—]—A tenant who pays a sum in respect of landlord's property tax & omits to deduct it from his next payment of rent has no right to deduct it subsequently.—**HILL v. KIRSHENSTEIN**, [1920] 3 K. B. 556; 89 L. J. K. B. 1128; 123 L. T. 766; 36 T. L. R. 716; 64 Sol. Jo. 584, C. A.

## (b) Amount Deducted.

**4370. Amount of assessment—Not amount of collector's receipt.**—A tenant is not entitled to deduct from the rent paid to his landlord, more property tax than is assessed on the premises under Sched. A. & the assessment, not the collector's receipt, is the criterion how much the tenant may deduct.—**GABELL v. SHEVELL** (1813), 5 Taunt. 81; 128 E. R. 617.

in the absence of an agreement to the contrary, authorises the tenant to deduct the taxes paid by him from

his rent, only does so when he can be compelled to pay the same.—**CARSON v. VERTCH** (1885), 9 O. R. 706.—**CAN.**

m. Tax paid for period prior to occupation.]—**MEEHAN v. PEARNS** (1899), 30 O. R. 433.—**CAN.**

*Sect. 1.—Liability in absence of agreement: Sub-sect. 2, A. (b), (c) i. & ii., (d), & B.]*

**4371. Tax paid by previous tenant.]**—Where the assignee of a term gave up at Michaelmas to a second assignee the occupation of a house, & afterwards paid three-quarters of a year's landlord's property-tax, due at Michaelmas, & handed over the receipt to the succeeding occupier, it was held that the succeeding occupier, paying two quarters of a year's rent accruing at the following Christmas, might tender in part of his rent the receipt for property-tax given to the former occupier, & might plead it as a payment made by himself.—*CLENNELL v. HEAD* (1816), 7 Taunt. 50; 2 Marsh. 371; 129 E. R. 20.

*Annotations:—Mentd. Beaufort v. I. R. Comrs., I. R. Comrs. v. Anglesey, [1913] 3 K. B. 48; North London & General Property Co. v. Moy, [1917] 2 K. B. 617.*

**4372. Tax on full rent—Before deductions under Licensing Act for compensation.]**—*HANCOCK & Co. v. GILLARD*, No. 4379, *post*.

**4373. All past payments of tax—On "next payment of rent"—Where no rent paid for several years.]**—*Re STURMEY MOTORS, LTD., RATTRAY v. STURMEY MOTORS, LTD.*, No. 4377, *post*.

**4374. ————**—Where a tenant makes no payment of rent for several years, but pays the landlord's property tax in respect of those years, & then makes a payment of rent to the landlord, that payment is the "next payment of rent" within Income Tax Act, 1918 (c. 40), s. 211 (2), & the tenant is entitled under that sect. to deduct from that payment not merely the property tax for the current financial year but the sums paid in respect of property tax during those years in which no rent was paid.—*KIRK v. CUNNINGTON*, [1921] 3 K. B. 637; 90 L. J. K. B. 1345; 125 L. T. 831; 37 T. L. R. 937; 19 L. G. R. 636, D. C.

**4375. Amount actually paid—Sub-lease at improved rent.]**—A., the leaseholder of a house in London subject to a rent of £500 a year, let it to B. at a rent of £750. B. sublet to C., who was in occupation. The property was rated at £540 gross & £450 net. C. paid the income tax under Income Tax Act, 1918 (c. 40), Sched. A., upon the net assessment of £450, & deducted the amount from the rent paid by him to B., who, in paying his rent to A. claimed to deduct income tax at 6s. in the pound upon £750.—*Held*: upon the construction of Income Tax Act, 1918 (c. 40), Sched. A., No. VIII., r. 4, & r. 19 of the General Rules applicable to all Schedules, B. was only entitled to deduct the amount of tax actually paid by him by way of deduction from the rent paid to him by C.—*ROSSDALE v. FRYER*, [1922] 2 K. B. 303; 91 L. J. K. B. 620; 127 L. T. 392; 38 T. L. R. 445; 68 Sol. Jo. 366; 20 L. G. R. 477, C. A.

#### (c) From What Deducted.

##### i. Rent.

**4376. "Next payment of rent."]**—*HILL v. KIRSHENSTEIN*, No. 4369, *ante*.

**4377. — No rent paid for several years—Landlord's tax paid meanwhile—Subsequent payment of rent without deduction.]**—By a lease dated in 1907, certain premises were demised to a co., & the co. thereby covenanted to pay the rent & taxes in respect thereof, except land tax & landlord's property tax. The co. never paid any of the rent reserved, but made certain payments in respect of landlord's property tax. In 1911 a debentureholders' action was commenced & a receiver was appointed. Subsequently the lessor threatened

to distrain for the rent in arrear, & in order to avoid distress the receiver signed an undertaking by which he undertook to pay an occupation rent, & also to pay the "arrears of rent" then owing out of a particular fund. The receiver paid one year's landlord's property tax, & subsequently made a payment of occupation rent without deducting anything for property tax.—*Held*: (1) the joint effect of Income Tax Act, 1842 (c. 35), Sched. A., No. IV., r. 9, & Income Tax Act, 1853 (c. 34), s. 40, was to treat the payment by a tenant of landlord's property tax as a *pro tanto* payment of rent; (2) the receiver was entitled to deduct the payments made by the co. & himself in respect of landlord's property tax from any future payments of rent to be made by him under his undertaking.

It is on the payment of the rent for which he is liable, not the rent for a quarter of a year, or a year, or any other particular periods, that he is "to deduct & retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable (WARRINGTON, J.).—*Re STURMEY MOTORS, LTD., RATTRAY v. STURMEY MOTORS, LTD.*, [1913] 1 Ch. 16; 82 L. J. Ch. 68; 107 L. T. 523; 57 Sol. Jo. 44.

*Annotations:—As to (1) Refd. Re Fife's Settltm. Trusts, [1922] 2 Ch. 348. As to (2) Refd. Re Hayman, Christy & Lilly (No. 2), Christy v. The Co., [1917] 1 Ch. 545.*

**4378. ———— Tender of arrears less tax paid.]**—*KIRK v. CUNNINGTON*, No. 4374, *ante*.

**Omission to deduct.]**—*See* Sub-sect. 2, A. (a) ii., *ante*.

**4379. Tax on full rent—Before deductions under Licensing Act for compensation.]**—The right given by Licensing Act, 1904 (c. 23), s. 3, to a license holder to deduct from his rent a portion of the amount paid by him in respect of compensation charges does not affect the "rent payable" to the landlord within the meaning of the Income Tax Act, 1842 (c. 35), & therefore the tenant of licensed premises is entitled to deduct from the next payment of rent the tax that he has paid on the total rent payable by him to his landlord, although he has not paid to the landlord the whole amount of that rent, but has deducted from it a proportion of the compensation charge in accordance with the provisions of the Licensing Act, 1904 (c. 23).—*HANCOCK & Co. v. GILLARD*, [1907] 1 K. B. 47; 76 L. J. K. B. 20; 95 L. T. 680; 71 J. P. 9; 23 T. L. R. 12.

*Annotations:—Refd. Smith v. Lion Brewery Co. (1910), 5 Tax Cas. 568. Mentd. I. R. Comrs. v. Northumberland, [1919] 2 K. B. 200.*

#### ii. Payments Other than Rent.

**4380. Payments in the nature of rent—Periodical payments.]**—*TAYLOR v. EVANS*, No. 3557, *ante*.

**4381. Annuity equal to former rent—Payable for duration of lease assigned.]**—Pltf. the owner of a leasehold interest expiring in 1912 in certain property which was sub-let at a gross rental of £195 but subject to the payment of a ground rent of £300 to the superior landlord, contracted with defts. for the sale to them of his interest, the transaction being carried out by two deeds of even date. By the first deed pltf. conveyed & assigned the property to defts. for the residue of the term, subject to the payment of the £300 ground rent to the superior landlord, which defts. covenanted to pay, the consideration for the assignment being expressed to be the payment by defts. of the sum of £1,000 to pltf. & the execution by defts. of a deed of even date. By the latter deed defts. covenanted with pltf. to pay him until the last day of the term the sum of £1,625 *per annum* by quarterly payments;

no sum was fixed as the total amount to be paid. Defts. in making the quarterly payments deducted Income Tax at the current rate under Income Tax Act, 1853 (c. 34), s. 40, & Customs & Inland Revenue Act, 1888 (c. 8), s. 24 (3). Pltfs. sought to recover amount deducted:—*Held*: the intention was for pltfs. to receive an income to the end of the term of the same net amount as he previously received as rent, & the payments were payments of an annuity or other annual payment within Income Tax Act, 1853 (c. 34), s. 40, & were not the payment of a fixed amount by instalments, & the deductions in respect of income tax had therefore been properly made by defts.—*CHADWICK v. PEARL LIFE INSURANCE CO.*, [1905] 2 K. B. 507; 74 L. J. K. B. 671; 93 L. T. 25; 54 W. R. 78; 21 T. L. R. 456.

*Annotations*:—*Mentd.* Surbiton U. D. C. v. Callender's Cable & Construction Co. (1910), 8 L. G. R. 244; Jones v. I. R. Comrs., [1920] 1 K. B. 711.

#### 4382. Money spent in repairs.—In lieu of rent.]—

In the course of negotiations for the granting of a lease of some stables for a term of years at a certain annual rent it was agreed between the parties that, instead of the landlord putting the premises in repair, the tenant should undertake to do the repairs "in consideration of no rent being payable for the first year of the term." Accordingly a lease was executed reserving a peppercorn rent for the first year & the agreed money rent for the residue of the term, & on entering, the tenant executed the repairs. The tenant paid the property tax payable in respect of the premises for the first year & claimed to deduct it from the money rent payable to the landlord for the second year, upon the ground that the expenditure on the repairs was to be treated as the equivalent of the rent for the first year of the term within Income Tax Act, 1918 (c. 40), Sched. A., No. VIII., r. 1.

In an action by the landlord for rent:—*Held*: the expenditure on repairs was not to be treated as rent, but was to be accepted as the substitute for an agreement to pay rent, & the tenant was not entitled to deduct the tax payable the first year of the tenancy or to counterclaim for the amount of the tax as money paid for the use of the landlord.—*DRUGHORN v. MOORE*, [1924] A. C. 53; 93 L. J. K. B. 161; 130 L. T. 321; 68 Sol. Jo. 138, H. L.; *affy.* S. C. *sub nom.* *MOORE v. DRUGHORN*, [1922] 2 K. B. 492, C. A.

#### (d) Proof of Payment.

4383. Production of certificate.]—*POCOCK v. EUSTACE*, No. 4362, *ante*.

4384. Whether production of assessment essential.]—In an action for rent, to entitle the tenant to deduct the property tax, it is sufficient to prove the payments to the collector, without producing the assessment.—*PHILIPS v. BEER* (1815), 4 Camp. 266, N. P.

4385. Whether production of collector's receipt essential.]—A landlord is bound to allow, by way of deduction from or discharge of rent due from the tenant, a payment of property tax made by the tenant to the Inland Revenue authorities, notwithstanding that the tenant refuses to show him the collector's receipt for payment of the tax.—*NORTH LONDON & GENERAL PROPERTY CO., LTD. v. MOY, LTD.*, [1918] 2 K. B. 439; 87 L. J. K. B. 986; 119 L. T. 230; 34 T. L. R. 227, C. A.

*Annotations*:—*Refd.* Hill v. Kirshenstein, [1920] 3 K. B. 556. *Mentd.* *Re Fife's Settlt. Trusts*, [1922] 2 Ch. 348.

#### B. Land Tax.

4386. Right of tenant to deduct.—In absence of express agreement.]—The land tax may be deducted

by a tenant, unless there be an express agreement that it shall not.—*CRANSTON v. CLARKE* (1753), Say. 78; 96 E. R. 809.

*Annotation*:—*Distd.* Parish v. Sleeman (1860), 1 De G. F. & J. 326.

#### 4387. — Only after actual payment made.]—

A plea in bar in replevin stated, that divers sums of money amounting to a certain sum, had been, from time to time, duly assessed & rated upon the premises for land tax, & from time to time paid by pltf. wherefore he deducted the said sum, being the amount of the tax which deft., as landlord, was liable to bear in respect of the rent:—*Held*: this plea was bad, for not stating the specific periods for which the respective sums were assessed or paid, & in not stating that the payment was made after the rent distrained for had accrued, or was accruing.—*STUBBS v. PARSONS* (1820), 3 B. & Ald. 516; 106 E. R. 750.

*Annotations*:—*Refd.* Mattison v. Hart (1854), 14 C. B. 357; Earle v. Maugham (1863), 14 C. B. N. S. 626; Lamb v. Brewster (1879), 4 Q. B. D. 220.

#### 4388. What amount may be deducted.—Rate of assessment.]—

An annuity of £40 *per annum* charged upon land; the tenant insisted to have a deduction of 4s. in the pound for land tax, but because the assessment in the parish where the lands lay was no more than 2s. 6d. such a deduction was only allowed.—*KING v. WESTON* (1709), 2 Eq. Cas. Abr. 62; 22 B. R. 54.

#### 4389. — Where tenant improves property.—

Only original rate.]—*BAINFACOR v. LEE* (1765), cited in 3 Term Rep. 379; 100 E. R. 631.

*Annotations*:—*Consd.* Hyde v. Hill (1789), 3 Term Rep. 377; Mansfield v. Relf (1907), 77 L. J. K. B. 145.

#### 4390. Failure to deduct from current rent.—Tax

not recoverable subsequently.]—An allegation of payment of land tax & paving rates due for any period preceding the current year, is no plea in bar to an avowry for rent arrear. If the land tax & paving rates are not deducted, as they ought to be, from the rent of the current year, they cannot be deducted, or the amount of them be recovered back, from the landlord in any subsequent year.—*ANDREW v. HANCOCK* (1819), 1 Brod. & Bing. 37; 3 Moore, C. P. 278; 129 E. R. 637.

*Annotations*:—*Distd.* Hales v. Freeman (1819), 1 Brod. & Bing. 391. *Consd.* Smith v. Alsop (1824), 1 McCle 622. *Fold.* Smith v. Humble (1854), 18 J. P. 760. *Apld.* Dawes v. Thomas, [1892] 1 Q. B. 414. *Refd.* Bramston v. Robins (1826), 4 Bing. 11; Carter v. Carter (1829), 5 Bing. 406; Hackney & Lamberhurst Tithe Commutation Rent Charges (1858), E. R. & E. 1; Pigott v. Cuckfield Union Assmt. Com. (1921), 125 L. T. 402.

#### 4391. — — —.]—

In 1814, a distress was made on a tenant for the whole of the rent due from him, & a deduction for land tax was refused, the lease being silent as to the land tax; the tenant having protested against his liability, paid, during five succeeding years, the land tax, without renewing in any sort the objection of his non-liability to pay:—*Held*: in 1820 he could not recover, in an action for money paid to deft.'s use, any of the sums so paid for land tax.—*SPRAGG v. HAMMOND* (1820), 2 Brod. & Bing. 59; 4 Moore, C. P. 431; 129 E. R. 880.

*Annotation*:—*Apld.* Bramston v. Robins (1826), 12 Moore, C. P. 68.

4392. — — —.]—(1) *Semble*: if a tenant pays taxes which he alleges ought to have been paid by his landlord, & afterwards pays rent for two years subsequently, without making any deduction, he cannot recover the amount in an action against the landlord.

(2) *Semble*: a broker, who, when receiving rent under a distress, deducts a sum purporting to be for land tax, is not to be considered as allowing the land tax, so as to affect the landlord's

**Sect. 1.—Liability in absence of agreement: Sub-sect. 2, B. Sect. 2: Sub-sect. 1.]**

right, but as merely, from not knowing how to act, consenting to receive the money without the sum deducted.—*SAUNDERSON v. HANSON* (1828), 3 C. & P. 314, N. P.

**4393. Excessive deduction—Over period of years—Right of landlord to recover.]—**A landlord's receiver allowed the tenant to make a deduction in respect of a payment for land tax every year for seventeen years, greater than the landlord was liable to pay, the landlord knowing, or having the means of knowing, all the facts:—*Held*: he could not distrain for the amount erroneously allowed, though the receipt given every year showed the amount paid & the amount deducted.—*BRAMSTON v. ROBINS* (1826), 4 Bing. 11; 12 Moore, C. P. 68; 5 L. J. O. S. C. P. 13; 130 E. R. 671.

**Annotations:—***Refd.* Walker v. Andrews (1838), 3 M. & W. 312. *Mentd.* Edinburgh Ry. v. Wauchape (1842), 8 Cl. & Fin. 710; De Cordova v. De Cordova (1879), 4 App. Cas. 692; Daniel v. Sinclair (1881), 29 W. R. 569; Beaufort v. I. R. Comrs. I. R. Comrs. v. Anglesey, [1913] 3 K. B. 48; Rosdale v. Fryer, [1922] 2 K. B. 303.

**4394. Redemption by landlord—Right to annual payment from tenant.]—**Where the owner of a house in consideration of a premium, demised it at one-third of its annual value, & afterwards redeemed the land tax:—*Held*: he was entitled to receive from the tenant an annual payment equal to two-thirds of the land tax so redeemed.—*WARD v. CONST* (1830), 10 B. & C. 635; 5 Man. & Ry. K. B. 402; 8 L. J. O. S. K. B. 291; 109 E. R. 586.

**Annotations:—***Fold.* Smith v. Humble (1854), 18 J. P. 760. *Refd.* C. L. Ry. v. City of London Land Tax Comrs., [1911] 2 Ch. 467.

**4395. — Tax not expressly reserved—Lease voidable—Land Tax Redemption Act, 1802 (c. 116).]**—*Held*: in a lease of lands belonging to a bishop in right of his see, granted after the passing of above Act, the land tax having been redeemed by such bishop with money raised pursuant to above Act, such redeemed land tax must, in addition to the ancient & accustomed rent, be expressly reserved & made payable during the term granted by the lease; & therefore, a lease of such lands granted by a bishop, in which the redeemed land tax was not so reserved & made payable, was voidable by the successor; & although such land tax had been regularly paid to the bishop who granted the lease.—*DOE d. ROCHESTER (Bp.) v. BRIDGES* (1831), 1 B. & Ad. 847; 9 L. J. O. S. K. B. 113; 109 E. R. 1001.

**Annotations:—***Refd.* Doe d. Egremont v. Forwood (1842), 3 Q. B. 627; Doe d. Egremont v. Courtenay (1848), 11 Q. B. 702; Doe d. Blidulph v. Poole (1848), 11 Q. B. 713. *Mentd.* Stevens v. Jeacocke (1848), 11 Q. B. 731; Couch v. Steel (1854), 3 E. & B. 402; Lamplugh v. Norton (1889), 22 Q. B. D. 452; Clegg Parkinson v. Earby Gas Co., [1896] Q. B. 592; Johnston & Toronto Type Foundry Co. v. Toronto Consumers' Gas Co., [1898] A. C. 447; Pasmoro v. Oswaldtwistle U.C., [1898] A. C. 387; Devonport Corp'n. v. Tozer (1903), 67 J. P. 269; Hulme v. Ferranti, [1918] 2 K. B. 426; R. v. Poplar B. C. (No. 1), [1922] 1 K. B. 72; Waghorn v. Collison (1922), 127 L. T. 8; Phillips v. Britannia Hygienic Laundry Co., [1923] 2 K. B. 832; Everett v. Griffiths, [1924] 1 K. B. 911.

**PART XVI. SECT. 2, SUB-SECT. 1.**

n. "All rates & taxes"—"Imposed upon the premises"—"Liability for improvement taxes & additions for arrears."—A lease contained a covenant to pay "all taxes, rates, duties, & assessments whatsoever now charged or hereafter to be charged upon the demised premises":—*Held*: deft. was liable for local improvement taxes & for the additions made under the Assessment Act year by year to the amount of the taxes in arrear or additions made

by the municipality.—*BOULTON v. BLAKE* (1886), 12 O. R. 532.—*CAN.*  
o. — "Covenant running with the land."—*MACKINNON v. CRAFTS, LEE & GALLINGER*, [1917] 1 W. W. R. 1402; 11 Alta. L. R. 147.—*CAN.*

p. — "Whether house duty included."—Where a written lease of a house provided that the lessors should "pay all rates & taxes on the premises," & also the interest on the mtges. on the property:—*Held*: the terms were wide enough to include house duty.—

**SECT. 2.—COVENANTS FOR PAYMENT.**

**SUB-SECT. 1.—GENERAL COVENANTS.**

**Whether a usual covenant.]—**See Part XI., Sect. 2, sub-sect. 5, ante.

**4396. "All rates & taxes"—Tenant quitting without payment—Remedy of landlord.]—**By a local Act, the landlord or the receiver of the rents, & not the tenant is rendered liable to pay the poor rates. By a written agreement A., the tenant agreed with B., the landlord, to pay the rent clear of all rates & taxes. After occupying the premises for some time A. quitted them leaving poor rates & land tax unpaid. The receiver of the rents was compelled to pay the rates, & the succeeding tenant the land tax; which rates & land tax were repaid to them by B.:—*Held*: B.'s remedy was on the special agreement, & he could not recover these sums from A. as money paid to A.'s use.—*SPENCER v. PARRY* (1835), 3 Ad. & El. 331; 1 Har. & W. 179; 4 Nev. & M. K. B. 770; 4 L. J. K. B. 186; 111 E. R. 439.

**Annotations:—***Apld.* Lubbock v. Tribe (1838), 3 M. & W. 607. *Consd.* Brittain v. Lloyd (1845), 14 M. & W. 762; Lewis v. Campbell (1849), 8 C. B. 541; Westropp v. Solomon (1849), 8 C. B. 345. *Mentd.* Pawley v. Gunn (1838), 4 Bing. N. C. 445; Lewis v. Edwards (1840), 7 M. & W. 300; Prior v. Hembrow (1841), 8 M. & W. 873; Kemp v. Finden (1844), 12 M. & W. 421; Garrard v. Cottrell (1847), 10 Q. B. 679; Bailey v. Maculay, Bailey v. Pearson, Bailey v. Haines, Bailey v. Bracebridge, Dawson v. Hay, Wilson v. Holden (1849), 19 L. J. Q. B. 73; Adams v. Morgan, [1923] 2 K. B. 234.

**4397. — Application of local Act—Agreement made after Act.]—**(1) A local Act of Parliament empowered trustees to build a church & to make rates on all houses in the parish, one half on the landlords, the other half on the tenants. It was also enacted, that the tenants should first pay the whole rate & deduct a moiety out of the rent, & that every landlord should allow of such deduction "notwithstanding any agreement to the contrary." After the passing of this Act, certain premises in the parish were leased, the tenant covenanting to pay all rates & taxes. The landlord having refused to deduct half the church rate from the rent, on the ground that the act extended only to agreements in existence at the time of its passing, plff. served him with a plaint from the county ct. The ct. refused a writ of prohibition, "the title to any corporeal or incorporeal hereditaments" within 9 & 10 Vict., s. 58, not being in question. (2) *Seemle*: the local Act did not apply to agreements entered into subsequently to the time of its passing.—*Re KNIGHT, GWYNNE v. KNIGHT* (1848), 1 Exch. 802; Cox, M. & H. 47; 17 L. J. Ex. 168; 10 L. T. O. S. 377; 12 Jur. 101; 154 E. R. 341; *sub nom.* *Re GIORGIONE v. KNIGHT*, 12 J. P. 506.

**Annotation:—***As to* (2) *Refd.* Wooler v. North Eastern Breweries, [1910] 1 K. B. 247.

**4398. — "Imposed upon the premises"—Whether future rates included.]—**A lessee covenanted that he "would pay all taxes, charges, rates, tithes, or rentcharge in lieu of tithe, dues & duties whatsoever, as then were or should at any time thereafter during that demise be taxed,

GERMAN LUTHERAN CHURCH (TRUSTEES) v. PERCIVAL (1887), 5 S. C. 194.—*S. AF.*

q. — "Land sold for taxes—Purchase by lessee."—*HEYDEN v. CASTLE* (1888), 15 O. R. 257.—*CAN.*

r. — "Property subsequently becoming partnership property—Liability of partners."—*MCDUFF v. McDOUGALL* (1889), 21 N. S. R. 250.—*CAN.*

t. — "Whether poor rate included."—Under a written agreement for the letting of premises at the yearly

charged, assessed, or imposed upon the said demised premises:—*Held*: the covenant was not confined to rates payable by the landlord, but meant all rates then imposed on the lessee in respect of his occupation, & all future rates which might be imposed on the land itself.—*HURST v. HURST* (1849), 4 Exch. 571; 19 L. J. Ex. 410; 14 L. T. O. S. 183, 257; 154 E. R. 1341.

*Annotation*:—*Mentd.* *Leigh v. Lillie* (1860), 6 H. & N. 165.

**4399. — Payment of proportion—Only part of premises let.**—A declaration after setting forth an agreement by which deft. took of pltf. certain rooms, part of a messuage, & agreed to pay, without saying to whom, “the proportion of the rates,” etc. “which might be assessed on the premises so taken” by him, averred, that afterwards, rates amounting, to wit, to £150, were assessed on the messuage, being the rates whereof the proportion was agreed to be paid as aforesaid; that such rates were afterwards assessed, became due, & were paid by pltf.; that the proper proportion payable by deft. was a certain proportion, to wit, one-third, amounting, to wit, to £50, of all which deft. had notice, & was requested by pltf. to pay the said sum, nevertheless deft. disregarded, etc. Upon special demurrer:—*Held*: (1) deft. was bound to pay his proportion of the rates to pltf.; (2) his liability to do so was a primary, & not a collateral liability; &, therefore, no request to pay was necessary; (3) under the agreement to pay a proportion of the rates assessed on the premises so taken by him, he was bound to pay a proportion of the rates assessed on the messuage, of which such premises were a part.—*HOOPER v. WOOLMER* (1850), 10 C. B. 370; 1 L. M. & P. 634; 20 L. J. C. P. 63; 16 L. T. O. S. 236; 138 E. R. 149.

*Annotation*:—*Generally*, *Mentd.* *Dorset v. Aspdin* (1851), 11 C. B. 651.

**4400. — Necessity for demand—To constitute breach of agreement.**—*HOOPER v. WOOLMER*, No. 4399, *ante*.

**4401. — — — — —**—Where a lessee covenants to pay rates and taxes, no demand is necessary, to constitute a breach, so as to entitle the lessor to avail himself of the proviso for re-entry.—*DAVIS v. BURRELL & LANE* (1851), 10 C. B. 821; 17 L. T. O. S. 51; 15 Jur. 658; 138 E. R. 325.

*Annotations*:—*Refd.* *Jones v. Foley* (1891), 60 L. J. Q. B. 464.

*Mentd.* *Kershaw, Lease v. Stockport Overseers*, [1923] 2 K. B. 129; *Gill v. Mellor, Gill v. Monday*, [1924] 1 K. B. 97.

**4402. — Whether water rate included.**—In a lease of a shop & basement & of three rooms on the third floor of the same house, the lessor covenanted to pay “all rates & taxes chargeable in respect of the demised premises.” Water was separately supplied by a water co. to the shop & basement, & paid for by the tenant. In an action to recover from the lessor the amount so paid:—*Held*: such charge was a “rate” within the meaning of the covenant.—*SPANISH TELEGRAPH CO. v. SHEPHERD* (1884), 13 Q. B. D. 202; *sub nom.* *DIRECT SPANISH TELEGRAPH CO. v. SHEPHERD*, 53 L. J. Q. B. 420; 51 L. T. 124; 48 J. P. 550; 32 W. R. 717, D. C.

*Annotations*:—*Distd.* *Badcock v. Hunt* (1888), 22 Q. B. D. 145. *Follid.* *Bourne & Tant v. Salmon & Gluckstein*, [1907] 1 Ch. 616. *Refd.* *Floyd v. Lyons* (1897), 76 L. T. 251.

**4403. — — — — —**—*BADCOCK v. HUNT*, No. 4470, *post*.

rent of £90 “including all rates & taxes”:—*Held*: the tenant was entitled to deduct from his rent the whole of the poor rates paid by him.—*BARCROFT v. WELLAND* (1883), 12 L. R. Ir. 35.—*IR.*

**a. — To what rates covenant extends.**—A covenant in a lease to pay rates & taxes applies to all rates which become due & payable during the term of the lease, although the period for which the rate is levied may

**4404. — — — — —**—The underlease of a shop & basement forming part of a large block of buildings contained a covenant by the lessor to procure to be paid “all rates & taxes payable in respect of the demised premises.” Water was supplied for domestic purposes to the whole building & charged for in one rate which had been hitherto paid by the superior lessees:—*Held*: the water rate was a “rate” within the meaning of this covenant which was payable by the lessor.—*BOURNE & TANT v. SALMON & GLUCKSTEIN, LTD.*, [1907] 1 Ch. 616; 76 L. J. Ch. 374; 96 L. T. 629; 71 J. P. 320, C. A.

*Annotation*:—*Apld.* *Drieselman v. Winstanley* (1909), 53 Sol. Jo. 631.

**4405. — Domestic & trade purposes.**—A covenant by a landlord to pay all rates & taxes, except gas & electric light, will include the water rate for water supplied for domestic purposes, but not the rate for water supplied for trade purposes.—*DRIESELMAN v. WINSTANLEY* (1909), 53 Sol. Jo. 631.

*See, also*, Sub-sect. 3, *post*.

**4406. — Whether specific contract to pay poor rate—Within Rating Act, 1874 (c. 54), s. 8.**—A covenant in a lease of iron mines to pay a certain rent “free of all rates, taxes & deductions whatsoever, Parliamentary, parochial or of any other nature,” is not a “specific contract to pay the poor rate in the event of the abolition of the exemption” of iron mines within Rating Act, 1874 (c. 54), s. 8, & the lessee is therefore entitled under that sect. to deduct half the poor rate from the rent.—*DEVONSHIRE (DUKE) v. BARROW HAEMATITE STEEL CO., LTD.* (1877), 2 Q. B. D. 280; 46 L. J. Q. B. 435; 36 L. T. 355; 25 W. R. 469, C. A.

*Annotations*:—*Refd.* *Chaloner v. Bolckow* (1878), 3 App. Cas. 933; *West v. Gwynne* (1911), 80 L. J. Ch. 578.

**4407. “Parliamentary or parochial taxes.”—Whether rate for repair of bridges included.**—At common law the liability to repair bridges *ratione tenuræ* is thrown ultimately on the owner of land, as between him & the occupier, though primarily as far as the public are concerned the occupier may be chargeable.

Where by certain Acts of Parliament it was provided, that the owners of certain lands, liable *ratione tenuræ* for the repairs of a bridge might make rates on such lands for the more conveniently raising the fund necessary for such repairs, & the lessee of a portion of such lands covenanted with the owner to pay his rent “free & clear of & from any land tax, & all other taxes & deductions whatsoever, either Parliamentary or parochial, then already taxed or imposed, or thereafter to be taxed or imposed upon the premises or upon the lessor, property tax or duty only excepted”:—*Held*: the covenant did not extend to make the lessee liable to pay a rate imposed on the demised premises for the repairs of such bridge.—*BAKER v. GREENHILL* (1842), 3 Q. B. 148; 2 Gal. & Dav. 435; 11 L. J. Q. B. 161; 6 Jur. 710; 114 E. R. 463.

*Annotations*:—*Distd.* *Thompson v. Lapworth* (1868), L. R. 3 C. P. 149. *Refd.* *Jeffrey v. Neale* (1871), L. R. 6 C. P. 240. *Mentd.* *R. v. Aylesbury with Walton* (1846), 9 Q. B. 261; *R. (on the prosecution of Maidstone Comrs.) v. Kent JJ.* (1860), 24 J. P. 710; *Cuckfield R. C. v. Goring*, [1898] 1 Q. B. 865.

**4408. — Whether sewer rate included.**—In an agreement for the lease of a house, it was

extend beyond the term of the lease.—*McKENROW v. TATTLE* (1905), 25 N. Z. L. R. 881.—*N. Z.*

**b. “All rates & taxes except land tax.”—Liability to pay rate on unimproved value of land.**—*N. S. W.*

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stipulated that the tenant should pay "all the parochial & Parliamentary taxes":—*Held*: a sewers rate not being imposed directly by Act of Parliament, was not a Parliamentary tax, & the tenant was justified in deducting it from his rent.

—*PALMER v. FARITH* (1845), 14 M. & W. 428; 14 L. J. Ex. 256; 5 L. T. O. S. 287; 9 J. P. 842; 153 E. R. 542.

*Annotations*:—*Mentd. Bedford Union Grdns. v. Bedford Comrs.* (1852), 7 Exch. 777; *R. v. Kent JJ.* (1860), 2 E. & E. 911; *Associated Newspapers v. London City Corp.*, [1916] 2 A. C. 429; *Pole-Carew v. Craddock*, [1920] 3 K. B. 109.

**SUB-SECT. 2.—ASSESSMENT INCREASED BY IMPROVEMENTS TO PREMISES.**

**4409. Tenant liable for increase—Tenant's covenant to pay all taxes except land tax.]**—Under a covenant in a building lease by the tenant to pay all the taxes, except the land tax, the landlord is only to pay the old land tax, & not the additional land tax occasioned by the improvement of the estate.—*HYDE v. HILL* (1789), 3 Term Rep. 377; 100 E. R. 630.

*Annotations*:—*Expld. Watson v. Home* (1827), 7 B. & C. 285. *Consd. Ward v. Const* (1830), 10 B. & C. 635; *Mansfield v. Relf* (1907), 77 L. J. K. B. 145. *Refd. Smith v. Humble* (1854), 18 J. P. 760.

**4410. — Tenant's covenant to pay "further or additional rates."]**—Under a covenant by a tenant for the payment of £80 yearly rent, all taxes thereon being to him allowed; & also that he would pay all further or additional rates on the premises, or on any additional buildings or improvements made by him; & a covenant by the landlords to pay all rates on the premises or on the tenant, in respect of the said yearly rent of £80, except such further or additional taxes as may be assessed on the demised premises; the tenant is bound to defray all increase of the old as well as any new rates beyond the proportion at which the premises were rated at the time of the deed, which was £20 in respect of the £80 rent.—*GRAHAM v. WADE* (1812), 16 East, 29; 104 E. R. 1000.

**4411. — Tenant's covenant to pay "all fresh taxes thereafter chargeable."]**—Where a party took seven-sixteenths of certain premises, the whole of which then were rated at the annual value of £35, & the lessor covenanted to pay all taxes then chargeable on the premises, or any part thereof, or on the yearly rent thereby reserved, & the lessee covenanted to pay all fresh taxes which should thereafter be charged upon the premises, or any part thereof:—*Held*: the true construction of these covenants was, that the lessor should pay such taxes as were chargeable on the premises at the time of making the lease, considering them as of the annual value of seven-sixteenths of £35, & that the lessee should pay all fresh taxes, & all such additions to the taxes formerly chargeable, as were occasioned by the improved value of the premises.—*WATSON v. ATKINS* (1820), 3 B. & Ald. 647; 106 E. R. 797.

*Annotation*:—*Refd. Bramston v. Robins* (1826), 12 Moore, C. P. 68.

**4412. — Landlord liable in proportion to rent reserved.]**—A landlord who covenants to pay taxes, is to pay them in proportion to the rent he receives, & no more; & if the taxes are increased, by improvements upon the premises which

enhance their value, the tenant is to pay such increase.

Demise, by indenture, of land, for a term of years, at the rent of £79 12s. 6d. with a stipulation that lessee should not build upon it, without the written licence of lessor. Covenant by lessor to pay all taxes, then charged, or to be charged, upon, or in respect of, the land. Lessor having given his written licence, of even date with the lease, for lessee to build on the land, buildings were erected, whereby the value of the estate was greatly improved, & the amount of taxes increased in proportion:—*Held*: lessor was liable for the amount of taxes calculated upon the rent of £79 12s. 6d. but not for the amount calculated upon the improved value of the land, occasioned by the erection of the buildings.—*WATSON v. HOME* (1827), 7 B. & C. 285; 1 Man. & Ry. K. B. 191; 6 L. J. O. S. K. B. 73; 108 E. R. 730.

*Annotations*:—*Folld. Smith v. Humble* (1854), 15 C. B. 321; *Mansfield v. Relf*, [1908] 1 K. B. 71. *Distd. Salaman v. Holford*, [1909] 2 Ch. 602. *Refd. Ward v. Const* (1830), 10 B. & C. 635.

**4413. — —.]**—A. & B. demised premises to C. for seventy-nine years, at the yearly rent of £60 a year, "clear of all Parliamentary, parochial & other rates, taxes, assessments & deductions whatsoever, the sewers rate, land tax, & landlord's property tax only excepted," & the lease contained a covenant by the lessee to pay the rent "without any deductions or abatement whatsoever, except on account of the sewers rate, land tax, & landlord's property or income tax." Previous to the lease being granted, C. the lessee, had erected buildings upon the land, whereby its annual value had been greatly increased, but ever since the lease was granted it had continued of the same annual value:—*Held*: C. was only entitled to deduct from the rent the land tax & sewers rates, payable on the rent reserved, & not that payable upon the annual value.—*SMITH v. HUMBLE* (1854), 15 C. B. 321; 3 C. L. R. 225; 18 J. P. 760; 139 E. R. 447.

*Annotations*:—*Folld. Mansfield v. Relf*, [1908] 1 K. B. 71. *Distd. Salaman v. Holford*, [1909] 2 Ch. 602.

**4414. — —.]**—Where in a lease of premises at a ground rent the lessors covenanted to pay the land tax chargeable on the demised premises:—*Held*: the covenant must be construed as referring only to so much of the total land tax chargeable on the premises as was proportionate to the benefit derived therefrom by the lessors, i.e., the amount of the ground rent.—*MANSFIELD v. RELF*, [1908] 1 K. B. 71; 77 L. J. K. B. 145; 97 L. T. 745; 71 J. P. 556; 24 T. L. R. 79, C. A.

*Annotation*:—*Distd. Salaman v. Holford*, [1909] 2 Ch. 602.

*See, also*, No. 4389, *ante*.

**4415. Landlord liable for increase—Covenant to pay "all rates & taxes now or hereafter payable."]**—Where in a lease of premises at a rack rent, the lessor covenanted to pay all rates & taxes "now payable or hereafter to become payable in respect of the premises":—*Held*: the lessor's liability under his covenant was not limited to the assessment existing at the date of the lease, but extended to an increased assessment.—*SALAMAN v. HOLFORD*, [1909] 2 Ch. 602; 79 L. J. Ch. 41; 101 L. T. 505, C. A.

**SUB-SECT. 3.—RATES.**

General covenants for payment of all rates & taxes, *see* Sub-sect. 1, *ante*.

**4416. House sub-let to attaché of foreign**

*SPORTS CLUB, LTD. v. SOLOMON* (1915), 15 S. R. N. S. W. 381; 32 N. S. W. W. N. 45; 19 C. L. R. 698.—AUS.

c. ———.]—*PETERSON v. KELLY*

(1918), 24 C. L. R. 442.—AUS.

d. ——— *Exception extended to*

*Federal land tax.*]—*SOUTH AUSTRALIAN BREWING CO., LTD. v. HILL*, [1919] A. C. 519.—AUS.

**embassy—Diplomatic privilege—Liability of sub-  
lessor on covenant.]**—A lease of a dwelling-house contained a covenant by the lessee to pay the sewers rate, & all other rates, taxes, assessments, & impositions of what nature or kind soever, & whether Parliamentary, parochial, or otherwise, which then were, or at any time thereafter during the term should be assessed, charged, or imposed upon the demised premises, or on the land in respect thereof. By a local Act relating to parochial rates in the parish in which the demised premises were situated it was provided that every rate or assessment made, laid or assessed by virtue of the Act in respect of any land, ground, house, etc., which any ambassador, envoy, resident, agent, or other public minister of any foreign prince or state, or the servant of any such ambassador, envoy, resident, agent, or public minister, or any other person not liable by law to pay such rate or assessment then did or thereafter should inhabit, should be paid by & be recoverable from the landlord, owner, lessor or proprietor, of such land, ground, house, etc. The lessee of the demised premises assigned the same to an *attaché* of a foreign embassy who occupied them as his residence. The assignee having claimed exemption from liability to pay a parochial rate made in respect of the premises under the local Act, the parish authorities enforced payment of the same against the lessor. In an action brought against the lessee by the lessor to recover the amount so paid by him:—*Held*: payment of the rate was not enforceable against an *attaché* of a foreign embassy, & the rate was therefore under the local Act recoverable from the lessor; & the lessee was under the covenant bound to repay to the lessor the amount of the rate so paid by him.—*PARKINSON v. POTTER* (1885), 16 Q. B. D. 152; 55 L. J. Q. B. 153; 53 L. T. 878; 50 J. P. 470; 34 W. R. 215; 2 T. L. R. 184, D. C.

*Annotation*:—*Mentd. Re Suarez, Suarez v. Suarez*, [1918] 1 Ch. 176.

**4417. "All water rate"—Whether water rate for trade purposes included.]**—Under a covenant by the lessor, in a lease, to pay "all water rate imposed or assessed upon the premises or on the lessor or lessees in respect thereof" the lessor is not bound to pay for water supplied by the water co. to the lessees for trade purposes.—*Re FLOYD, FLOYD v. LYONS (J.) & Co.*, [1897] 1 Ch. 633; 66 L. J. Ch. 350; 76 L. T. 251; 45 W. R. 435; 13 T. L. R. 278; 41 Sol. Jo. 348, C. A.

*Annotation*:—*Reid. Drieschman v. Winstanley* (1909), 53 Sol. Jo. 631.

**—Whether included in general covenant.]**—*See Nos. 4402–4405, ante.*

**Future rates—Whether included in covenant to pay "all rates & taxes"—"Imposed upon the premises."]**—*See No. 4398, ante.*

**Sewer rate—Whether included in "Parliamentary & parochial taxes."]**—*See No. 4408, ante.*

**Church or poor rates—Whether included in "taxes on the land."]**—*See Sub-sect. 4, A., post.*

**Assessment increased by improvements to premises.]**—*See Sub-sect. 2, ante.*

#### PART XVI. SECT. 2, SUB-SECT. 4.—A.

**e. "All taxes"—Whether income tax "a tax on or in respect of rent."]**—*MARRICKVILLE BUILDINGS, LTD. v. UNION THEATRES, LTD.* (1924), 25 S. R. N. S. W. 316; 35 C. L. R. 171.—*AUS.*

**f. —Whether special rate created by corporation bye-law included.]**—An ordinary lease containing the words " & to pay taxes," covers a special rate created by a corp'n. bye-law as well as all other taxes.—

*Re MICHIE & CITY OF TORONTO CORPN.* (1862), 11 C. P. 379.—*CAN.*

**g. —Lessee building over lane in accordance with proviso in lease—Whether such building included in covenant.]**—A lease contained a provision that the lessee might at any time build or extend any building over a lane described as being "north of the premises hereby demised," & the lessee covenanted to pay all taxes "to be charged upon the demised premises or upon the lessor on account thereof":

#### SUB-SECT. 4.—TAXES.

##### A. In General.

**4418. "All taxes"—Parliamentary taxes included.]**—Covenant to pay taxes generally includes Parliamentary taxes.—*ARRAN (COUNT) v. CRISP* (1894), 12 Mod. Rep. 54; Holt, K. B. 549; 1 Salk. 221; 88 E. R. 1161.

**4419. —Whether new Parliamentary taxes included.]**—*DAVENANT v. SALISBURY (BP.)* (1671), 3 Keb. 69; 2 Lev. 68; 1 Vent. 223; 83 E. R. 453.

**4420. ———.]**—*GILES v. HOOPER*, No. 4438, *post.*

**4421. ——— Taxes of different nature.]**—(1) A covenant in a grant of rent that it shall be for ever paid free from all taxes extends to such taxes as are imposed by subsequent Acts as well as those in being at the time the covenant was made.

(2) Covenant to discharge from taxes, extends to subsequent taxes of the same nature; not of different nature.—*BREWSTER v. KIDGELL* (1698), Carth. 438; Comb. 466; Holt, K. B. 175, 609; 1 Id. Raym. 317; 5 Mod. Rep. 368; 12 Mod. Rep. 166; 1 Salk. 198; 2 Salk. 615; 3 Salk. 340; 90 E. R. 853.

*Annotations*:—*As to* (1) *Consd. Bradbury v. Wright* (1781), 2 Doug. K. B. 624; Milnes v. Branch (1816), 5 M. & S. 411; Louch v. Peters (1834), 1 My. & K. 489. *Expld. Newby v. Sharpe* (1878), 8 Ch. D. 39. *Reid. Blandford v. Marlborough* (1743), 2 Atk. 542; Bally v. Wells (1769), Wilm. 341; Waller v. Andrews (1838), 3 M. & W. 312; Doe d. Anglesca v. Rugely (1844), 6 Q. B. 107; Moon v. Durden (1848), 2 Exch. 22; Bally v. De Crespigny (1869), L. R. 4 Q. B. 180; Newington L. B. v. Cottingham L. B. (1879), 12 Ch. D. 725; *Re Shiplon, Anderson & Harrison's Arbitration*, [1915] 3 K. B. 676. *As to* (2) *Reid. Louch v. Peters* (1834), 1 My. & K. 489. *Generally, Mentd. Hopwood v. Barefoot* (1709), 11 Mod. Rep. 237; Cox v. Phillips (1736), Lee temp. Hard. 237; Good v. Elliott (1790), 3 Term Rep. 693; Furlador v. Rogers (1802), 3 Bos. & P. 191; Touteng v. Hubbard (1802), 3 Bos. & P. 291; Palmer v. Earith (1845), 14 M. & W. 428; Festing v. Taylor (1862), 26 J. P. 261; Tidswell v. Whitworth (1867), 15 L. T. 574; Austerberry v. Oldham Corp'n. (1885), 29 Ch. D. 750; Blackburn Robbin Co. v. Allen (1918), 87 L. J. K. B. 1085; Ertel Bieber v. Ito Tinto Co., Dynamit Act. v. Ito Tinto Co., Vereinigte Königs & Laurabütte Act. v. Ito Tinto Co., [1918] A. C. 260; Metropolitan Water Board v. Dick, Kerr, [1918] A. C. 119.

**4422. —Covenant in part illegal—Limited taxes lawfully payable by tenant.]**—A distinct covenant in a lease, whereby the tenant bound himself to pay the property tax & all other taxes imposed on the premises or on the landlord in respect thereof, though void & illegal by 46 Geo. 3, c. 65, s. 115, will not avoid a separate covenant in the lease for payment of rent clear of all Parliamentary taxes, etc. generally; for such general words will be understood of such taxes as the tenant might lawfully engage to defray.—*GASKELL v. KING* (1809), 11 East, 165; 103 E. R. 907.

*Annotations*:—*Expld. Fuller v. Abbott* (1811), 4 Taunt. 105. *Reid. Wigg v. Shuttleworth* (1810), 13 East, 87; Pickering v. Iffracombe Ity. (1868), L. R. 3 C. P. 235.

**—Whether tithe rentcharge included.]**—*See ECCLESIASTICAL LAW*, Vol. XIX., p. 494, Nos. 3504, 3505.

**4423. "Taxes on the land"—Whether church or poor rates included.]**—A covenant to pay taxes

*—Held*: the covenant to pay taxes did not apply to the portion of the buildings afterwards erected over the lane.—*JANES v. O'KEEFE* (1896), 23 A. R. 129.—*CAN.*

*h. —To what property covenant applies.]*—A lessee covenanted to pay "all taxes that may be lawfully assessed upon the lessor & upon the real & personal estate taken under this lease":—*Held*: the covenant only applied to those imposed in respect of the property demised & did not oblige

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on the land does not extend to the rates to church & poor.—*THEED v. STARKEY* (1724), 8 Mod. Rep. 314; 88 E. R. 225.

**Annotations:—***Refd.* *Sunderland Overseers v. Sunderland Union Grdns.* (1865), 18 C. B. N. S. 531. *Mentd.* *Mersey Docks v. Cameron, Jones v. Mersey Docks* (1865), 11 H. L. Cas. 443.

**4424.** ————]—*CASE v. STEPHENS*, No. 4460, *post*.

**4425. Parliamentary taxes or assessments—Whether rentcharge in lieu of land tax included.]**

A lessee covenanted "to pay all Parliamentary, parochial, & other taxes, tithes, & assessments, then, or thereafter to be, issuing out of all or any of the demised premises, or chargeable upon the landlords or tenants thereof, for the time being, in respect thereof":—*Held*: a rentcharge, imposed on the premises in lieu of the land tax, which had been furnished by a former tenant of the premises under Land Tax Redemption Act, 1802 (c. 116), was a Parliamentary tax or assessment, within the covenant.—*CHRIST'S HOSPITAL (GOVERNORS) v. HARRILD* (1841), 2 Man. & G. 707; 3 Scott, N. R. 126; Drinkwater, 163; 10 L. J. C. P. 200; 5 J. P. 452; 133 E. R. 930.

**4426. "All assessments"—Whether inhabited house duty included.]**—A lessee under a lease covenanted to pay all assessments charged upon the demised premises:—*Held*: inhabited house duty was charged upon the premises within the meaning of the covenant.—*EASTWOOD v. McNAB*, [1914] 2 K. B. 361; 83 L. J. K. B. 941; 110 L. T. 701; 12 L. G. R. 517, D. C.

**4427. Effect of statute on liability under covenant—Covenant by tenant to pay all "duties dues & taxes"—Statute imposing fresh taxes on landlord—Proviso saving covenants.]**—Rent is reserved in a lease "without deduction, in respect of parish duties, dues, taxes, etc. made or to be made, etc." A subsequent Act imposes a tax to be paid by landlords with a proviso saving covenants between landlords & tenants: *Qu.*: whether the tenant may deduct payments made under the Act.—*MARSHALL v. WISDALE* (1674), 1 Freem. K. B. 148; 80 E. R. 107.

**Annotation:—***Mentd.* *Rowe v. Young* (1820), 2 BH. 391.

**B. Income Tax.**

*See* Income Tax Act, 1918 (c. 40), Rules applicable to all Schedules, r. 23; & generally, *INCOME TAX*, Vol. XXVIII., pp. 1 *ets eq.*

**4428. Covenant by tenant to pay income tax—Void—Effect on separate covenant to pay rent—Clear of all taxes generally.]**—*GASKELL v. KING*, No. 4422, *ante*.

**4429. ———— Entered into before imposition of tax.]**—46 Geo. 3, c. 65, ss. 112, 115, in declaring covenants to pay the same, void, has a retrospective operation: therefore covenant entered into before the Act passed, void.—*BUXTON v. MONKHOUSE* (1810), Coop. G. 41; 35 E. R. 470, L. C.

**Annotations:—***Mentd.* *Sollory v. Leaver* (1869), L. R. 9 Eq. 22; *Kelsoy v. Kelsoy* (1874), L. R. 17 Eq. 495.

**4430. ———— Valid as covenant to pay same rent less deduction.]**—Where deft., by indenture made since the passing of 46 Geo. 3, c. 65, demised to J. certain premises, *reddendum* £40 annually, clear of land tax, property tax, etc., & J. covenanted to pay the said yearly rent in the manner the same

was reserved to be paid as aforesaid, & to pay the land tax, property tax, etc.:—*Held*: by sect. 115, coupled with sect. 195, of the above Act, so much of the *reddendum* & covenant as stipulated for payment of the rent clear of deduction on account of property tax was void, but the residue was good for payment of the rent, subject to such deduction; & therefore pltf., who had paid a deposit as purchaser of the said rent, was not entitled, on the above ground of objection, to recover back his deposit from deft., who had engaged to make a good assignment to the said rent.—*FULLER v. ABBOTT* (1811), 4 Taunt. 105; 128 E. R. 268.

**Annotation:—***Refd.* *Festing v. Taylor* (1862), 3 B. & S. 217.

**4431. ————]**—(1) In debt for rent, the tenant may plead, as to part, that he has paid landlord's property-tax to that amount, in respect of the rent due to pltf. claimed by the declaration, after he has in fact paid the tax.

(2) It is not enough to plead that deft. was on the premises at & a short time before sunset on the rent day, ready to pay, without averring that he was there long enough before sunset to have counted the money.

(3) A lease rendering rent clear of landlord's property tax is good as a lease rendering the same rent subject to a deduction thereout of the property tax.—*TINKLER v. PRENTICE* (1812), 4 Taunt. 549; 128 E. R. 445.

**Annotations:—***As to* (1) *Consd.* *North London & General Property Co. v. Moy*, [1918] 2 K. B. 439. *As to* (2) *Refd.* *Startup v. Macdonald* (1843), 6 Man. & G. 593. *As to* (3) *Consd.* *Festing v. Taylor* (1862), 3 B. & S. 217.

**4432. ————]**—A contract for payment of a rent, or other annual sum, in full, without allowing the deduction of the income tax, is absolutely void as to the latter proviso.—*FLOYER v. BANKES* (1863), 2 New Rep. 7; 32 L. J. Ch. 610; 8 L. T. 483; 9 Jur. N. S. 684; 11 W. R. 630; *subsequent proceedings*, 3 De G. J. & Sm. 306, L. C.

**Annotations:—***Refd.* *Brooke v. Price*, [1916] 2 Ch. 345. *Mentd.* *Gleadow v. Leatham* (1882), 52 L. J. Ch. 102.

**4433. ———— Covenant by landlord to repay tenant.]**

—An agreement that, if the tenant will continue to pay his rent in full without any deduction in respect of landlord's property tax paid by him, the landlord will repay to the tenant all sums which he has paid or shall pay for the landlord's property tax, is not invalid as being contrary to 5 & 6 Vict. c. 35.—*LAMB v. BREWSTER* (1879), 4 Q. B. D. 607; 48 L. J. Q. B. 421; 40 L. T. 537; 43 J. P. 461; 27 W. R. 478, C. A.

**4434. Covenant for rent varying with amount of tax.]**—A. in 1807, when 46 Geo. 3, c. 65, existed, leased premises to B., at a rent of £340, with a proviso that the rent should be reduced to £330 in the event of "the said tax called income tax" becoming repealed, annihilated, or suspended at any time during the continuance of the demise; such reduced rent to continue to be paid only so long as the income tax should remain repealed & not payable:—*Held*: the rent which had so become reduced on the expiration of 46 Geo. 3, c. 65, was restored to the original amount on the passing of 5 & 6 Vict. c. 35, there being nothing in sect. 73 of that Act to render the covenant illegal.—*COLBRON v. TRAVERS* (1862), 12 C. B. N. S. 181; 31 L. J. C. P. 257; 6 L. T. 287; 8 Jur. N. S. 1105; 10 W. R. 603; 142 E. R. 1112.

**Annotations:—***Consd.* *Floyer v. Bankes* (1863), 2 New Rep. 7; *Tuff v. Drapers Guild of City of London*, [1913] 1 K. B. 40. *Refd.* *Ludlow v. Pike*, [1904] 1 K. B. 531.

the lessee to pay taxes imposed on the lessor under Dominion Income War Tax Act, 1917.—*NEW BRUNSWICK & CANADA RAILROAD CO. v. NEW BRUNSWICK RY. CO.*, [1924] 4 D. L. R. 962;

[1924] S. C. R. 450; *affg.*, [1924] 1 D. L. R. 72; 50 N. B. R. 376.—*CAN.*

**k. Partial exemption—Lessor to pay "regular & ordinary" taxes—Con-**

**struction of covenant.]**—*ST. MARY'S YOUNG MEN'S TOTAL ABSTINENCE & BENEVOLENT SOCIETY v. ALBEE* (1910), 30 C. L. T. 530; 7 E. L. R. 435; 43 S. C. R. 288.—*CAN.*

**4435.** —[An agreement for a lease had been agreed to be specifically performed by, amongst other things, the insertion in the new lease of the same covenants & provisions as were contained in the old one. Amongst the old covenants was one to the effect that, so long as any tax upon property or income should be imposed upon the rents, the reserved rent of £690 should be increased in proportion to the amount of the tax:—*Held*: notwithstanding the provisions of 5 & 6 Vict. c. 35, the new lease must be in the same terms as the old one, & decreed accordingly.—*BEADEL v. PITT* (1864), 11 L. T. 592; 11 Jur. N. S. 152; 13 W. R. 287.

**4436.** From what deducted.—Payments other than rent—Royalty.]—By indenture, a piece of land was demised with power to the lessee to get from the land, clay, brick earth, & other materials for making bricks, & to make the same into bricks upon the premises, for a term of fourteen years; paying to the lessor the yearly rent of £17 10s. for surface rent, by quarterly payments; also paying to the lessor, for royalty or brick rent, the yearly sum of £100, by four equal quarterly payments on the same days; & also paying in respect of every thousand bricks over & above the first million which should be made on the premises in any one year, an additional royalty or brick rent of 2s., to be paid on the last day of every year:—*Held*: both the royalties or brick rents were chargeable with income tax, & it was payable in the first instance by the lessee, who was entitled to deduct it from the amount due to the lessor.—*EDMONDS v. EASTWOOD* (1858), 2 H. & N. 811; 27 L. J. Ex. 209; 30 L. T. O. S. 304; 22 J. P. 275; 6 W. R. 331; 157 E. R. 334.

*Annotation*:—*Refd.* *Foley v. Fletcher* (1858), 3 H. & N. 769.

### C. Land Tax.

Where assessment increased by improvements to premises.]—*See* Nos. 4409–4415, *ante*.

**4437.** What covenants include land tax—"All taxes"—Whether land tax included.]—A tenant verbally agreed "to pay all taxes":—*Held*: under this agreement he was bound to pay the land tax although it was not specifically mentioned.—*AMFIELD v. WHITE* (1825), Ry. & M. 246.

*Annotation*:—*Refd.* *Festing v. Taylor* (1862), 26 J. P. 261.

**4438.** — Agreement before imposition of land tax.]—Lease for years, rendering rent, free of all taxes, the word render makes a covenant, & the lessee is discharged from all taxes.—*GILES v. HOOPER* (1690), Carth. 135; 90 E. R. 683.

*Annotation*:—*Refd.* *Festing v. Taylor* (1862), 3 B. & S. 218.

**4439.** — Taxes in respect of "poor, church or otherwise."—*HOPWOOD v. BAREFOOT* (1709), 11 Mod. Rep. 237; 88 E. R. 1013.

*Annotation*:—*Refd.* *Bradbury v. Wright* (1781), 2 Doug. K. B. 624.

**4440.** — Rent without deduction whatsoever.]—On a grant of a fee farm rent, "without any deduction, defalcation, or abatement, for or in any respect whatsoever," the grantee is entitled to receive the full rent, without deducting the land tax.—*BRADBURY v. WRIGHT* (1781), 2 Doug. K. B. 624; 99 E. R. 395.

*Annotations*:—*Fold.* *Parish v. Sleeman* (1860), 1 De G. F. & J. 326. *Refd.* *Musgrave v. Emmerson* (1847), 10 Q. B. 326; *Festing v. Taylor* (1862), 26 J. P. 261.

**4441.** — All parliamentary & parochial taxes—Fee farm rent in lieu.]—*CHRIST'S HOSPITAL (GOVERNORS) v. HARRILD*, No. 4425, *ante*.

**4442.** —[The land tax is a "Parliamentary tax," within an agreement to pay rent & all taxes Parliamentary & parochial.]—

*MANNING v. LUNN & THRUPE* (1845), 2 Car. & Kir. 13, N. P.

*Annotation*:—*Mentd.* *Scott v. Uxbridge & Rickmansworth Ry.* (1866), L. R. 1 C. P. 596.

**4443.** — All outgoings.]—*PARISH v. SLEEMAN*, No. 4473, *post*.

**4444.** Covenant by landlord—Measure of liability.]—Landlord who covenants to pay land tax shall only pay according to the rent he receives, & not according to the rent the premises are taxed at.—*YAW v. LEMAN* (1743), 1 Wils. 21; 95 E. R. 470; *sub nom.* *YEO v. LEMAN*, 2 Stra. 1191.

*Annotations*:—*Refd.* *Hyde v. Hill* (1789), 3 Term Rep. 377; *Watson v. Home* (1827), 7 B. & C. 285; *Ward v. Const* (1830), 10 B. & C. 635; *Smith v. Humble* (1854), 18 J. P. 760; *Mansfield v. Relf* (1907), 77 L. J. K. B. 145.

**4445.** —[A landlord under a covenant in a lease to pay the land tax, is bound to pay the land tax in proportion to the quantum of rent only.

—*WHITFIELD v. BRANDWOOD* (1818), 2 Stark. 440.

*Annotations*:—*Refd.* *Ward v. Const* (1830), 10 B. & C. 635; *Smith v. Humble* (1854), 18 J. P. 760.

Liability of landlord for increased assessment, *see* Nos. 4409, 4413, 4414, *ante*.

**4446.** Effect of redemption by landlord—Rectification of lease.]—By an agreement in writing, A. agreed to take an underlease from B., at a rent of £340, A. "paying all taxes, land tax & insurance." A lease was granted, reserving the rent of £340, stated to include the land tax. It had, however, been redeemed by the superior landlord. The lessee having refused to pay the amount of the land tax redeemed, the lease was ordered to be reformed by making him liable for the land tax, though redeemed.—*MURRAY v. PARKER* (1854), 10 Beav. 305; 52 E. R. 367.

### SUB-SECT. 5.—TITHES.

*See* Tithe Act, 1891 (c. 8), & generally, *ECCLESIASTICAL LAW*, Vol. XIX., pp. 476 *et seq.*

**4447.** General rule—Contracts between owners & occupiers.]—Tithe Act, 1891 (c. 8), s. 1 (1), which provides that "any contract made between an occupier & owner of lands after the passing of this Act for the payment of the tithe rentcharge by the occupier shall be void," prohibits not only a contract by the occupier to pay the tithe rentcharge directly to the tithe owner, but also a contract to re-imburse the landlord such sums as shall be paid by him for tithe rentcharge.—*LUDLOW (LORD) v. PIKE*, [1904] 1 K. B. 531; 73 L. J. K. B. 274; 90 L. T. 458; 68 J. P. 243; 52 W. R. 475; 20 T. L. R. 276; 48 Sol. Jo. 277.

*Annotation*:—*Fold.* *Tuff v. Guild of Drapers of the City of London*, [1913] 1 K. B. 40.

**4448.** —[A contract made after the passing of the Tithe Act, 1891 (c. 8), by which an occupier of land agrees to pay to the owner thereof sums which the owner shall pay in respect of tithe rentcharge issuing out of the land, is void by reason of the provisions of the Tithe Act, 1891 (c. 8), s. 1 (1).—*TUFF v. GUILD OF DRAPERS OF THE CITY OF LONDON*, [1913] 1 K. B. 40; 82 L. J. K. B. 174; 107 L. T. 635; 29 T. L. R. 36; 57 Sol. Jo. 43, C. A.

*Annotation*:—*Refd.* *Neall v. Beadle* (1912), 57 Sol. Jo. 77.

**4449.** Whether deductible from rent—After Tithe Commutation Act, 1836 (c. 71).]—The landlady of an estate being lessee of the tithes thereof, agreed by her agent to demise that estate subsequent to above Act, to a tenant to a certain rent, tithe free. There was no deed executed; & the rent being in arrear a distress was levied for the whole, including the sum which would have

**Sect. 2.—Covenants for payment: Sub-sect. 5. Sect. 3: Sub-sects. 1 & 2. Part XVII. Sect. 1: Sub-sects. 1 & 2.]**

been payable in respect of the tithe rentcharge:—*Held*: she was entitled to do so, under the terms of the agreement, notwithstanding that there was no letting of the tithes to the tenant by deed, as sect. 80 of above Act provided that any tenant who shall hold his lands under an agreement that the same shall be holden by him free of tithes, & who shall pay any such rentcharge shall be allowed the same in account with his landlord.—*MEGGISON v. GLAMIS (LADY), SELLS v. SAME* (1852), 7 Exch. 685; 21 L. J. Ex. 284; 19 L. T. O. S. 168; 17 J. P. 87.

*Annotation*:—*Reid. Jeffery v. Neale* (1871), 40 L. J. C. P. 191.

**4450. — Landlord lessee of tithes at time of agreement.**—Tenant, under written agreement, not under seal, made before the commutation of the tithes of the land, which did not expressly provide for the holding of the land free of tithes, or give any security for indemnity in case the tenant should be called upon for tithes:—*Held*: not entitled to deduct the payment of the rentcharge, at which the tithes were commuted during the tenancy, from the rent, under sect. 80 of above Act, although the landlord at the time of the making of the agreement was the owner of the tithes, his interest therein having expired & the tithes having passed to the bishop during the holding, & although there was good reason to believe that at the time of the agreement it was the understanding between the landlord & the tenant that the tenant should not be called upon to pay tithes.—*FOURIES v. ELDERFIELD* (1855), 26 L. T. O. S. 71; 4 W. R. 15.

**4451. — Only from next payment of rent.**—Each deduction in respect of a payment of tithe rentcharge under sect. 80 of above Act, should be made from the next payment of rent, & cannot be brought into account in the payment of any subsequent rent.—*DAWES v. THOMAS*, [1892] 1 Q. B. 414; 61 L. J. Q. B. 482; 60 L. T. 451; 56 J. P. 326; 40 W. R. 305; 8 T. L. R. 307; 36 Sol. Jo. 253, C. A.

**4452. — Payable "free of all outgoings."**—*PARISH v. SLEEMAN*, No. 4473, *post*.

**4453. — Payable free of "charges."**—*LOCKWOOD v. WILSON*, No. 4462, *post*.

**4454. — Effect of Tithe Act, 1891 (c. 8).**—Sect. 6 of above Act provides that "any rate to which tithe rentcharge is subject shall be assessed on & may be recovered from the owner of the tithe rentcharge & so much of any Act as authorises any rate on tithe rentcharge to be assessed or recovered from the occupier of any lands out of which the tithe rentcharge issues is hereby repealed." At the passing of the Act certain rates upon a tithe rentcharge were due & in arrear. The overseers subsequently demanded, & obtained payment of, these rates from the occupiers of the land, purporting to act under Tithe Commutation Act, 1836 (c. 71), & Tithe Act, 1837 (c. 69). The occupiers deducted the amount from their rent, & the landlord deducted that amount from the

next payment of tithe rentcharge:—*Held*: by reason of the repeal contained in sect. 6 of above Act, the payment by the occupiers & the allowance by the landlord were voluntary, & the landlord, therefore, was not entitled to deduct the amount from the next payment of tithe rentcharge.—*ROBERTS v. POTTS, JONES v. COOKE*, [1894] 1 Q. B. 213; 58 J. P. 333; 42 W. R. 294; 9 R. 230; *sub nom. JONES v. POTTS, JONES v. COOKE*, 63 L. J. Q. B. 381; 69 L. T. 849; 10 T. L. R. 111, C. A.

*Annotation*:—*Distd. Lewis v. Hughes*, [1916] 1 K. B. 831.

**4455. — Application within City of London.**—By a lease made in 1894 land & two houses erected thereon in the City of London were demised to lessees for a term of ninety-nine years at a rent of £480, payable without any deduction except for "tithe rentcharge, if any, & landlord's property tax." In pursuance of local Acts, a tithe rate of £11 9s. 3d. was assessed upon the demised premises & was recoverable by distress according to those Acts. The present lessees by assignment of the residue of the term claimed as against the freeholder to deduct this amount from their rent under the terms of the lease:—*Held*: the definition of "tithe rentcharge" in above Act was inapplicable to any payment within the City of London; & further, this tithe rate, having regard to its origin & nature, was in no sense a rent issuing out of land but a rate assessed by virtue of ownership which the lessees could not deduct from their rent under the terms of this lease.—*Re SALTER & AWDRY'S LEASE, PROPERTY & ESTATES CO. v. BLUNT*, [1921] 2 Ch. 141; 90 L. J. Ch. 459; 125 L. T. 537; 65 Sol. Jo. 605.

### SECT. 3.—RECOVERY OF PAYMENT.

#### SUB-SECT. 1.—BY TENANT.

**4456. Recovery by tenant—After omission to deduct—Taxes.**—College made a lease, the rent subject to taxes; the tenant by mistake did not deduct them; equity will not allow him those already paid, nor decree the account back.—*A.-G. v. BALIOL COLLEGE, OXFORD* (1744), 9 Mod. Rep. 407; 88 E. R. 538.

*Annotations*:—*Mentd. Brown v. Blount* (1830), 9 L. J. O. S. Ch. 74; *Willats v. Busby* (1842), 5 Beav. 193.

**4457. — Tithes—Not recoverable from subsequent payments.**—*DAWES v. THOMAS*, No. 4451, *ante*.

**Right to deduct from rent—Income tax.**—*See Sect. 1, sub-sect. 2, A. (a), ante*.

**Land tax.**—*See Sect. 1, sub-sect. 2, B., ante*.

#### SUB-SECT. 2.—BY LANDLORD.

**Distress—Rates.**—*See DISTRESS*, Vol. XVIII., p. 320, Nos. 545–546, pp. 395–422.

**Taxes.**—*See DISTRESS*, Vol. XVIII., p. 320, Nos. 538–544, pp. 422–426.

**Tithes.**—*See DISTRESS*, Vol. XVIII., pp. 320–321, No. 547, *ECCLESIASTICAL LAW*, Vol. XIX., pp. 492 *et seq.*

### PART XVI. SECT. 3, SUB-SECT. 1.

**1. Recovery by tenant—Payment by mistake.**—A lessee paid to his lessor, on demand, a sum of money in respect of land tax, the lessee being under the

belief that the lease contained a term requiring him to pay. In fact the lease did not contain any such term:—*Held*: the lessee was entitled to recover the money as having been paid under a mistake of fact.—*LEEDON v. SKINNER*,

[1923] V. L. R. 401.—*AUS.*

**m. — Voluntary payment in pursuance of agreement.**—*MCANANY v. TICKELL* (1864), 23 U. C. R. 499.—*CAN.*

## Part XVII.—Assessments, Charges, Outgoings, etc.

## SECT. 1.—INTERPRETATION OF TERMS.

## SUB-SECT. 1.—ASSESSMENTS.

**4458. Paving expenses.]**—By indenture of lease the lessee covenanted that he would during the continuance of the term pay & discharge "all taxes, rates, duties, & assessments whatsoever, which during the continuance of the demise should be taxed, assessed, or imposed on the tenant or landlord of the premises demised in respect thereof," etc. The vestry of the parish having, under the provisions of the Metropolis Management Act, 1855 (c. 120), paved the street upon which the demised premises abutted, assessed the sum payable by the owner as his proportion of the estimated expenses thereof at £49 2s. 6d., gave the occupier a notice, under Metropolis Management Amendment Act, 1862 (c. 102), s. 96, requiring him to pay it, & upon his failure to do so, took proceedings against the owner before a magistrate, & compelled him to pay:—*Held*: (1) this was a "duty" or (2) "assessment" assessed or imposed upon the owner in respect of the premises, within the covenant.—*THOMPSON v. LAPWORTH* (1868), L. R. 3 C. P. 149; 37 L. J. C. P. 74; 17 L. T. 507; 32 J. P. 184; 16 W. R. 312.

*Annotations*:—*As to* (1) *Distd. Rawlins v. Briggs* (1878), 3 C. P. D. 368. *Consd. Aldridge v. Ferno* (1886), 55 L. J. Q. B. 587; *Shepherd v. Barber* (1902), 1 L. Q. L. 157. *Refd. Budd v. Marshall* (1880), 5 C. P. D. 481; *Hill v. Edward* (1885), *Cab. & El.* 481; *Brett v. Rogers*, (1897) 1 Q. B. 525; *Wix v. Rutson*, [1899] 1 Q. B. 474; *Farlow v. Stevenson*, [1900] 1 Ch. 128. *As to* (2) *Refd. Wilkinson v. Collyer* (1884), 13 Q. B. D. 1; *Hill v. Edward* (1885), *Cab. & El.* 481; *Wix v. Rutson*, [1899] 1 Q. B. 474; *Farlow v. Stevenson*, [1900] 1 Ch. 128. *Generally, Refd. Crosse v. Raw* (1874), L. R. 9 Exch. 209; *Hartley v. Hudson* (1879), 4 C. P. D. 367; *Midgley v. Coppock* (1879), 43 J. P. 683; *Brett v. Rogers*, [1897] 1 Q. B. 525; *Arding v. Economic Printing & Publishing Co.* (1898), 79 L. T. 622; *Foulger v. Arding*, [1902] 1 K. B. 700; *Skinner v. Hunt*, [1904] 2 K. B. 452.

**4459. Drainage expenses.]**—*LYON v. GREENHOW* (1892), 8 T. L. R. 457; 36 Sol. Jo. 381.

*Annotation*:—*Consd. Lumby v. Faupel* (1903), 88 L. T. 562.

**Expenditure under Factory & Workshop Acts—Provision of fire escape.]**—*See FACTORIES*, Vol. XXIV., p. 914, No. 93.

**Whether tithe rentcharge included.]**—*See ECCLESIASTICAL LAW*, Vol. XIX., p. 494, Nos. 3504, 3505.

## SUB-SECT. 2.—CHARGES.

**4460. Whether poor rate included.]**—Covenant in a lease for years to indemnify against all charges on the land; poor rate not within the same.

Poor & church rates are taxes payable in respect of the land; but they are not payable out of the land for the personal estate only is subject to them, whereas the land tax does immediately charge & affect the land, & therefore is properly called an imposition upon that land (*Eyre, C.J.*).—*CASE v. STEPHENS* (1731), *Fitz-G.* 297; 94 E. R. 761.

*Annotation*:—*Refd. Mersey Docks v. Cameron, Jones v. Mersey Docks* (1865), 11 H. L. Cas. 444.

**4461. Abatement of nuisance.]**—An agreement for the lease of certain premises stipulated that the landlord should keep the premises in good & substantial repair, & should pay & discharge all rates, taxes, tithes, & other charges payable in respect of the premises. A piece of ornamental water formed part of the demised premises, in which a deposit of foul mud accumulated, which

became a nuisance. The local authority took proceedings under 18 & 19 Vict. c. 121, & obtained an order of the magistrates against pltf., the tenant, as the person by whose act or default the nuisance arose, for the removal thereof. The tenant, previously to the making of the order, but after the commencement of the proceedings against him, entered into an agreement for the cleansing of the piece of water, & upon the completion of the work, paid the contractor a reasonable sum for the same. He then brought an action against the landlord, deft., for breach of his agreement to pay all rates, taxes, & charges payable in respect of the premises, & for money paid to his use:—*Held*: (1) the landlord was not liable, under the agreement to repair, to cleanse the piece of water, & the expense of removing the nuisance was not a charge within the meaning of the agreement; (2) as the contract for cleansing was entered into before the order was made by the magistrates, pltf. was a volunteer, & could not, therefore, recover the sum laid out as money paid to deft.'s use.—*BIRD v. ELWES* (1868), L. R. 3 Exch. 225; 37 L. J. Ex. 91; 18 L. T. 727; 32 J. P. 694; 16 W. R. 1120.

*Annotations*:—*As to* (1) *Distd. Rawlins v. Briggs* (1878), 3 C. P. D. 368. *Consd. Dashwood v. Magniac*, [1891] 3 Ch. 306.

**4462. Tithe rentcharge.]**—A lease contained a covenant that the lessee would pay the rent reserved without any deductions in respect of any taxes, rates, assessments, or charges whatsoever, the landlord's property tax only excepted:—*Held*: he was not entitled to deduct the amount of a tithe rentcharge paid by him from the rent payable to the lessor, for that word "charges" is wide enough to include it, & is not confined to matters *ejusdem generis* with taxes, rates, & assessments.—*LOCKWOOD v. WILSON* (1874), 43 L. J. C. P. 179; 30 L. T. 761; 22 W. R. 919.

*See, now, Tithe Act, 1891* (c. 8).

**4463. Sewering & paving.]**—Deft. became tenant of a house under a lease by which he covenanted to pay "all rates, taxes, charges, & assessments whatsoever which now are or may be charged or assessed upon the said premises, or any part thereof, or upon any person or persons in respect thereof," land tax & property tax excepted. The local board of health gave notice to pltf. as owner, he having acquired the lessor's interest in the premises, to sewer, level, pave, etc., the street in which the house was situate; & upon his failure to comply with the notice, the board did the work, & made an apportionment upon him in respect thereof, under 11 & 12 Vict. c. 63, & the Acts amending that Act, & he was compelled to pay the amount & interest:—*Held*: this was a "charge upon the premises," or "upon a person in respect thereof," from which by his covenant deft. undertook to relieve pltf., & therefore pltf. was entitled to maintain an action against deft. in respect of the money & interest so paid by him.—*HARTLEY v. HUDSON* (1879), 4 C. P. D. 367; 48 L. J. Q. B. 751; 43 J. P. 784.

*Annotations*:—*Apprvd. Budd v. Marshall* (1880), 5 C. P. D. 481. *Apld. Wilkinson v. Collyer* (1884), 13 Q. B. D. 1. *Distd. Baylis v. Jiggins*, [1898] 2 Q. B. 315. *Fold. Weld v. Clayton-Le-Moore U. D. C.* (1902), 86 L. T. 584. *Refd. Hill v. Edward* (1885), *Cab. & El.* 481; *Foulger v. Arding* (1901), 70 L. J. K. B. 580.

**4464. Drainage expenses—Under order of local authority.]**—A lessee covenanted to pay, bear, &

*Sect. 1.—Interpretation of terms: Sub-sects. 2, 3, 4 & 5.]*

discharge all land tax, sewers rate, main drainage rate, & all other rates, taxes, assessment charges, or impositions whatsoever, Parliamentary, parochial, or otherwise, taxed, charged, assessed, or imposed upon the demised premises, or on the lessor for or in respect of the premises. The lessee also covenanted to repair. The lessee failed to repair, in consequence of which a drain on the premises got out of order, & caused a nuisance. The sanitary authority made an order on the lessor, under the Public Health (London) Act, 1891 (c. 76), directing him to repair the drain. The lessor incurred expenses in complying with this order, & sued the lessee to recover the amount:—*Held*: the expenses so incurred were a charge imposed on the lessor in respect of the premises, & *pltf.* was entitled to recover.—*SMITH v. ROBINSON*, [1893] 2 Q. B. 53; 62 L. J. Q. B. 509; 69 L. T. 434; 58 J. P. 73; 41 W. R. 588; 9 T. L. R. 493; 37 Sol. Jo. 585; 5 R. 469, D. C.

*Annotations*:—*Apld.* *Foulger v. Arding*, [1901] 2 K. B. 151. *Refd.* *Greaves v. Whitmarsh, Watson* (1906), 4 L. G. R. 718.

**4465.** ———.]—A lease for years, granted by *pltf.* to *deft.*, contained a covenant by the lessee to pay during the term "the sewers rate & all other taxes, rates, charges, & assessments whatsoever, Parliamentary, parochial, or otherwise, which then were or thereafter should be imposed, charged, or assessed upon or in respect of the premises, or payable by either the owner or occupier in respect of the same." The lease also contained a covenant by the lessee to repair & keep in repair. In compliance with a notice given by the local authority, under Public Health Act, 1875 (c. 55), s. 94, *pltf.* did the work necessary to abate a nuisance caused by a defective drain upon the premises, & brought this action to recover the cost of that work:—*Held*: the expenses of doing this work came within the terms of the covenant as a "charge imposed upon or in respect of the premises or payable by either the owner or occupier in respect of the same"; & the lessee was therefore liable to pay the expense thereof himself.—*GEORGE v. COATES* (1903), 88 L. T. 48, C. A.

SUB-SECT. 3.—DUTIES.

**4466. Drainage expenses.**—*Deft.*, who was the lessee of *pltf.*, covenanted to "pay the land tax, sewers rate, & all other taxes, rates, duties, assessments, & impositions, Parliamentary, parochial, or otherwise, which now are or shall at any time during this demise be assessed or imposed on or in respect of the said demised premises." Very shortly after the commencement of the lease the sanitary authority served a notice on *pltf.*, as owner, under Public Health (London) Act, 1891 (c. 76), directing him to abate a nuisance on the premises, & for that purpose to take up a defective drain & lay a new drain throughout the premises. *Pltf.* incurred expenses in complying with the notice, & sued *deft.* to recover the amount:—*Held*: the obligation to lay the new drain was a "duty imposed in respect of the premises," & *deft.* was liable to pay to *pltf.* the amount expended by her in complying with the notice of the sanitary authority.—*BRETT v. ROGERS*, [1897] 1 Q. B. 525; 66 L. J. Q. B. 287; 70 L. T. 26; 45 W. R. 334; 13 T. L. R. 175; 41 Sol. Jo. 258, D. C.

*Annotations*:—*Folld.* *Antil v. Godwin* (1899), 63 J. P. 441; *Farlow v. Stevenson*, [1900] 1 Ch. 128; *Stockdale v.*

*Ascherberg*, [1903] 1 K. B. 873. *Refd.* *Foulger v. Arding*, [1902] 1 K. B. 700.

Licence duties, *see* Sect. 2, sub-sect. 3, *post*.

SUB-SECT. 4.—IMPOSITIONS.

**4467. Drainage expenses—Abatement of nuisance.**—A lease for years contained a covenant by the lessee to "pay & discharge all taxes, rates, including sewers main drainage assessments & impositions whatsoever which now are or which at any time or times hereafter during the continuance of the said term hereby granted be taxed rated assessed charged or imposed upon or in respect of the said premises or any part thereof on the landlord tenant or occupier of the same premises by authority of Parliament or otherwise howsoever, landlord's property tax & tithe only excepted." There was no repairing covenant in the lease. Notice was given to the lessor by the sanitary authority of the district, under Public Health London Act, 1891 (c. 76), to abate a nuisance caused by a foul & offensive privy on the premises, by removing the privy, & constructing a water-closet in accordance with the bye-laws of the London County Council. The lessor thereupon did the work required by the notice, & subsequently sued the lessee to recover the expense incurred by him in so doing:—*Held*: this expense was covered by the words "impositions charged or imposed upon or in respect of the said premises on the landlord tenant or occupier of the same" in the covenant, & therefore the action was maintainable.—*FOULGER v. ARDING*, [1902] 1 K. B. 700; 71 L. J. K. B. 499; 86 L. T. 488; 50 W. R. 417; 18 T. L. R. 422; 46 Sol. Jo. 356, C. A.

*Annotations*:—*Folld.* *Shepherd v. Barber* (1902), 67 J. P. 238; *George v. Coates* (1903), 88 L. T. 48. *Consd.* *Lumby v. Faupel* (1903), 88 L. T. 562. *Apld.* *Stockdale v. Ascherberg*, [1903] 1 K. B. 873; *Valpy v. St. Leonard's Wharf Co.* (1903), 67 J. P. 402; *Re Warriner, Brayshaw v. Ninnis*, [1903] 2 Ch. 367. *Folld.* *Goldstein v. Hollingsworth*, [1904] 2 K. B. 578. *Consd.* *Greaves v. Whitmarsh, Watson*, [1906] 2 K. B. 340. *Refd.* *Monk v. Arnold* (1902), 86 L. T. 580; *Horne v. Franklin* (1904), 2 L. G. R. 1190; *Morris v. Beal*, [1904] 2 K. B. 585; *Stuckey v. Hooke* (1905), 69 J. P. 119; *Henman v. Berliner*, [1918] 2 K. B. 236.

**4468.** ———.]—A landlord let a house to a tenant for three years at the "clear yearly rent" of £54, to be paid "free & clear of & from all deductions whatsoever," property tax excepted. The tenant covenanted to pay the rent & to pay & discharge "all rates, taxes, assessments, & impositions whatsoever," whether "Parliamentary, parochial, or otherwise," that might become due or assessed in respect of the premises during the tenancy, property tax excepted, & to keep the premises in as good repair as at the commencement of the tenancy, fair wear & tear excepted. The landlord covenanted to keep the main walls and roof in repair during the tenancy:—*Held*: the duty & expense of complying with a notice from the sanitary authority to reconstruct the drains constituted an "imposition" within the agreement which fell on the tenant notwithstanding the absence of such words as "imposed on the landlord or tenant," & notwithstanding the shortness of the tenancy.—*Re WARRINER, BRAYSHAW v. NINNIS*, [1903] 2 Ch. 367; 72 L. J. Ch. 701; 88 L. T. 766; 67 J. P. 351; 19 T. L. R. 543; 1 L. G. R. 765.

**4469.** ——— Expenses caused through landlord's breach of covenant to repair.]—*HEARN v. HOVINDEN* (1903), cited in *Encyclopædia of Forms & Precedents*, 2nd ed., Vol. VIII., p. 51.

**4470. Water rates.]**—By a covenant contained in a lease of a warehouse in the city of London the lessor covenanted with the lessees to pay all rates, taxes, & impositions whatsoever, whether parliamentary, parochial, or imposed by the corp. of the city of London or otherwise, howsoever, which then were or thereafter might be rated, charged, or assessed on the said premises, or any part thereof, or on the said yearly rent, or on the landlord, owner, or tenants of the said premises in respect thereof. Water having been supplied to the demised premises for domestic purposes by the New River co. under the provisions of the Waterworks Clauses Act, 1847 (c. 17), the lessees paid the water rates due in respect of such supply, & sought to recover the same from the lessor:—*Held*: such water rates were not rates or impositions imposed on or in respect of the premises within the meaning of the covenant, & therefore the lessees were not entitled to recover the same from the lessor.—*BADCOCK v. HUNT* (1888), 22 Q. B. D. 145; 58 L. J. Q. B. 134; 60 L. T. 314; 53 J. P. 340; 37 W. R. 205; 5 T. L. R. 148, C. A.

*Annotations*:—*Refd.* *Re Floyd*, *Floyd v. Lyons*, [1897] 1 Ch. 616; *Bourne & Tant v. Salmon & Gluckstein*, [1907] 1 Ch. 616.

**4471. Paving street.]**—Land was leased in 1885 with a covenant by the tenant to pay all "assessments, impositions & outgoing." The lease having expired, the tenant remained in possession as tenant from year to year at a rent of £46 5s. The local authority of the district claimed from the landlord, *pltf.*, the sum of £188 2s. 9d. for the cost of making up the road, which *pltf.* paid, & sued to recover from the tenant, *deft.*:—*Held*: the covenant being plain & unambiguous, it was not open to the tenant to say that it was not such a sum as was contemplated by the parties to the lease, & the tenant, having held over upon the terms of the lease, was liable to pay.—*LOWTHER v. CLIFFORD* (1926), 42 T. L. R. 432; 70 Sol. Jo. 544; 90 J. P. Jo. 229, C. A.

**Expenditure under Factory & Workshop Acts—On underground bakehouses.]**—*See* FACTORIES, Vol. XXIV., p. 907, No. 59.

**Provision of fire escape.]**—*See* FACTORIES, Vol. XXXIV., p. 914, Nos. 92, 93.

#### SUB-SECT. 5.—OUTGOINGS.

**4472. Assessment by commissioners of sewers.]**—*WALLER v. ANDREWS*, No. 4484, *post*.

**4473. Land tax & tithe commutation rentcharge.]**—Upon the construction of an agreement between landlord & tenant for the lease of a farm for a term of years, at a yearly rent of £40, payable quarterly, free of all outgoing:—*Held*: the word "outgoing" included the land tax & tithe commutation rentcharge.—*PARISH v. SLEEMAN* (1860), 1 De G. F. & J. 326; 29 L. J. Ch. 96; 1 L. T. 506; 24 J. P. 100; 6 Jur. N. S. 385; 8 W. R. 166; 45 E. R. 385, L. C.

*Annotations*:—*Distd.* *Jeffrey v. Neale* (1871), L. R. 6 C. P. 240. *Refd.* *Lockwood v. Wilson* (1874), 43 L. J. C. P. 179.

**4474. Drainage expenses—Abatement of nuisance.]**—*Re BETTINGHAM, MELHADO v. WOODCOCK* (1892), 9 T. L. R. 48.

*Annotation*:—*Fold.* *Smith v. Robinson*, [1893] 2 Q. B. 53.

**4475. Expenses incurred voluntarily by owner.]**—The owners of a house let to *deft.* for a term of three years at a rent of £70, *deft.* agreeing to pay "all rates, taxes, assessments, & outgoing" whatsoever in respect of the said premises. After the expiry of the term *deft.* continued in occupation of the house without

any fresh agreement, & paid rent for it at the same rate. Subsequently, & whilst *deft.* was still in occupation, the sanitary inspector of the district served upon the owners of the house an intimation under Public Health London Act, 1891 (c. 76), s. 3, that the house was in such a state as to be a nuisance owing to the drain being defective. The owners gave notice to *deft.*, & required him to do the work necessary to abate the nuisance. Upon *deft.* refusing to do so, the owners proceeded to do the work themselves at once without waiting to be served by the sanitary authority with a notice under sect. 4 of the said Act requiring them to do the work. The expense incurred by them in doing the work amounted to £70 1s. 6d. In an action by the owners to recover that sum from *deft.* under his covenant to pay all outgoing:—*Held*: the action could not be maintained because the owners, having done the work immediately upon receipt of the intimation of the existence of the nuisance & before service of any notice requiring them to abate it, did it voluntarily & not under any obligation, & the expenditure was consequently not an "outgoing" within the meaning of the covenant; & even if a covenant to pay outgoing would cover such an expenditure, it was not, having regard to the proportion which the expenditure bore to the yearly rent, a covenant which was applicable to a yearly tenancy, & *deft.*, in holding over after the expiry of his term & paying rent, could not be presumed to have intended to become a yearly tenant on the terms of such an obligation.—*HARRIS v. HICKMAN*, [1904] 1 K. B. 13; 73 L. J. K. B. 31; 89 L. T. 722; 68 J. P. 65; 20 T. L. R. 18; 48 Sol. Jo. 69; 2 L. G. R. 1.

*Annotations*:—*Distd.* *Haedleke v. Friern Barnet U. C.*, [1904] 2 K. B. 807. *Refd.* *Oliver v. Camberwell B. C.* (1904), 90 L. T. 285; *Graves v. Whitmarsh, Watson* (1906), 95 L. T. 425.

**4476. Caused by failure of landlord to repair.]**—*Deft.* agreed with *pltf.* that if *pltf.* would put the drains of *pltf.*'s house into a sound & proper condition, he would take a lease of the house. A lease was subsequently executed by *deft.*, which contained covenants by *deft.* to pay all outgoing payable in respect of the premises during the tenancy, & to keep the premises in repair. *Pltf.* did not, either before or after the execution of the lease, put the drains into a sound or proper condition, & by reason of her failure so to do a nuisance from defective drainage was caused on the premises during the currency of the lease, & *pltf.* incurred expense in complying with an order of the sanitary authority to abate the nuisance, under Public Health London Act, 1891 (c. 75). *Pltf.* sued *deft.* to recover the sum expended by her:—*Held*: *deft.* was not liable, on the grounds that the covenant to pay outgoing did not apply to a payment for work rendered necessary by *pltf.*'s failure to repair the drains in accordance with the agreement; & the covenant to keep the premises in repair did not apply to the drains unless & until they had first been put in repair by *pltf.*—*HENMAN v. BERLINER*, [1918] 2 K. B. 236; 87 L. J. K. B. 984; 119 L. T. 312; 82 J. P. 300; 34 T. L. R. 456; 16 L. G. R. 707.

**4477. Whether within reasonable contemplation of parties.]**—In a contract of demise between landlord & tenants a covenant by the tenants to pay "all rates, taxes, assessments & outgoing of every description, payable in respect of the premises during the tenancy, except the landlord's property tax," must be assumed to relate only to matters which may reasonably be supposed to have been contemplated by

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the parties as being within the purview of such a contract.

In the case of a tenancy of a cottage & yard from year to year under a lease at the annual rent of £20 where the lease contained such a covenant & the tenant had held the said premises for over ten years:—*Held*: a supply of water to a water-closet required by the sanitary authority under Public Health London Act, 1891 (c. 76), was, & the paving & draining of a yard & repairs to drains required by the said authority under the said Act were not, within the reasonable contemplation of the parties to the demise.—*VALPY v. SR. LEONARD'S WHARF CO., LTD.* (1903), 67 J. P. 402; 1 L. G. R. 305.

*Annotations*:—*Distd. Stockdale v. Ascherberg*, [1903] 1 K. B. 873. *Folld. Harris v. Hickman*, [1904] 1 K. B. 13. *Refd. Morris v. Beal* (1904), 68 J. P. 542.

**4478. Paving street.**—The lessee of a house in a new street within the metropolitan district covenanted with his lessor to pay during the term "all existing & future taxes, rates, assessments, land tax, tithe or tithe rentcharge, & outgoings of every description for the time being payable either by the landlord or tenant in respect of the said premises":—*Held*: the owner's proportion of the cost of paving the street under Metropolitan Management Amendment Act, 1862 (c. 102), s. 96, was an "outgoing" payable by the lessee under this covenant.—*ALDRIDGE v. FERNE* (1886), 17 Q. B. D. 212; 55 L. J. Q. B. 587; 34 W. R. 578, D. C.

*Annotations*:—*Folld. Batchelor v. Bigger* (1889), 60 L. T. 416. *Consd. Antill v. Godwin* (1899), 63 J. P. 441. *Folld. Weld v. Clayton-Jo-Moors U. D. C.* (1902), 86 L. T. 584. *Refd. Brett v. Rogers*, [1897] 1 Q. B. 525; *Arding v. Economic Printing & Publishing Co.* (1898), 79 L. T. 420; *Baylis v. Jiggins*, [1898] 2 Q. B. 315; *Re Waterhouse's Contract* (1900), 44 Sol. Jo. 645.

**4479. Tenancy for three years only.**—By an agreement for a lease of a house for three years at a rent of £75 *per annum* the tenant agreed "to pay all sewers rate, tithe rentcharge, land tax, if any, & all existing & future taxes, rates, assessments & outgoings of every description payable by landlord or tenant in respect of the premises during the tenancy, except the landlord's property tax." The local board made a claim upon the landlord & tenant for £68 15s. 11d., the share of the expenses of paving the road abutting on the house which had been apportioned to it:—*Held*: the words of the agreement were large enough to cover this payment; & their meaning could not be regarded as altered because the agreement was only for a term of three years; therefore, the tenant must pay the amount claimed by the board.—*BACHELOR v. BIGGER* (1889), 60 L. T. 416.

*Annotations*:—*Refd. Stock v. Meakin* (1900), 69 L. J. Ch. 401; *Stockdale v. Ascherberg*, [1903] 1 K. B. 873.

**4480.**—[Pltf. demised to defts. certain premises for a period of twenty-one years at an annual rent, defts. covenanting to pay "all rates taxes & outgoings now payable or hereafter to become payable" in respect of the demised premises. The local authority having, under Public Health Act, 1875 (c. 55), s. 150, executed certain paving works on a road upon which the demised premises abutted, pltf. paid to the local authority her proportion of the expenses incurred by them in executing the works, & brought an action against defts. to recover the amount:—

*Held*: the paving expenses were "outgoings" payable in respect of the demised premises, & pltf. was entitled to recover.—*GREAVES v. WHITMARSH, WATSON & CO., LTD.*, [1906] 2 K. B. 340; 75 L. J. K. B. 633; 95 L. T. 425; 70 J. P. 415; 4 L. G. R. 718, D. C.

**4481.**—[—]*LOWTHER v. CLIFFORD*, No. 4471, *ante*.

**4482. New rate.**—A tenant from year to year agreed to pay all outgoings. In the course of the tenancy a new rate was imposed, to be paid by the tenant, who could deduct it from the rent, apart from any agreement to the contrary:—*Held*: the tenant could deduct it, as the agreement between him & his landlord did not apply to such a new rate, & there was no agreement to the contrary; but it could only be deducted from the current rent, & past rates which the tenant had paid could not be deducted, but only that for the current year.—*MILE END OLD TOWN VESTRY v. WHITBY* (1898), 78 L. T. 80.

**4483. Water supply required by sanitary authority.**—*VALPY v. ST. LEONARD'S WHARF CO., LTD.*, No. 4477, *ante*.

**Expenditure under Factory & Workshop Acts—On underground bakehouses.**—*See FACTORIES*, Vol. XXIV., Nos. 59, 60.

**Provision of fire escape.**—*See FACTORIES*, Vol. XXIV., p. 914, Nos. 92, 94.

**New licence duty.**—*See No. 4534, post*.

## SECT. 2.—LIABILITY FOR PAYMENT.

### SUB-SECT. 1.—IN GENERAL.

**Covenant to pay—Whether a usual covenant.**—*See Part XI., Sect. 2, sub-sect. 5, ante*.

**4484. Mistaken deduction from rent by tenant—Action by landlord to recover.**—(1) By a memorandum of agreement, certain marsh lands were demised by pltf. to deft., subject to a condition that deft. should pay all outgoings whatsoever, rates, taxes, scots, etc., whether parochial or Parliamentary, which then were or should be thereafter charged or chargeable upon or on account of the said marsh lands, the then present land tax only excepted:—*Held*: an extraordinary assessment made by Comrs. of Sewers upon the lands, for a work of permanent benefit to the land, was within the meaning of the agreement.

(2) The assessment was made in certain proportions upon the owners & occupiers. For four years deft., the tenant, paid, in the first instance, both his own share & that of pltf., his landlord, & upon each half-year's settlement of accounts for rent due, with pltf.'s agent, who was ignorant of the agreement, the sum so paid was allowed towards the rent, & receipts were given for the balance:—*Held*: in an action brought upon the agreement, to recover the sums so allowed as arrears of rent, the facts supported a plea of payment.—*WALLER v. ANDREWS* (1838), 3 M. & W. 312; 1 Horn & H. 87; 7 L. J. Ex. 67; 2 J. P. 84; 150 E. R. 1163.

*Annotations*:—*As to* (1) *Distd. Palmer v. Earith* (1845), 14 M. & W. 428. *Consd. Tidswell v. Whitworth* (1867), L. R. 2 C. P. 326. *Refd. Thompson v. Lapworth* (1868), L. R. 3 C. P. 149. *Generally, Mentd. R. v. Kent JJ.* (1860), 2 E. & E. 911.

**4485. Liability of tenant—Expenses incurred as volunteer.**—*BIRD v. ELWES*, No. 4461, *ante*.

### PART XVII. SECT. 2, SUB-SECT. 1.

**n. Liability of tenant—Tithe rentcharge—Agreement by tenant to pay.**—

Where there is an agreement to make the tithe rentcharge payable by the tenant, & the agreement rests in *stet*, the ct. may, in favour of the intention,

add the amount of the rentcharge to the rent.—*CAROLAN v. BRABAZON* (1846), 3 Jo. & Lat. 200.—*IR*.

**4486.** — — —.]—Under Public Health London Act, 1891 (c. 70), a sanitary authority served on certain premises an intimation or warning, addressed to the owners, that, if certain necessary works were not completed within a specified time, they would commence proceedings against them "by the service of a statutory notice." Thereupon, the occupier, without forwarding the document to the owners, or informing them of it, caused the work to be executed, & then sought to recover the amount expended thereon from the owners:—*Held*: the occupiers, not being compellable to execute the work, had acted as mere volunteers in doing so, & had no claim to be reimbursed by the owners.—**THOMPSON & NORRIS MANUFACTURING CO., LTD. v. HAWES** (1895), 73 L. T. 369; 59 J. P. 580, C. A.

*Annotations*:—**Apld.** *Oliver v. Camberwell B. C.* (1904), 90 L. T. 285. **Consd.** *Wilson's Music & General Printing Co. v. Finsbury B. C.*, [1908] 1 K. B. 563. **Refd.** *Haedicke v. Friern Barnet U. C.*, [1904] 2 K. B. 807.

**4487.** — **Expenses not within reasonable contemplation of parties.**—**VALPY v. ST. LEONARD'S WHARF CO., LTD.**, No. 4477, *ante*.

**4488.** — **Short duration of tenancy—Structural repairs.**—**HARRIS v. HICKMAN**, No. 4475, *ante*.

**4489.** — — —.]—By an agreement in writing *pltf.* let a house to *def.* for a term of three years, & then from year to year until either party should give three months' notice, at a yearly rent of £55; & *def.* agreed to pay "all outgoings of every description for the time being payable in respect of the premises." During the term of three years *pltf.* expended £83 in reconstructing the drainage of the house in compliance with a notice from the local authority:—*Held*: the tenant was liable to pay the expense of doing this work as an "outgoing" within the meaning of the agreement, although the term was short & the rent small.—**STOCKDALE v. ASCHERBERG**, [1904] 1 K. B. 447; 73 L. J. K. B. 206; 90 L. T. 111; 68 J. P. 241; 52 W. R. 289; 20 T. L. R. 235; 48 Sol. Jo. 244; 2 L. G. R. 529, C. A.; *affg.*, [1903] 1 K. B. 873.

*Annotations*:—**Apld.** *Re Warriner, Brayshaw v. Ninnis*, [1903] 2 Ch. 367; *Greaves v. Whitmarsh, Watson*, [1906] 2 K. B. 340. **Distd.** *Howe v. Botwood*, [1913] 2 K. B. 387; *Henman v. Berliner*, [1918] 2 K. B. 236. **Apld.** *Lowther v. Clifford*, [1926] 1 K. B. 185. **Refd.** *Harris v. Hickman*, [1904] 1 K. B. 13.

**4490.** — **Yearly tenancy.**—**LOWTHER v. CLIFFORD**, No. 4471, *ante*.

**4491.** — **Charge levied before commencement of term—Private Street Works Act, 1892 (c. 57).**—Where by a covenant in a lease the lessee covenanted that he would during the term pay & bear all present & future rates, taxes, duties, assessments, & outgoings charged upon the demised premises, or the owner or occupier in respect thereof:—*Held*: the covenant did not apply to expenses of private streets works which, under Private Street Works Act, 1892 (c. 57), had become a charge upon the premises on the completion of the works before the date of the commencement of the term granted by the lease, though not payable until after that date.—**SURTEES v. WOODHOUSE**, [1903] 1 K. B. 396; 72 L. J. K. B. 302; 88 L. T. 407; 67 J. P. 232; 51 W. R. 275; 19 T. L. R. 221; 47 Sol. Jo. 276; 1 L. G. R. 227, C. A.

*Annotations*:—**Fold.** *Lumby v. Faupel* (1904), 90 L. T. 140. **Mentd.** *Re Allen v. Driscoll's Contract*, [1904] 2 Ch. 226.

**4492.** — **Public Health Act, 1875 (c. 55).**—A covenant by a lessee that he will pay "all rates, taxes, & assessments whatsoever which now are or during the said term shall be imposed or assessed upon the said premises or on the landlord or tenant in respect thereof by authority of Parlia-

ment or otherwise" does not apply to paying expenses which have become a charge upon the premises under Public Health Act, 1875 (c. 55), upon the completion of the works before the date of the lease, although such expenses do not become payable until after that date.—**LUMBY v. FAUPEL** (1904), 90 L. T. 140; 20 T. L. R. 237; 2 L. G. R. 605, C. A.

**4493.** — **Expenses consequent on breach of landlord's covenant.**—**HEARN v. HOVINDEN** (1903), cited in *Encyclopædia of Forms & Precedents*, 2nd ed., Vol. VIII., p. 51.

**4494.** — — —.]—A lease of a dwelling-house contained a covenant by the lessee to "pay & discharge all rates, taxes, assessments, charges, & outgoings whatsoever which now are or during the said term shall be imposed or charged on the premises or the landlord or tenant in respect thereof, land tax & landlord's property tax only excepted." The lessor covenanted to "keep the exterior of the said dwelling-house & buildings in repair." The sanitary authority served notice during the term on the lessor under Public Health Act, 1875 (c. 55), stating that a nuisance existed on the premises arising from an outside defective drain & requiring him to do certain work which involved the renewal & reconstruction of the drainage system outside the house; & an order of justices was made directing him to do the work. The lessor accordingly did the work required, & claimed to recover from the lessee the cost thereof so far as it exceeded mere repair:—*Held*: the lessee's covenant to pay "all outgoings imposed on the landlord in respect of the premises" must be read as being subject to the performance by the lessor of his covenant to keep the exterior of the buildings in repair, & as the work of renewal & reconstruction was necessary in order to enable the lessor to perform his covenant to repair, he was bound to bear the cost thereof.—**HOWE v. BOTWOOD**, [1913] 2 K. B. 387; 82 L. J. K. B. 569; 108 L. T. 767; 29 T. L. R. 437.

*Annotation*:—**Refd.** *Henman v. Berliner*, [1918] 2 K. B. 236.

**4495.** — — —.]—**HENMAN v. BERLINER**, No. 4476, *ante*.

— **Expenses for permanent improvements.**—*See Nos.* 4507, 4508, *post*.

— **Construction of fire escape in factory.**—*See FACTORIES*, Vol. XXIV., p. 914, Nos. 92, 93, & compare, Nos. 4505, 4532, *post*.

## SUB-SECT. 2.—EXPENSES UNDER PARTICULAR STATUTES.

### A. Metropolitan Management Acts.

*See* *Metropolis Management Act, 1855* (c. 120); *Metropolis Management Amendment Act, 1862* (c. 102); *Metropolis Management & Building Acts Amendment Act, 1878* (c. 32).

**4496. Liability of tenant under covenant—Drainage works.**—A. held premises under a building lease, with a covenant to pay, bear, & discharge "all such Parliamentary, parochial, & county, district, & occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties, & services whatsoever as during the term should be taxed, assessed, or imposed upon or in respect of the premises, or any part thereof." He granted an underlease, at a rack-rent, to B., the latter covenanting "that the several covenants, conditions, & agreements contained in the original lease on the lessee's part to be performed & observed, except the covenants

*Sect. 2.—Liability for payment: Sub-sect. 2, A.*  
*& H.]*

to pay rent & to insure, should during the continuance of the demise be performed & observed by him":—*Held*: B. was liable for the expense of drainage works done upon the premises under the authority of Metropolis Management Act, 1855 (c. 120).—*SWEET v. SEAGER* (1857), 2 C. B. N. S. 119; 2 Saund. & M. 194; 29 L. T. O. S. 109; 21 J. P. 406; 3 Jur. N. S. 588; 5 W. R. 560; 140 E. R. 357.

*Annotations*.—*Distd.* Tidswell v. Whitworth (1867), L. R. 2 C. P. 326. *Consd.* Crosse v. Raw (1874), L. R. 9 Exch. 209. *Apd.* Brett v. Rogers, [1897] 1 Q. B. 525; Farlow v. Stevenson, [1900] 1 Ch. 128. *Refd.* Thompson v. Lapworth (1868), L. R. 3 C. P. 149; Budd v. Marshall (1880), 5 C. P. D. 481; Skinner v. Hunt, [1904] 2 K. B. 452.

4497. ————.]—*CLAYTON v. SMITH* (1895), 11 T. L. R. 374.

4498. ————.]—A tenant covenanted with his landlord that he would pay & discharge "all taxes, rates, duties & assessments whatsoever, which now are, or hereafter shall become, payable for or in respect of the premises hereby demised, or any part thereof, whether Parliamentary, parochial or otherwise, except the landlord's property tax":—*Held*: under this covenant the tenant was liable to pay the cost of drainage works, the execution of which was required by the local authority under Metropolis Management Act, 1855 (c. 120), s. 85.—*FARLOW v. STEVENSON*, [1900] 1 Ch. 128; 69 L. J. Ch. 163; 81 L. T. 589; 48 W. R. 213; 16 T. L. R. 57; 44 Sol. Jo. 73, C. A.

*Annotations*.—*Consd.* Foulger v. Arding, [1902] 1 K. B. 700. *Apd.* Stockdale v. Ascherberg, [1903] 1 K. B. 873. *Refd.* Shephard v. Barber (1902), 1 L. G. R. 157; Lumby v. Faupel (1903), 88 L. T. 562.

4499. ————.]—*Paving street.*—*ALDRIDGE v. FERNE*, No. 4478, *ante*.

4500. ————.]—*BATCHELOR v. BIGGER*, No. 4479, *ante*.

4501. ————.]—*No right to deduct amount paid.*—Metropolis Management Act, 1862 (c. 102), s. 96, empowers a local authority to require the payment of any expenses, which the owner of any premises may be liable to pay, from the owner or occupier of the premises, & provides that the owner shall allow the occupier to deduct what he so pays "out of the rent from time to time becoming due in respect of the said premises, as if the same had been paid to such owner as part of such rent." There is a proviso that nothing in the sect. contained shall be taken to affect any contract whatsoever between landlord & tenant:—*Held*: a payment made by a tenant to a local authority under this sect. is not a payment of or on account of rent, but a payment of or on account of expenses, therefore, when a tenant has covenanted with his landlord that he will bear the expenses which he has under sect. 96 of above Act paid to the local authority, he has, by reason of the proviso, no right to deduct from the rent the amount which he has so paid, & the landlord's right to distrain for unpaid rent is unaffected.—*SKINNER v. HUNT*, [1904] 2 K. B. 452; 73 L. J. K. B. 680; 91 L. T. 270; 68 J. P. 402; 20 T. L. R. 556; 2 L. G. R. 769, C. A.

4502. ————.]—*Prior payment by landlord—Recovery from tenant—Paving.*—*THOMPSON v. LAPWORTH*, No. 4458, *ante*.

4503. ————.]—By a covenant in a lease of land in the metropolis the tenant was liable to bear, pay, & discharge, charges, duties, assessments, & impositions, charged, assessed, or imposed, upon the premises, or upon the landlord

in respect thereof. The lease was determinable by six months' notice. The landlords gave notice to determine it, & contracted to sell the property. The district board of works gave notice to the landlords of apportionment of expenses of paving a new street, under the Metropolis Management Act, 1855 (c. 120), s. 77, fixing no date for payment. The landlords paid the amount claimed. The work was commenced after the notice to determine the lease had expired. In an action by the landlords to recover under the covenant the amount paid by them to the district board:—*Held*: the words of the covenant included the expenses of paving the new street, & when the district board gave notice to the landlords of the apportionment & charge, the charge became operative, & the landlords became liable to pay the amount, & were entitled to recover it from the tenant under the covenant.—*WIX v. RUTSON*, [1899] 1 Q. B. 474; 68 L. J. Q. B. 298; 80 L. T. 168; 15 T. L. R. 200; 43 Sol. Jo. 263.

4504. ————.]—*Drainage.*—*FARLOW v. STEVENSON*, No. 4498, *ante*.

4505. ————.]—*Fire protection for theatre.*—The owner of a theatre, in pursuance of a notice given by the Metropolitan Board of Works, under Metropolis Management & Buildings Acts Amendment Act, 1878 (c. 32), s. 11, incurred certain expenses in executing works required by the notice to be done by him. In an action against his lessee to recover the expenses under a covenant contained in the lease, by which the lessee covenanted to pay, bear, & discharge, *inter alia*, every other rate, tax, charge, assessment, burthen, duty, & imposition whatsoever, Parliamentary, parochial, or otherwise, to which the lessor then was, or should, or might thereafter, be liable:—*Held*: the lessor was entitled to recover.—*RE ROBERTSON & THORNE* (1883), 47 J. P. 566, D. C.

4506. *Liability of landlord—Deduction by tenant from rent—Expenses not in fact paid.*—By Metropolis Management Amendment Act, 1862 (c. 102), s. 96, the owner shall allow the occupier to deduct out of the rent from time to time becoming due in respect of the premises the sums of money which the occupier pays to the vestry or district board for works done by them under the Act:—*Held*: to entitle the occupier to avail himself of that provision, the money must have been actually paid; & consequently, a distress for rent which became due after service of a notice from the vestry, made before payment to the vestry clerk, is not illegal.—*RYAN v. THOMPSON* (1868), L. R. 3 C. P. 144; 37 L. J. C. P. 134; 17 L. T. 506; 32 J. P. 135; 16 W. R. 314.

*Annotation*.—*Consd.* Skinner v. Hunt, [1904] 2 K. B. 452.

4507. ————.]—*Notwithstanding covenant by tenant—Works of permanent improvement.*—A tenant, under a lease for seven, fourteen, or twenty-one years, of a house in a new street within the metropolitan district, covenanted to pay the "district rates & assessments . . . which were or should be taxed, rated, charged, assessed, or imposed upon the demised premises, . . . or upon or payable by the occupier or tenant in respect thereof." In an action brought by the landlord to recover the amount paid by him in respect of a rate made by the vestry for the paving of the street:—*Held*: the tenant was not liable to repay the amount to the landlord, the rate being in the nature of an expense incurred for permanent improvements, & therefore, not the kind of rate mentioned in the covenant; & not being by Metropolis Management Amendment Act, 1862 (c. 102), s. 96, imposed upon the premises or the occupier of them, but upon the owner.—*ALLUM v.*

DICKINSON (1882), 9 Q. B. D. 632; 52 L. J. Q. B. 190; 47 L. T. 493; 47 J. P. 102; 30 W. R. 930, C. A.

*Annotations*:—*Apld.* Wilkinson v. Collyer (1884), 13 Q. B. D. 1. *Consd.* Home & Colonial Stores v. Todd (1891), 63 L. T. 829. *Distd.* Brett v. Rogers, [1897] 1 Q. B. 525. *Consd.* Baylis v. Jiggins, [1898] 2 Q. B. 315. *Refd.* Batchelor v. Bigger (1889), 60 L. T. 416. *Mentd.* Hession Jones, [1914] 2 K. B. 421; Rackham v. Tabrum (1923), 129 L. T. 24.

**4508.** ————.]—By an agreement of lease the tenant agreed to pay "all rates, taxes, & assessments payable in respect of the premises during the term":—*Held*: a sum assessed upon the owners as their proportion of the expense of paving the street upon which the premises abutted, was not a rate, tax, or assessment within the meaning of the covenant, but a charge imposed upon the owner for the permanent improvement of his property.—WILKINSON v. COLLYER (1884), 13 Q. B. D. 1; 53 L. J. Q. B. 278; 51 L. T. 299; 48 J. P. 791; 32 W. R. 614, D. C.

*Annotations*:—*Distd.* Aldridge v. Ferne (1886), 17 Q. B. D. 212; Batchelor v. Bigger (1889), 60 L. T. 416. *Apld.* Home & Colonial Stores v. Todd (1891), 63 L. T. 829. *Distd.* Brett v. Rogers, [1897] 1 Q. B. 525. *Apld.* Baylis v. Jiggins, [1898] 2 Q. B. 315. *Refd.* Lumby v. Faupel (1903), 88 L. T. 562.

**4509.** ———— To pay rent without deduction.]—Pltfs. were tenants of a house in Lambeth under a lease from deft., by which a rent of £40 was reserved "to be paid without deduction, except landlord's property tax, by equal quarterly payments, free & clear from all deductions for main-drainage & sewer rates, metropolitan & local improvement rates, taxes, land tax, tithes rent-charge, & commutation in lieu of tithes," & the lessees covenanted to pay "the said yearly rent of £40 at the times & in manner aforesaid, free & clear of all deductions except aforesaid," & to pay & discharge during the said tenancy all maindrainage & sewers rates, etc., following the words of the reservation. In May, 1890, the Lambeth vestry required deft. as owner of the premises to construct a drain into the common sewer under Metropolis Management Act, 1855 (c. 120), s. 73, & deft. not complying, did the work themselves, & recovered the costs, £17 17s., from pltfs. under Metropolis Management Amendment Act, 1862 (c. 102), s. 96. Pltfs. deducted this amount from their next half-year's rent, & upon deft. threatening to distrain, brought this action for an injunction to restrain him:—*Held*: the payment in question was not within the express covenant in the lease, & the covenant to pay the rent without deduction could not be construed as a contract between landlord & tenant to exclude the tenant's right to deduct this payment from his rent under Metropolis Management Amendment Act, 1862 (c. 102), s. 96.—HOME & COLONIAL STORES v. TODD (1891), 63 L. T. 829; 7 T. L. R. 200.

*Annotation*:—*Consd.* Skinner v. Hunt, [1904] 2 K. B. 452.

### B. Public Health Acts.

See Public Health Act, 1875 (c. 55); Public Health (London) Act, 1891 (c. 70).

**4510. Liability of tenant under covenant—Drainage.**—In a lease of a house & premises by deft. to pltf., pltf. covenanted with deft. to "bear, pay & discharge the sewers rate, tithes, rentcharge in lieu of tithes, & all other taxes, rates, assessments, & outgoings whatsoever which at any time or times during the said demise should be taxed, rated, charged, assessed, or imposed upon the said demised premises, or any part thereof, or upon the landlord or tenant in respect thereof, or on the rent thereby reserved," excepting landlord's property tax:—*Held*: pltf. could not recover from

deft. the expenses of making a drain, which under Sanitary Act, 1866 (c. 90), s. 10, deft., as "owner," might have been required by the sewer authority to make, but which pltf. had made under an arrangement with deft. by which the expense was to be borne by the party liable.

I go a long way with the argument . . . that the landlord would be liable for what may be called capital expenditure, but not for expenditure which should be charged against revenue (BRAMWELL, B.).—CROSSE v. RAW (1874), L. R. 9 Exch. 209; 43 L. J. Ex. 144; 23 W. R. 6.

*Annotations*:—*Consd.* Hartley v. Hudson (1879), 4 C. P. D. 367. *Apprvd.* Budd v. Marshall (1880), 5 C. P. D. 481. *Apld.* Gardner v. Furness Ry. (1882), 47 J. P. 232. *Consd.* Batchelor v. Bigger (1889), 60 L. T. 416. *Refd.* Rawlins v. Briggs (1878), 3 C. P. D. 368; Hill v. Edward (1885), Cab. & El. 481; Arding v. Economic Printing & Publishing Co. (1898), 79 L. T. 622; Weld v. Clayton-Le-Moors U. D. C. (1902), 88 L. T. 584.

**4511.** ————.]—*Re* BETTINGHAM, MELHADO v. WOODCOCK (1892), 9 T. L. R. 48.

*Annotation*:—*Refd.* Smith v. Robinson, [1893] 2 Q. B. 53.

**4512.** ————.]—*Re* WALKINER, BRAYSHAW v. NINNIS, No. 4468, *ante*.

**4513.** ———— Prior payment by landlord—Recovery from tenant—Sewering levelling & paving street.]—HARTLEY v. HUDSON, No. 4463, *ante*.

**4514.** ———— Drainage.]—Deft. was tenant to pltfs. of certain hereditaments under a lease, by which he was bound to "bear, pay, & discharge . . . all other taxes, rates, duties, & assessments whatsoever, whether Parliamentary, parochial, or otherwise." The drainage having become defective, the sanitary authority of the borough within which the hereditaments were situate caused a notice to be served upon pltfs. requiring them, as owners, to abate the nuisance, & the notice not having been complied with, obtained an order from a justice to the like effect. Pltfs. having executed the works necessary to enable them to obey the order, sought to recover the cost of them from deft. under the foregoing covenant:—*Held*: the action was maintainable.—BUDD v. MARSHALL (1880), 5 C. P. D. 481; 50 L. J. Q. B. 24; 42 L. T. 793; 44 J. P. 584; 29 W. R. 148, C. A.

*Annotations*:—*Consd.* Wilkinson v. Collyer (1884), 13 Q. B. D. 1. *Apld.* *Re* Bettingham, Melhado v. Woodcock (1892), 9 T. L. R. 48. *Foll.* Clayton v. Smith (1895), 11 T. L. R. 374. *Consd.* Brett v. Rogers, [1897] 1 Q. B. 525. *Refd.* *Re* Robertson & Thorne (1883), 47 J. P. 566; Hill v. Edward (1885), Cab. & El. 481; Baylis v. Jiggins, [1898] 2 Q. B. 315; Farlow v. Stevenson, [1900] 1 Ch. 128.

**4515.** ————.]—SMITH v. ROBINSON, No. 4464, *ante*.

**4516.** ————.]—BRETT v. ROGERS, No. 4460, *ante*.

**4517.** ————.]—A tenant covenanted to maintain the demised premises, & sinks & sewers belonging thereto, in good & substantial & complete tenable repair & condition; to pay all sewer rates, & all other rates, taxes, outgoings & assessments whatsoever, & to bear a reasonable proportion of the charges & expenses of making, cleaning, cementing, etc., all gullies, common sewers, drains, cesspools which should be used in common by the tenants of the premises & the tenants or occupiers of any contiguous buildings. The landlord received a notice from the sanitary authority requiring him to abate a nuisance on the premises. The works required to be done amounted to a reconstruction of the house drainage. The landlord did the works:—*Held*: the landlord was entitled to recover the cost from the tenant.—ANTIL v. GODWIN (1899), 63 J. P. 441; 15 T. L. R. 462.

*Annotation*:—*Foll.* Greaves v. Whitmarsh, Watson, [1906] 2 K. B. 340.

**Sect. 2.—Liability for payment: Sub-sect. 2, B., C. & D.]**

**4518.** —————.]—*FOULGER v. ARDING*, No. 4467, *ante*.

**4519.** —————.]—*GEORGE v. COATES*, No. 4465, *ante*.

**4520.** —————.]—*STOCKDALE v. ASCHERBERG*, No. 4489, *ante*.

**4521.** ————— **Paving.**]—Apportioned paving expenses under Public Health Act, 1875 (c. 55), which the landlord has paid, can be recovered from the tenant, where the latter has covenanted to pay all rates, taxes, assessments, & outgoings payable, or to become payable, whether by the landlord or tenant, in respect of the premises.—*WELD v. CLAYTON-LE-MOORS URBAN DISTRICT COUNCIL* (1902), 86 L. T. 584, D. C.

**4522.** —————.]—*GREAVES v. WHITMARSH, WATSON & Co., LTD.*, No. 4480, *ante*.

**4523. Liability of landlord—Expenses for permanent improvements.**]—*CROSSE v. RAW*, No. 4510, *ante*.

**4524. — Abatement of nuisance—Performance of statutory duty.**]—Under a demise of premises for twenty-one years, the lessee covenanted to pay the rent reserved "without any deduction or abatement, except land tax & landlord's property tax," & further "to pay & discharge all & all manner of taxes, rates, charges, assessments, & impositions whatever, except as aforesaid, then or any time or times during the term to be charged, assessed, or imposed on the premises thereby demised, or in respect thereof or of the said rent as aforesaid, by authority of Parliament or otherwise howsoever." During the term the lessor received from the sanitary authority a notice, pursuant to Public Health Act, 1875 (c. 55), s. 94, to abate a nuisance injurious to health arising from the bad condition of the drains upon the premises, & in order to prevent proceedings against him executed the required works:—*Held*: the payment having been made by the lessor, not for a "rate, charge, assessment, or imposition assessed or imposed on the demised premises or in respect thereof," but in performance of a duty imposed upon him by the Act of Parliament, he was not entitled to call upon the lessee under his covenant to repay the amount.—*RAWLINS v. BRIGGS* (1878), 3 C. P. D. 368; 47 L. J. Q. B. 487; 42 J. P. 791; 27 W. R. 138.

*Annotations*:—*Consd.* *Budd v. Marshall* (1880), 5 C. P. D. 481; *Brett v. Rogers*, [1897] 1 Q. B. 525. *Refd.* *Hartley v. Hudson* (1879), 4 C. P. D. 367; *Wilkinson v. Collyer* (1884), 13 Q. B. D. 1; *Hill v. Edward* (1885), 1 T. L. R. 253; *Foulger v. Arding*, [1901] 2 K. B. 151.

**4525. — Reimbursement of tenant.**]—G., a tenant from year to year of a house of which S. was owner, & a nuisance from sewage in the cellar arising, was served with notice by the sanitary authority to abate it, which G. acted upon by abating the nuisance:—*Held*: G. was entitled, under Public Health London Act, 1891 (c. 70), s. 11, to recover from S. the expense, though no notice had been served on S.—*GERHARDT v. SAUNDERS*, [1892] 2 Q. B. 452; 67 L. T. 684; 56 J. P. 741; 40 W. R. 571; 36 Sol. Jo. 524, D. C.

*Annotations*:—*Refd.* *Thompson & Norris Manufacturing Co. v. Hawes* (1895), 73 L. T. 369. *Mentd.* *Andrew v. St. Olave's Board of Works*, [1898] 1 Q. B. 775; *North v. Walthamstow U. C.* (1898), 67 L. J. Q. B. 972; *Cree v. St. Pancras Vestry*, [1899] 1 Q. B. 693; *Ellis v. Bromley R. D. C.* (1899), 81 L. T. 224; *Hope v. Walter*, [1900] 1 Ch. 257; *Reeve v. Sadler* (1903), 67 J. P. 63; *Rhymney Iron Co. v. Golligaar District Council*, [1917] 1 K. B. 589.

**4526. — Paving, etc., expenses.**]—A lessee covenanted to pay the tithe or rentcharge in lieu of tithes, land tax, if any, sewers' rates,

maindrainage rates, & all other taxes, rates, assessments, & impositions & outgoings whatsoever, then or thereafter to be charged or imposed on or in respect of the said premises, or any part thereof:—*Held*: the lessee was not liable to pay the amount charged by the urban authority for sewerage, levelling & paving the road on which the demised premises abutted, under Public Health Act, 1875 (c. 55), s. 150.—*HILL v. EDWARD* (1885), 1 Cab. & El. 481; 1 T. L. R. 253.

*Annotations*:—*Consd.* *Aldridge v. Ferne* (1886), 17 Q. B. D. 212; *Arding v. Economic Printing & Publishing Co.* (1898), 79 L. T. 420. *Refd.* *Antil v. Godwin* (1899), 63 J. P. 441; *Monk v. Arnold* (1902), 86 L. T. 580; *Greaves v. Whitmarsh, Watson* (1906), 95 L. T. 425.

**4527. —** —————.]—Expenses of paving, etc., a street, recovered in a summary manner, by an urban authority, from the owner of premises outside the metropolis, under Public Health Act, 1875 (c. 55), s. 150, cannot be recovered by the owner from his tenant, under a covenant by the tenant to pay "all rates, taxes, & assessments whatsoever, which now are, or during the term shall be, imposed or assessed upon the premises, or the landlords or tenants in respect thereof, by authority of Parliament or otherwise, except the landlord's property tax."—*BAYLIS v. JIGGENS*, [1898] 2 Q. B. 315; 67 L. J. Q. B. 793; 79 L. T. 78; 14 T. L. R. 493.

*Annotation*:—*Refd.* *Lumby v. Faupel* (1903), 88 L. T. 562.

*C. Factory and Workshop Acts.*

**Structural alterations—To obtain certificate for underground bakehouse.**]—*See* *Factories*, Vol. XXIV., p. 907, Nos. 59, 60.

**Provision of fire escape.**]—*See* *Factories*, Vol. XXIV., p. 914, Nos. 92–94.

*D. Local Acts.*

**4528. Liability of landlord—Right of tenant to deduct from rent—Rights of outgoing tenant.**]—Where, by a local Act, it was provided that a drainage tax should be paid by the tenants of the lands & grounds charged with the same, who might deduct & retain the same out of the rents payable to their landlord. Also, that in case of neglect to pay, the tax might be levied by distress on the goods & chattels which should be found on the lands charged with the tax in arrear, & if the same should be untenanted, or no sufficient distress could be found, the lands & grounds chargeable should remain as a surety for the payment thereof, & might be taken possession of, & let in discharge of the tax:—*Held*: the tenants to be charged with the tax were those in whose time the tax accrued due, & not the tenants for the time being, therefore, where an outgoing tenant having paid his rent in full, had left property on the premises, which was afterwards distrained for the tax due during his tenancy, & he was obliged to pay it, he might recover the same in an action against his landlord for money paid.—*DAWSON v. LINTON* (1822), 5 B. & Ald. 521; 1 Dow. & Ry. K. B. 117; 106 E. R. 1281.

*Annotations*:—*Consd.* *Spencer v. Parry* (1835), 3 Ad. & El. 331. *Refd.* *Griffiths v. Daubuz* (1855), 5 E. & B. 746; *Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc.*, [1899] 1 Q. B. 161.

**4529. — Notwithstanding covenant by tenant—Breach of duty by landlord.**]—By a local Act the council were empowered to order streets to be sewered & paved by the owners of the adjoining premises, & in case of default by such owners, to do the work themselves, & to charge the respective owners with their proportionate parts of the expenses thereof, to be recoverable by action of

debt, etc. By way of additional remedy, the council were empowered to require payment from any present or future tenant or occupier, to be levied by distress, & it was made compulsory on the owner to allow such payments to be deducted from the rent. In 1863, premises in G. Street were demised by *pltf.* to *deft.* for seven years, at the "clear yearly rent" of £90, the latter covenanting that he would "pay & discharge all taxes, rates, assessments, & impositions whatsoever, except property tax, which during the term should become payable in respect of the demised premises." In 1865 the council gave notice to have G. Street sewered & paved. *Pltf.* neglecting to do the required work, the council caused it to be done, & assessed his proportion of the expense at £213 3s. 6d., which he paid:—*Held*: the payment having been made by *pltf.*, not for a rate, assessment, or imposition which had become payable in respect of the demised premises, but for the breach of a duty imposed upon him by the Act of Parliament, he was not entitled to call upon *deft.* under his covenant to repay him the amount.—*TIDSWELL v. WHITWORTH* (1867), L. R. 2 C. P. 326; 30 L. J. C. P. 103; 15 L. T. 574; 15 W. R. 427.

*Annotations*:—*Distd.* Thompson v. Lapworth (1868), L. R. 3 C. P. 149. *Consd.* Crosse v. Raw (1874), L. R. 9 Exch. 209. *Folld.* Rawlins v. Briggs (1878), 3 C. P. D. 368. *Consd.* Hartley v. Hudson (1879), 4 C. P. D. 367; Budd v. Marshall (1880), 5 C. P. D. 481; Wilkinson v. Collyer (1884), 13 Q. B. D. 1. *Folld.* Hill v. Edward (1885), 1 T. L. R. 253. *Consd.* Brett v. Rogers, [1897] 1 Q. B. 525. *Distd.* Farlow v. Stevenson, [1900] 1 Ch. 128. *Consd.* Poulger v. Arding, [1902] 1 K. B. 700; Shephard v. Barber (1902), 1 L. G. R. 157. *Refd.* Jeffrey v. Neale (1871), L. R. 6 C. P. 240; Midgley v. Coppock (1879), 4 Ex. D. 309; West Hartlepool Corp. v. Robinson (1897), 77 L. T. 387; Skinner v. Hunt, [1904] 2 K. B. 452.

**4530. Liability of tenant—Under covenant—Paving.**—By a local Act, the comrs. appointed thereby were authorised to pave & flag footways, & the costs thereof were to be paid by the tenants or occupiers of the houses next adjoining; in default whereof, they were to be recovered by distress. Another clause empowered the tenant to deduct the costs so paid by him out of his rent:—*Held*: this charge was within the terms of a covenant in a lease subsequently made, whereby the tenant covenanted to pay all taxes, rates, duties, levies, assessments, & payments whatever, which were, or during the term might be rated, levied, assessed, or imposed on the premises.—*PAYNE v. BURRIDGE* (1844), 12 M. & W. 727; 13 L. J. Ex. 190; 3 L. T. O. S. 78; 8 J. P. 711; 152 E. R. 1391.

*Annotations*:—*Folld.* Sweet v. Seager (1857), 2 C. B. N. S. 119. *Consd.* Tidswell v. Whitworth (1867), L. R. 2 C. P. 326. *Folld.* Thompson v. Lapworth (1868), L. R. 3 C. P. 149; Brett v. Rogers, [1897] 1 Q. B. 525. *Appld.* Farlow v. Stevenson, [1900] 1 Ch. 128. *Refd.* Budd v. Marshall (1880), 5 C. P. D. 481.

**4531. ———— Payment in first instance by landlord—Recovery from tenant.**—*Pltf.*, the owner of certain premises, demised them to *defts.* for a term of years at a yearly rent "clear of all present & future rates, taxes, & deductions," & a covenant was contained in the lease that *defts.*, "their successors or assigns should & would during the term, well & truly pay, or cause to be paid, the yearly rent thereinbefore reserved, & also should & would bear & pay all the rates, taxes & outgoings, then payable or thereafter to become payable, whether by landlord or tenant, in respect of the said premises." The *corp.* within whose limits the premises were situated incurred, under the special Act, certain expenses in paving, etc., the street adjoining the premises, which expenses they were empowered to charge upon the owners of buildings & lands in the street.

*Pltf.*, on demand, paid the expenses incurred by the *corp.*, & brought the present action to recover them from *defts.* under the covenant in the lease:—*Held*: the omission of the word "outgoings" in the *reddendum* clause did not qualify the covenant, & *pltf.* was therefore entitled to recover.—*GARDNER v. FURNESS RY. CO.* (1883), 47 J. P. 232.

**4532. ———— Fire escape—London Building Act, Amendment Act, 1905 (c. cclx).**—In May, 1903, *resp.* let a house in London to *applt.* for twenty-one years, the lessee covenanting that he would "execute all such works as are or may under or in pursuance of any Act or Acts of Parliament already passed or hereafter to be passed be directed or required by any local or public authority to be executed at any time during the said term upon or in respect of the said premises whether by the landlord or the tenant thereof." At that date there had been passed Public Health London Act, 1891 (c. 76), which enacted that owners of factories should provide means of escape in case of fire. Two years after the date of the lease London Building Act (Amendment) Acts, 1905 (c. cclx), was passed, by which the owner of a house such as that demised by *resp.* was required to furnish means of escape from fire, & by sect. 20 of which it was provided that the owner on satisfying that requirements might apply to the county ct. judge of the district to apportion the expenses of the work between him & the lessee, & that the ct. might "make such order concerning such expenses or their apportionment . . . as appears to the ct. to be just & equitable in the circumstances of the case, regard being had to the terms of the lease or contract affecting such building." In 1915, the house was burnt down, & the London County Council under the Act of 1905, required *applt.*, as being the owner of the house for the purposes of the Act, to provide sufficient means of escape from fire. He complied with the requirements & applied to the county ct. judge to apportion the expenses as between him & his lessor. The county ct. judge decided that the lessee must bear the whole burden of the expense:—*Held*: having regard to the language of the covenant & the fact that there was at its date a statute in force which imposed an obligation upon the owners of another class of buildings to provide means of escape from fire, the lessee must be presumed to have contemplated the possibility of an Act being thereafter passed imposing a similar obligation upon the owners of houses such as that which he was about to rent, & under these circumstances no other order than that made by the county ct. judge would have been, "just & equitable" within sect. 20.—*MONRO v. BURGHCLERE (LORD)*, [1918] 1 K. B. 291; 87 L. J. K. B. 366; 118 L. T. 343; 82 J. P. 86; 34 T. L. R. 131; 62 Sol. Jo. 231; 16 L. G. R. 210, D. C.

*Compare* No. 4505, *ante*.

**4533. ———— Improvement charge—Claim against landlord abandoned—London County Council Improvements Act, 1899 (c. cclxvi).**—The improvement charge, which by the above Act is placed upon all lands adjacent to, & enhanced in value by, the operations carried out under the Act, is an overriding charge upon the lands as a whole. The Council have a statutory right to recover the full amount of the charge from any owner, lessee, or occupier; & they are not limited in their right to recover against lessees by the fact that the Council have abandoned the charge as against the freehold reversioners.—*HOLBORN & FRASCATI, LTD. v. LONDON COUNTY COUNCIL* (1916), 85 L. J. Ch. 266; 114 L. T. 541; 80 J. P. 225; 14 L. G. R. 538.

**Sect. 2.—Liability for payment: Sub-sect. 3. Part XVIII. Sect. 1.]**

**SUB-SECT. 3.—LICENCE DUTIES.**

*See Finance (1909–1910) Act, 1910 (c. 8), s. 46; & generally, INTOXICATING LIQUORS.*

**4534. Nature of duty—"Outgoing."**—In 1907 pltf. became tenant to defts. of a public-house, & he covenanted to pay "all taxes, rates, assessments, & outgoings whatsoever now or hereafter to be taxed, rated, or assessed on the premises or on the landlords or tenant in respect thereof." He deposited a sum of money with defts. as security for the due performance of his covenants, & this

sum was to be retained by them until pltf. should have transferred the licence to their nominee. The licence was transferred to new tenants in July, 1910, & pltf. thereupon demanded the return of his deposit; but defts. claimed to retain same under the pltf.'s covenant, to meet the new licence duty imposed by Finance (1909–10) Act, 1910 (c. 8), which was chargeable on any licence granted after July 1, 1909, but the amount of which had not yet been decided by the Inland Revenue Comrs.:—*Held*: the new duty was an "outgoing" within pltf.'s covenant, & defts. were entitled to retain the deposit to meet such duty.—*WAUER v. HOARE & Co., LTD.* (1910), 27 T. L. R. 16.

## Part XVIII.—Repairs.

**SECT. 1.—COVENANT TO REPAIR—RUNS WITH THE LAND AND WITH THE REVERSION.**

*See Law of Property Act, 1925 (c. 20), ss. 77–80, 141, 142.*

**Covenants running with the land generally.]—***See Part XI., Sect. 6, ante.*

**4535. Assignees of lessee bound.]—**After the lessee grants over his term, & the assignee does not repair, an action of covenant lies against the assignee; for this is a covenant which runs with the land.—*ANON.* (1533), Bro. N. C. 18; 73 E. R. 854.

**4536. —.]—**(1) A covenant to repair runs with the land.

(2) Where single rent is reserved in respect of land & chattels, it issues out of land (*see* No. 3640, *ante*).—*SPENCER'S CASE* (1583), 5 Co. Rep. 16 a; 77 E. R. 72.

*Annotations:—As to (1) Consd. Dewar v. Goodman, [1909] A. C. 72. Rejd. Kitchen & Knight v. Buukley (1663), 1 Keb. 572; Pomfret v. Hicoff (1669), 2 Keb. 569; Lougher v. Williams (1673), 2 Lev. 92; Knipe v. Palmer (1760), 2 Wils. 130; Bally v. Wells (1769), Wilm. 341; Tatem v. Chaplin (1793), 2 Hy. Bl. 133; Easterby v. Sampson (1830), 6 Bing. 644; Flight v. Glossopp (1835), 2 Bing. N. C. 125; Wollaston v. Hakewill (1841), 3 Man. & G. 297; Martyn v. Cline (1852), 18 Q. B. 661; Martyn v. Williams (1857), 1 H. & N. 817; Minshall v. Oakes (1858), 2 H. & N. 793; Morland v. Cook (1868), L. R. 6 Eq. 252; Williams v. Earle (1868), L. R. 3 Q. B. 739; Haywood v. Brunswick Bldg. Soc. (1881), 8 Q. B. D. 403. As to (2) Apld. Newman v. Anderton (1806), 2 Bos. & P. N. R. 224. Rejd. Vyvyan v. Arthur (1823), 2 Dow. & Ry. K. B. 670. Generally, Mentd. Attow v. Hemmings (1614), 2 Bulst. 281; Tovey v. Pitcher (1691), Carth. 177; Brewster v. Kitchell (1697), 1 Salk. 198; London (City) v. Richmond (1701), 2 Vern. 421; Uxbridge v. Staveland (1747), 1 Ves. Sen. 56; Ryall v. Rolle (1749), 1 Atk. 165; Grey v. Cuthbertson (1785), 2 Chit. 482; Canham v. Rust (1818), 2 Moore, C. P. 164; Vernon v. Smith (1821), 5 B. & Ald. 1; Keppell v. Bailey (1834), 2 My. & K. 517; Hemmingway v. Fernandez (1842), 12 L. J. Ch. 130; Davies v. Lowndes (1843), 6 Man. & G. 471; Williams v. Burrell (1845), 1 C. B. 402; Doughty v. Bowman (1848), 11 Q. B. 444; Cottey v. Richardson (1851), 7 Exch. 143; Cuthbertson v. Irving (1860), 6 H. & N. 135; Hill v. Tupper (1863), 11 W. R. 784; Wilkinson v. Rogers (1863), 3 New Rep. 145; Wilson v. Hart (1865), 2 Hem. & M. 551; Hooper v. Clark (1867), 8 B. & S. 150; Stevens v. Copp (1868), L. R. 4 Exch. 20; Bally v. De Crespiigny (1869), L. R. 4 Q. B. 180; Thomas v. Hayward (1869), L. R. 4 Exch. 311; West v. Dobb (1869), 38 L. J. Q. B. 289; Cooke v. Chilcott (1876), 3 Ch. D. 694; Werderman v. Soc. Générale d'Electricité (1881), 19 Ch. D. 246; Andrew v. Aitken (1883), 22 Ch. D. 218; L. & S. W. Ry. v. Gomm (1882), 20 Ch. D. 562; Lybbe v. Hart (1885), 29 Ch. D. 8; Gower v. Postmaster-General (1887), 57 L. T. 527; Johns v. Pink, [1900] 1 Ch. 296; Rogers v. Houghton, [1900] 2 Ch. 388; G. N. Ry. v. I. R. Comrs., [1901]*

1 K. B. 416; Davis v. Town Properties Investment Corp., [1903] 1 Ch. 797; Formby v. Barker, [1903] 2 Ch. 539; *Re Nisbet & Potts' Contract*, [1906] 1 Ch. 386; Ricketts v. Enfield, [1909] 1 Ch. 544; Wilkes v. Spooner, [1911] 2 K. B. 473; Long v. Gray (1913), 58 Sol. Jo. 46; L. C. C. v. Allen, [1914] 3 K. B. 642; *Re Stephenson, Poole v. Stephenson*, [1915] 1 Ch. 802; Barker v. Stickney, [1919], 1 K. B. 121; Kelly v. Barrett, [1924] 2 Ch. 379.

**4537. —.]—**There cannot be a more apt covenant to run with the land than to leave it sufficiently repaired (*per* CUR.).—*MATURES v. WESTWOOD* (1598), Cro. Eliz. 599; 73 E. R. 842. *Annotation:—Mentd. Wright v. Burroughes* (1846), 3 C. B. 685.

**4538. —.]—***WAKEFIELD v. BROWN*, No. 4788, *post*.

**4539. —.]—**Declaration in covenant, by lessor against assignee of lessee, set forth a covenant by lessee, for himself, his heirs, exors., administrators & assigns, that he & they would take the premises, from, etc., for fourteen years, & would pay the rent; & that lessee, his exors. & administrators, would, at his & their own cost, repair & put into tenable repair the demised premises, he, the lessee, having been already paid by lessor £400, the valued amount of the then present dilapidations exclusive of rough timber, but not on the stem, which was to be allowed by lessor, his heirs & assigns, on the demised premises: & that, after the premises should have been put into such repair, lessee, his exors., administrators & assigns, would, at his & their proper cost, from time to time repair & keep in tenable repair the demised premises, being allowed rough timber but not on the stem, upon the demised premises; the timber to be fetched & carried at the expense of lessee, his exors., administrators & assigns: & the premises so repaired & kept, together with the possession of the premises, should yield up to lessor at the expiration of the term: & should not cross crop the land, nor commit any waste, etc., but should cultivate the land in a good husbandlike manner & according to the custom of the country. The count then averred entry of the lessee, & assignment by him to deft., who entered, & was possessed until the expiration of the term. Breach: that, although lessor, from the time of making the lease till the assignment, was ready & willing at all times to provide for lessee, & from the assignment till the expiration of the term, was ready & willing to provide for

**PART XVIII. SECT. 1.**

**4535 i. Assignees of lessee bound.]—**A lessee assigned his estate to defts.:—*Held*: defts. were liable for not putting into repair the premises which

were out of repair at the time of defts. becoming assignees.—*BUSBY v. JOSEPH* (1868), 7 N. S. W. S. C. R. (L.) 200.—*AUS.*

**4535 ii. —.]—***PERRY v. BANK OF UPPER CANADA* (1866), 16 C. P. 404.

**—CAN.**

**4535 iii. —.]—***CRAWFORD v. BUGG* (1886), 12 O. R. 8.—*CAN.*

**4535 iv. —.]—***FLEMING v. BLYTHE* (1907), 26 N. Z. L. R. 500.—*N.Z.*

deft. & lessee, on the demised premises, sufficient rough timber, not on the stem, to enable them to repair & put into tenable repair the premises, & although lessee did not before the assignment or at any time repair or put into repair the premises: yet deft. did not after the assignment repair or put into repair the premises, nor yield up same well repaired at the expiration of the term, but suffered them to be ruinous, etc., for want of repair, & so left them at the expiration of the term. Deft. pleaded among other pleas, as to suffering the premises to be ruinous & out of repair, & so leaving them: that lessor did not at any time from the assignment till the expiration of the term provide on the premises sufficient rough timber, not on the stem, to enable deft. to repair, nor any rough timber whatever; & he demurred specially to the declaration. Pltf. demurred to the plea:—*Held*: (1) the declaration was good; for the covenant to put in repair ran with the land, & bound the assignee, though the lessee, in this part of the deed, covenanted only for himself & his exors. & administrators, & the payment of £400 to the lessee was no ground for construing this covenant as limited to him personally; (2) it was sufficient, on this record, to aver that the lessor was always ready & willing to furnish timber, without stating that he actually did furnish it; (3) a covenant to yield up in repair at the end of a term runs with the land & binds an assignee, though not named; (4) the plea was bad, for that the condition precedent to deft.'s obligation to repair was sufficiently performed if he was ready & willing to supply timber when required.—*MARTYN v. CLUE* (1852), 18 Q. B. 661; 22 L. J. Q. B. 147; 118 E. R. 249.

4540. —.]—*WILLIAMS v. EARLE*, No. 4659, *post*.

4541. — **Though not named.**—*ANON.* (1584), Moore, K. B. 159; 72 E. R. 504.

*Annotations*:—*Consd. Minshull v. Oakes* (1858), 2 H. & N. 793. *Refd. Bally v. Wells* (1769), Wilms. 341. *Mentd. Vernon v. Smith* (1821), 5 B. & Ald. 1.

4542. —.]—*WINDSOR (DEAN & CHAP-TER) v. HYDE*, No. 4919, *post*.

4543. —.]—The administrator of the assignee of a lease is liable for a breach of the covenant to repair, although the assigns of the lessee are not mentioned in the covenant, for it runs with the land.—*KEELING v. MORRICE* (1700), 12 Mod. Rep. 371; 88 E. R. 1386.

4544. —.]—A declaration stated that, by indenture, A. in consideration of the rents & covenants on the part & behalf of B., his exors., administrators & assigns, to be paid, done & performed, demised to B., his exors., administrators & assigns, a certain messuage & lands for a term of sixty-three years; with liberty to B., his exors., administrators & assigns, to make any erections or buildings on any part of the premises. B. for himself, his heirs, exors. & administrators, not saying assigns, covenanted that he, his heirs, exors., administrators or assigns would pay the rent reserved; & that he, his exors. or administrators would repair the messuage & farm, outhouses, barns, stables & all other erections & buildings which should or might be thereafter erected during the term on the demised premises; & same being so repaired, that B., his exors., administrators & assigns would at the end of the term yield up. The declaration then stated that the interest of B. in the demised premises, by assignment, vested in defts., & that pltf. became seized of the reversion, subject to the term. First breach: that defts. did not repair the messuage, etc., & other buildings which were

during the term built on the demised premises. Second breach: that defts. yielded up to pltf. the premises out of repair. Second plea: to the breaches, on equitable grounds, that while defts. were possessed of the demised premises, by indenture they demised them to pltf. for a term, less by thirty days than their own term; that pltf. covenanted to repair & yield up in repair, defts. finding certain timber & iron work. The plea then alleged that the want of repair complained of by pltf., was caused by his default & was a breach of his covenant; & that defts. were ready to find timber & iron work; & that they are entitled to recover from pltf. the same amount of damages as he sought to recover from them. The plea concluded by offering to set off the damages. Third plea: as to not repairing & yielding up in repair certain buildings erected on the premises during the term; that the buildings were not in being at the time of making the indenture, & were built after the commencement of the term, & were then entirely new erections & not built in the place of anything standing on the land at the time of the demise:—*Held*: (1) the third plea was bad; for as the covenant was not a covenant absolutely to do a new thing, but to do something conditionally, viz. if new buildings were erected on the demised premises to repair them; & as when built they would be part of the thing demised, the assignee was bound though not named; (2) the second plea was not good as an equitable defence; or as a defence at law, in avoidance of circuity of action, inasmuch as the covenants were not co-extensive, & the damages could not be identical.—*MINSHULL v. OAKES* (1858), 2 H. & N. 793; 27 L. J. Ex. 194; 4 Jur. N. S. 169; 157 E. R. 327.

*Annotations*:—*As to* (1) *Refd. Williams v. Earle* (1868), 9 B. & S. 740; *Dewar v. Goodman*, [1908] 1 K. B. 94; *Re Stephenson & Co., Poole v. The Co.*, [1915] 1 Ch. 802.

4545. — **Assignment of part of estate.**—*STEVENSON v. LAMBARDE*, No. 4051, *ante*.

4546. **Assignee of underlease—Covenant in respect of premises not included in underlease—Collateral covenant.**—There is no authority for the proposition that a covenant in a lease to do an act not in respect of the demised premises, but which will protect from forfeiture the estate of the lessee in those premises, is a covenant which runs with the land.

A lease for years of land contained a covenant by the lessee to keep in repair all buildings erected on the land & a proviso for re-entry for breach of that covenant. Of several houses erected on the land two were demised by an underlease in which the underlessor covenanted for himself & his assigns with the underlessee & his assigns (a) for quiet enjoyment; (b) for the performance of the covenants of the head lease by the lessee thereof so far as they affected the land included in the head lease & not demised in the underlease; (c) to indemnify the underlessee & his assigns against breaches of those covenants. The underlessor's assignee, in whom the head lease had vested, failed to perform the covenant to repair in the head lease, & the head lessor re-entered on all the land demised by the head lease & ejected the assignee of the underlessee from the two houses demised by the underlease:—*Held*: the covenant in the underlease to perform the covenant in the head lease relating to premises not demised by the underlease, being a covenant not touching or concerning the land demised in the underlease, did not run with the land, & the assignee of the underlessor was not liable for breaches of the above-named covenants in the underlease.—*DEWAR v. GOODMAN*,

**Sect. 1.—Covenant to repair—Runs with the land and with the reversion.]**

[1909] A. C. 72; 78 L. J. K. B. 209; 100 J. T. 2; 25 T. L. R. 137; 53 Sol. Jo. 116, II. L.

**Annotations:—***Consd.* Ricketts v. Enfield, [1909] 1 Ch. 544. *Mentd.* County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

**4547. Assignees of lessor bound.]—PALMER v. EDWARDS** (1783), 1 Doug. K. B. 187, n.; 99 E. R. 122.

**Annotations:—***Refd.* Twynam v. Pickard (1818), 2 B. & Ald. 105. *Mentd.* Pluck v. Digges (1831), 5 Bl. N. S. 31; Whitmore v. Lamb (1844), 13 L. J. Ex. 205; Wollaston v. Hakewill (1844), 3 Scott, N. R. 593; Barrett v. Rolph (1845), 14 M. & W. 348; Pollock v. Stacy (1847), 9 Q. B. 1033; South of England Dairies v. Baker, [1906] 2 Ch. 631.

**4548. —.]—COWARD v. GREGORY**, No. 4737, post.

**4549. Whether assignees of lessor entitled to benefit—Though not named.]—KITCHIN v. COMPTON** (1663), 1 Sid. 157; 82 E. R. 1029; *sub nom.* KITCHIN & KNIGHT v. BUNKLEY, 1 Keb. 572; 1 Lev. 109; T. Raym. 80.

**Annotations:—***Refd.* Twynam v. Pickard (1818), 2 B. & Ald. 105; Simpson v. Clayton (1838), 4 Bing. N. C. 758; Foley v. Addenbrooke (1843), 4 Q. B. 197; Bradburne v. Botfield (1845), 14 M. & W. 559; Wakefield v. Brown (1846), 9 Q. B. 200; Thompson v. Hakewill (1865), 19 C. B. N. S. 713.

**4550. —.]—Lessee covenants with the lessor & his exors. to repair, yet covenant lies for the heir.—LOUGHER v. WILLIAMS** (1673), 2 Lev. 92; 83 E. R. 405.

**Annotations:—***Refd.* Forster v. Elvet Colliery Co., Quinn v. Same, Seed v. Same, Morgan v. Same (1908), 77 L. J. K. B. 521. *Mentd.* Goodwyn v. Goodwyn (1749), 1 Ves. Sen. 226.

**4551. —.]—The declaration stated, that, in consideration that defts. had become & were tenants to pltf., of certain premises, upon the terms, amongst others, that they should during the tenancy keep the premises in repair, defts. promised pltf., during their tenancy, thereof, to use the premises in a tenant-like manner, & to keep them in repair; that the tenancy of defts. continued from, etc., hitherto; yet that defts. did not use the premises in a tenant-like manner, or keep them in repair. Plea, that, after defts. had become tenants to pltf., & before the committing of the breach, or the accrual of the cause of action in respect thereof, pltf., by due course of law, conveyed, assigned, granted, & assured all his estate, etc., of & in the demised premises, & of & in the reversion expectant on the determination of defts.' tenancy, to one B.; & that pltf. thenceforward, & before the accrual of the cause of action, ceased to have anything in the demised premises, & defts. thence ceased to be, & never since had been, tenants thereof, to pltf.; concluding with a verification:—*Held*: the plea was no answer to the declaration; the tenancy therein alleged, being, a tenancy under pltf. & his assigns.—**BICKFORD v. PARSON** (1848), 5 C. B. 920; 17 L. J. C. P. 192; 11 L. T. O. S. 126; 12 Jur. 377; 136 E. R. 1141.**

**Annotations:—***Refd.* Arden v. Sullivan (1850), 19 L. J. Q. B. 268; Phillips v. Miller (1875), L. R. 10 C. P. 420; Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608; Wedd v. Porter, [1916] 2 K. B. 91.

**4552. —.]—A declaration in covenant stated, that one F. & G. being seised of an estate in fee demised by indenture to deft. & his assigns leave to dig for clay therein, & make such adits & erect sheds, engine-houses & buildings as he should think necessary for working the clay, & to have & hold the same for twenty-one years, determinable by a twelve-months' notice; that deft. covenanted**

with F. & G., their heirs & assigns, to pay compensation to them, their heirs & assigns, for all such lands within the limits thereof as he might injure by such digging, the amount in case of difference to be settled by an arbitrator; & that deft. would keep such "works," & all houses, sheds, engine-houses, etc., in good repair; that deft. entered & got the clay until May 31, 1853, when F. & G. by indenture granted & conveyed the lands to pltf., his heirs & assigns for ever, who thereby became seised thereof in fee, & that the interest of deft. was determined by a notice to quit. First breach, that although deft. by digging for clay after pltf. so became seised did injure & destroy part of the land, for which the pltf. was entitled to a compensation, & although pltf. appointed an arbitrator to ascertain the amount, yet deft. refused to appoint one. Second breach, that deft. did not keep the "works" in repair. Pleas, first, not guilty; secondly, that deft. in digging for clay after pltf. became so seised did not injure the lands. It was proved at the trial, that deft. had in digging for the clay injured the lands, but that such injury was done before the conveyance of the land to pltf. The judge amended the declaration by striking out the words "after pltf. so became seised." On motion to enter a verdict for deft. & in arrest of judgment:—*Held*: (1) the claim to damages in respect to the injury to the land being merely a chose in action did not pass to pltf. by the conveyance of the land to him, & the agreement as to ascertaining the amount of injury was merely incidental & annexed to the substantial matter, & was to be exercised by the person who was the owner of the land at the time the injury was done, & to whom the compensation ought to be made; (2) the conveyance of the land to pltf. during the existence of the term in the incorporeal hereditaments was an assignment of the reversion within 32 Hen. 8, c. 34; (3) the covenant to repair, as it directly touched & concerned the thing demised, was assignable with the reversion, & the action might be brought in the name of pltf., who was entitled to the benefit of the covenants.—**MARTYN v. WILLIAMS** (1857), 1 H. & N. 817; 26 L. J. Ex. 117; 28 L. T. O. S. 321; 5 W. R. 351; 156 E. R. 1430.

**Annotations:—***As to* (1) *Refd.* Hastings v. N. E. Ry., [1898] 2 Ch. 674. *As to* (2) *Apld.* Hooper v. Clark (1867), L. R. 2 Q. B. 200. *As to* (3) *Apld.* Norval v. Pascoe (1864), 4 New Rep. 390. *Generally, Mentd.* Indermaur v. Dames (1867), 36 L. J. C. P. 181.

**4553. —.]—A freehold messuage & tenement were the subject of the following leases: (a) a head lease which expired on Dec. 25, 1917; (b) an underlease which expired on Dec. 18, 1917; (c) a sub-underlease which expired on Dec. 15, 1917. All three leases contained onerous covenants to repair the premises & to keep them & yield them up in good repair. The sub-underlease became vested by assignment in deft. On Dec. 18, 1917, pltf., who had been a tenant to deft. of the same premises, & was liable to him under a covenant to repair less onerous than those in the three leases above mentioned, agreed to purchase, & on May 1, 1918, took a conveyance of the fee simple of the premises together with the benefit of the covenants in the head lease. At the expiration of all the leases the premises were out of repair & deft. was threatening pltf. with an action on his covenant. Thereupon pltf. obtained an assignment of the full benefit of the lessee's covenants to repair contained in the sub-underlease, & commenced an action against deft. as assignee of the**

**4547 i. Assignees of lessor bound.]—RANKIN v. DANBY** (1883), 9 V. L. R. L. 278.—**AUS.**

**4547 ii. —.]—BATES v. CASKY & MILNE** (1915), 34 N. Z. L. R. 714.—**N.Z.**

sub-underlease for breaches of the lessee's covenants therein:—*Held*: the assignment was free from objection on the ground of maintenance or champerty, the right of action on the covenants being so connected with the enjoyment of property as to be more than a bare right to litigate.—*ELLIS v. TORRINGTON*, [1920] 1 K. B. 399; 89 L. J. K. B. 369; 122 L. T. 361; 36 T. L. R. 82, C. A.

*Annotations*:—*Reid*. *Cole v. Kelly*, [1920] 2 K. B. 106; *Rye v. Purcell*, [1926] 1 K. B. 446.

**4554. — As reversioner by estoppel.**—If a mtgor. of lands who retains only an equity of redemption leases by deed, & afterwards assigns his interest in the land, by words large enough to convey a legal estate, the assignee may, as assignee of the reversion, sue the tenant for waste in breach of the covenant in the lease; for the tenant is estopped from denying that his lessor has a legal reversion capable of being assigned.—*CUTHBERTSON v. IRVING* (1860), 6 H. & N. 135; 29 L. J. Ex. 485; 158 E. R. 56; *sub nom.* *IRVING v. CUTHBERTSON*, 3 L. T. 335; 6 Jur. N. S. 1211; 8 W. R. 704, Ex. Ch.

*Annotations*:—*Reid*. *Morton v. Woods* (1868), 38 L. J. Q. B. 81; *Hartcup v. Bell* (1883), Cab. & El. 19; *Underhay v. Read* (1887), 58 L. T. 457. *Mentd.* *David v. Sabin* (1893), 62 L. J. Ch. 347; *Onward Bldg. Soc. v. Smithson*, [1893] 1 Ch. 1; *Brigg v. Thornton*, [1904] 1 Ch. 386; *Keith v. Gancia* (1904), 73 L. J. Ch. 411.

**4555. — Demise not by deed.**—(1) 32 Hen. 8, c. 34, applies only to cases of demise by deed, & an assignee of the reversion cannot maintain *assumpsit* on a contract to repair made with the assignor.

(2) Where a lease contains an express contract on the part of the tenant to repair, there can be no implied contract to repair arising from the relation of landlord & tenant.

A. & B. being entitled to copyhold premises in certain shares, B. demised the whole to deft., in his own name, by lease in writing not under seal, for one year, at a rent payable half-yearly; & B. thereby agreed for himself, his heirs, etc., & assigns with deft. that he should peaceably hold the demised premises. Before the first half-year's rent fell due, B. surrendered his interest in the premises to A., of which deft. had notice, & afterwards paid that rent to an agent employed by A. & B. In *assumpsit*, for use & occupation, brought by A. to recover the last half-year's rent:—*Held*: the occupation of deft. having become in point of law an occupation by the permission of A., as soon as his interest accrued, the action was maintainable by virtue of Distress for Rent Act, 1737 (c. 19), s. 14.—*STANDEN v. CHRISMAS* (1847), 10 Q. B. 135; 16 L. J. Q. B. 265; 9 L. T. O. S. 169; 11 Jur. 694; 116 E. R. 53.

*Annotations*:—*As to* (1) *Apld.* *Smith v. Eggington* (1874), L. R. 9 C. P. 145. *Expld.* *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608. *Reid.* *Hickman v. Machin* (1859), 4 H. & N. 716; *Elliott v. Johnson* (1866), L. R. 2 Q. B. 120; *Phillips v. Miller* (1875), L. R. 10 C. P. 420; *Wedd v. Porter*, [1916] 2 K. B. 91. *As to* (2) *Reid.* *Turner v. Cameron's Coalbrook Steam Coal Co.* (1850), 5 Exch. 932; *Churchward v. Ford* (1857), 2 H. & N. 446.

**4556. — Tenancy by parol.**—*WEDD v. PORTER*, No. 5006, *post*.

**4557. — Tenant holding over—Assignment of reversion after expiry of term—No written agreement for holding over.**—Where the tenant for a term under a lease by deed containing a covenant to repair held over after the expiration of the term, no further document being signed, as tenant from year to year upon the terms of the expired lease so far as applicable, & the reversion was subsequently assigned:—*Held*: assignee was not entitled to sue for breaches of the express covenant to repair in the lease; nor was he entitled to demand that the tenant should execute a lease

so as to enable him to sue upon the covenant.—*BLANE v. FRANCIS*, [1917] 1 K. B. 252; 86 L. J. K. B. 364; 115 L. T. 850, C. A.

*Annotations*:—*Distd.* *Cole v. Kelly*, [1920] 2 K. B. 106. *Consd.* *Rye v. Purcell*, [1926] 1 K. B. 446.

**4558. — Written agreement for holding over.**—By an indenture of lease dated Feb. 24, 1913, the lessee of a house in London for a term of ten years, hereinafter called the lessor, demised the first, second, & third floors thereof, with the hall on the ground floor & the staircases & passages, to deft. for five years from Dec. 25, 1912, the lease reserving to the lessor & her employees a right to use the hall for the purpose of gaining access from the street to the shop & premises occupied by her. The lease contained covenants by deft. that she would keep & yield up the premises in good & tenantable repair, that she would not make any alteration or addition to the premises without the consent of the lessor, that she would pay for the gas consumed in the premises including the hall, & that she would use the premises for carrying on occupations of a quiet & inoffensive nature only. The lessor covenanted that she would pay the rent & perform & observe the covenants in the lease under which she held, & would pay all rates, taxes, & outgoings payable in respect of the demised premises. By an agreement between the administrators of the lessor who had died & deft. contained in correspondence, it was arranged that on the expiration on Dec. 25, 1917, of deft.'s lease she should as from that date continue to occupy the premises on a quarterly tenancy. On June 20, 1918, deft. gave a quarter's notice to quit the premises on Sept. 29, 1918. Before the expiration of that notice, by an indenture dated July 10, 1918, the administrators demised the premises to plff. for the residue of the term created by the head lease less three days. Plff. sued deft. for alleged breaches of the repairing covenants:—*Held*: plff. was the assignee of the reversion expectant upon the determination of deft.'s tenancy; the terms of the expired lease as to repairs were to be implied in the new agreement in writing for a quarterly tenancy; those terms being implied in the written agreement were "therein contained" within Conveyancing & Law of Property Act, 1881 (c. 41), s. 10 (1); & therefore plff. was entitled to sue for breaches of the covenants to repair as contained in the agreement for the quarterly tenancy.—*COLE v. KELLY*, [1920] 2 K. B. 106; 89 L. J. K. B. 819; 123 L. T. 105; 36 T. L. R. 262, C. A.

*Annotations*:—*Apld.* *Rye v. Purcell*, [1926] 1 K. B. 446. *Reid.* *Re Leeds & Batley Breweries & Bradbury's Lease*, *Bradbury v. Grimble*, [1920] 2 Ch. 548.

**4559. — What written agreement sufficient to satisfy Conveyancing Act, 1881 (c. 41), s. 10.**—In Sept. 1895, a lease was granted of certain premises for twenty-one years, expiring in Mar. 1917. The lease contained full repairing & painting covenants, including a covenant by the lessee that he would at the expiration of the lease deliver up the premises in good & substantial repair. In 1900 the lease was assigned to deft. In 1910 the lessors granted a building lease to G. for ninety-nine years, subject to, but with the benefit of, the lease of Sept. 1895. In 1911 G. deposited his building lease with N. by way of equitable mtge. In June, 1915, G. was adjudicated bkpt. Shortly afterwards N. entered into possession of the mortgaged premises under the powers contained in his mtge. In Feb. 1917, N. agreed with deft. verbally that he should hold over after the expiration of the lease

**Sect. 1.—Covenant to repair—Runs with the land and with the reversion.** **Sect. 2: Sub-sect. 1, A. & B.; sub-sect. 2, A. & B.]**

on the terms of the old lease subject to an increased rent, & accordingly deft. remained in possession. In July, 1917, the trustee in bkpcy. of G. assigned the ninety-nine years' building lease to N. In Sept. 1918, N. made another verbal agreement with deft., that he should remain at the premises as tenant from Sept. 29, 1918, to the Declaration of Peace, but at an increased rent. This verbal agreement was confirmed in writing by a letter dated Sept. 7, 1918, signed only by N.'s agent, deft. not signing any document. On July 22, 1900, N. assigned the building lease to pltf., who at the same time acquired the freehold of the premises. Deft. in Nov. 1920, gave up possession of the premises, as pltf. alleged, in a serious state of dilapidation. Pltf. brought an action to recover damages from deft. for breaches of the repairing & painting covenants:—**Held:** the letter of Sept. 7, 1918, notwithstanding that it was signed only by the landlord's agent, constituted a sufficient agreement in writing within above sect. to entitle pltf. to maintain the action for breach of the covenant to deliver up the premises in good & substantial repair.—**RYE v. PURCELL**, [1926] 1 K. B. 440; 95 L. J. K. B. 380; 134 L. T. 382; 70 Sol. Jo. 345.

**4560. Effect of joint ownership—Covenant must be with all the owners.]**—A declaration in covenant stated, that A. & B., his wife, were seised in fee of an undivided moiety of certain premises in right of the wife, & C. was seised of the other moiety; that A., & B., & C. demised the premises for twenty-one years to D., who covenanted with A. & C. to repair; that C. afterwards became seised in fee of the reversion of all the premises, & devised them to pltfs. & A. in fee; that A. died, & the pltfs. survived him; & that before the death of A., all the estate of D. in the premises came to deft. by assignment; & assigned as a breach, that deft. would not, after the assignment & during the demise, & while pltfs. & A. were seised of the reversion, & before the death of A., repair the demised premises. **Semle:** the covenant sued upon, being made with A. & C. only, was not a covenant running with the land, on which the assignee of the reversion could sue; at least without an averment that the breach was committed in the lifetime of A.'s wife.—**WOOTTON v. STEFFENONI** (1843), 12 M. & W. 129; 13 L. J. Ex. 72; 2 L. T. O. S. 151; 152 E. R. 1139.

**Collateral & personal covenants.]—See Part XI., Sect. 6, sub-sects. 5, 7.**

## SECT. 2.—LIABILITY OF LANDLORD TO REPAIR.

### SUB-SECT. 1.—APART FROM COVENANT.

#### A. In General.

**Warranty of fitness.]—See Part XIII., Sect. 3, ante.**

### PART XVIII. SECT. 2, SUB-SECT. 1.—A.

**4561 i. No liability.]**—There is no implied covenant on the part of a landlord to protect a tenant of the ground floor against water percolating through a defective roof.—**BARKER v. FERGUSON** (1908), 16 O. L. R. 252; 11 O. W. R. 257.—CAN.

**4561 ii. —.]**—In the absence of any special provision in a lease of an unfurnished house or suite in an apartment block, there is no liability on the part of the landlord to put or keep the demised premises in repair.—

**McINTOSH v. WILSON** (1913), 26 W. L. R. 91; 5 W. W. R. 644; 14 D. L. R. 671; 23 Man. L. R. 653.—CAN.

**4561 iii. —.]**—**TRAINSHI v. CANADIAN PACIFIC RY. CO.**, [1918] 2 W. W. R. 1034.—CAN.

**4561 iv. —.]**—**IANNONE v. GRASSBY**, [1921] 2 W. W. R. 676.—CAN.

**4561 v. —.]**—**JACKSON v. SMITH**, [1925] 3 D. L. R. 50; 1 W. W. R. 1074; 19 Sask. L. R. 353.—CAN.

**4561 vi. —.]**—**SCALES v. VANDELEUR** (1913), 48 I. L. T. 36.—IR.

**4561. No liability.]**—Count by tenant, from year to year, of a house, against his landlord, for neglecting to do substantial repairs to the premises after notice that they were in a dangerous state; *per quod* the premises during the tenancy fell & injured pltf.'s goods. Demurrer:—**Held:** the declaration was bad in substance: no obligation to do substantial repairs on notice being implied by law from the relation of landlord & tenant.

It is clear to my mind that though in the absence of an express contract a tenant from year to year is not bound to do substantial repairs, yet in the absence of an express contract, he has no right to compel his landlord to do them (**LORD CAMPBELL, C.J.**).—**GOTT v. GANDY** (1853), 2 E. & B. 845; 2 C. L. R. 392; 23 L. J. Q. B. 1; 22 L. T. O. S. 97; 18 Jur. 310; 2 W. R. 38; 118 E. R. 984. **Annotation:—Refd.** **Colebeck v. Girdler's Co.** (1876), 1 Q. B. D. 234.

**4562. Liability by custom—Effect where rent reserved under value.]**—Bill for a specific performance of articles for a lease of lands in Norfolk, where by custom the landlords repair; but the rent reserved on this lease appearing to be under the value, decreed the tenant should covenant to repair.—**BURREL v. HARRISON** (1691), 2 Vern. 231; 23 E. R. 749; *sub nom.* **BURWELL v. HARRISON**, Prec. Ch. 25.

**4563. Exceptions from tenant's covenant—No implied covenant by landlord—"Casualties by fire & tempest excepted."]**—**WEIGALL v. WATERS**, No. 3841, *ante*.

**4564. ——— Fair wear & tear excepted.]**—Where the tenant of a house undertakes by his agreement to keep it in as good repair as when he took it, fair wear & tear excepted, he is not entitled to quit upon its becoming uninhabitable for want of other repairs during the term, & the landlord is under no implied obligation to do any repairs in such a case.—**ARDEN v. PULLEN** (1842), 10 M. & W. 321; 11 L. J. Ex. 359; 152 E. R. 492.

**Annotation:—Refd.** **Gott v. Gandy** (1853), 23 L. J. Q. B. 1.

**4565. Voluntary repairs by landlord—Negligence causing injury to tenant—Liability a question of fact.]**—A well was let from year to year, neither landlord nor tenant being bound to repair the steining. The well being out of repair the tenant complained to defts., the landlords, who sent in men to repair it. The well was destroyed by the negligence of the workmen employed. An action having been brought by the tenant to recover damages for the injury sustained by him:—**Held:** defts. were not necessarily responsible, but it was a question of fact for the jury what was the nature of the obligation incurred by them by reason of their interference.—**MILLS v. HOLTON** (1857), 2 H. & N. 14; 157 E. R. 6.

**See, also, No. 4894, post.**

**4566. Remedy of tenant—House useless & unsafe from want of repairs—Evacuation of premises.]**

—A tenant of a house from year to year, not under any agreement to repair, may quit, without previous notice to his landlord, on the premises

**4561 vii. —.]**—**CARROLL v. ROUTLEDGE**, [1925] N. 31.—IR.

**4561 viii. —.]**—**ALEXANDER v. ARMSTRONG** (1879), Buch. 233.—S. AF.

**4564 i. Exceptions from tenant's covenant—No implied covenant by landlord—Fair wear & tear excepted.]**—The mere fact that fair wear & tear are excepted from a sublessee's covenant to repair do not impose on the sublessor any obligation to make good any damage due to wear & tear.—**COLLINS v. WINTER**, [1924] N. Z. L. R. 449.—N.Z.

**o. Remedy of tenant—House no**

becoming unsafe & useless from want of repairs; & such tenant is not liable, in an action for use & occupation, for any rent after the occupation has ceased to be beneficial.—EDWARDS v. ETHERINGTON (OR HETHERINGTON) (1825), Ry. & M. 268, N. P.; subsequent proceedings, 7 Dow. & Ry. K. B. 117.

*Annotations*:—*Distd.* Izon v. Gorton (1839), 7 Scott, 537. *Apld.* Smith v. Marrable (1843), 11 M. & W. 5. *Distd.* Hart v. Windsor (1844), 12 M. & W. 68. *Distd.* Surplice v. Farnsworth (1844), 7 Man. & G. 576.

4567. ————.]—ARDEN v. PULLEN, No. 4564, *ante*.

Flats, chambers & offices.]—See Part X., Sect. 5, *ante*.

#### B. Under Statute.

See, now, Housing Act, 1925 (c. 14), ss. 1-3; & Part XIII., *ante*.

4568. Effect of covenant by tenant—On implied obligation—Standard of repair differentiated.]—A dwelling-house which as regards rent was within the Housing of the Working Classes Acts as well as the Rent Restriction Acts, was let to a tenant under an agreement by which he agreed "to keep & leave the premises & fixtures in good & tenantable repair, state & condition (fair wear & tear only excepted)." By the Housing of the Working Classes Acts an undertaking was implied in the contract of letting that the house should during the holding be kept by the landlords in all respects reasonably fit for human habitation. The landlords served three notices of increase of rent upon the tenant under Increase of Rent & Mortgage Interest Restrictions Act, 1920 (c. 17), s. 2 (1) (d), in all of which they claimed an increase of 25 per cent. upon the basis that the landlords were responsible for the whole of the repairs. The tenant paid the increases demanded, & subsequently claimed to recover rent overpaid on the basis that the notices of increase were invalid, as the landlords were not responsible for the whole of the repairs:—*Held*: the standard of repair required by the tenant's covenant to keep & leave the premises & fixtures in good & tenantable repair (fair wear & tear only excepted) was higher than the standard of repair imposed on the landlords by the Housing of the Working Classes Acts, & therefore the clause in the tenancy agreement was not void & the landlords were not responsible for the whole of the repairs.—JONES v. GEEN, [1925] 1 K. B. 659; 132 L. T. 796; 41 T. L. R. 311; 23 L. G. R. 390; *sub nom.* JONES v. PHILLIPS, 94 L. J. K. B. 413, D. C.

4569. Latent defect—Necessity for notice to landlord.]—Owing to a latent defect the ceiling in one room of a house to which Housing & Town Planning Act, 1909 (c. 44), applied, fell & damaged the tenant's furniture. Being unaware of the defect, which could only be detected by an expert examination, the tenant had given no notice to the landlord with regard to it. In an action by the tenant claiming damages for a breach of the undertaking by the landlord implied by sect. 15 of the Act to keep the house in all respects reasonably fit for human habitation, the county ct. judge gave judgment for pltf.:—*Held*: the absence of notice to the landlord of the latent defect in the ceiling did not preclude the tenant from recovering.

*Qu.*: if where the defect is patent notice by the tenant is not essential to entitle him to recover.—FISHER v. WALTERS, [1926] 2 K. B. 315; 95 L. J. K. B. 846; 135 L. T. 411; 42 T. L. R. 409; 70 Sol. Jo. 710.

#### SUB-SECT. 2.—UNDER COVENANT.

##### A. Nature of Covenant.

Runs with the reversion.]—See Sect. 1, *ante*.

##### B. Construction of Covenant.

4570. General rule—Same construction as lessee's covenants.]—(1) A covenant by a lessor to keep the outside walls of the demised premises in repair will be construed as a covenant to repair on notice, & there can be no breach of such a covenant until the lessor has notice of want of repair.

(2) The principle of construction that under a covenant to repair, the covenantor need not renew a building worn out by age or decaying from faulty construction applies to the case of a lessor as well as to the case of a lessee who has entered into such a covenant; & for the purpose of construing such a covenant there is in this respect no distinction between the two cases.

In 1890 the three upper storeys of a house in London were demised to the lessee for a term of eighteen years from Mar. 25, 1890, at a rent of £150. The lessor covenanted to keep the outside of the demised premises in good & substantial repair. The lessee covenanted to keep the inside in repair, to permit the lessor to enter & view the state of repair, & to use the premises for the business of a private hotel-keeper. In 1905 pltf. was the assignee of this lease, & deft. was the owner of the reversion. On July 13, 1905, the London County Council served on the premises a notice requiring the owner to take down the front & back walls of the house as being dangerous structures. Pltf. at once communicated this notice to deft. & required him to repair the walls. Deft. did nothing, & the London County Council themselves took down the walls from the first floor upwards, propped up the floors with timber, & left the place uninhabitable. Pltf. brought this action against deft. for breach of the covenant to keep the outside in repair. Deft. had no notice before July 13, 1905, of any want of repair. At that date the house, which was about 200 years old, had by the natural effect of time become so worn out & decayed that it was impossible to repair it except by taking it down & rebuilding:—*Held*: there had been no breach of the lessor's covenant to repair.—TORRENS v. WALKER, [1906] 2 Ch. 166; 75 L. J. Ch. 645; 95 L. T. 409; 54 W. R. 584.

*Annotations*:—As to (1) *Distd.* Lurecott v. Wakely & Wheeler, [1911] 1 K. B. 905. *Refd.* Murphy v. Hurly, [1922] 1 A. C. 369; Griffin v. Pilett (1925), 70 Sol. Jo. 110. As to (2) *Consd.* Hewitt v. Rowlands (1924), 93 L. J. K. B. 729.

Construction of lessee's covenants.]—See Sect. 3, sub-sect. 2, *post*.

4571. According to age of property.]—TORRENS v. WALKER, No. 4570, *ante*.

4572. ————.]—HEWITT v. ROWLANDS, No. 4607, *post*.

———.]—See, also, Sect. 3, sub-sect. 2, D. (a) iii., *post*.

habitable — Retention of rent.]—M'DONALD v. KYDD (1901), 3 F. (Ct. of Sess.) 923; 38 Sc. L. R. 697; 9 S. L. T. 114.—SCOT.

P. ————.]—BENSLEY v. CLEAR (1878), Buch. 89.—S. AF.

q. ———— Evacuation of premises.]—WEBSTER v. BROWN (1892), 19

R. (Ct. of Sess.) 765; 29 Sc. L. R. 631.—SCOT.

r. ————.]—KAISER BROTHERS (ASSIGNEES OF) v. CONTINENTAL CAOUTCHOUC CO. (1906), 23 S. C. 736.—S. AF.

t. Repairs effected by tenant—Without notice to landlord—No liability.]

—ROWEN v. DAVERIN (1914), App. D. 632.—S. AF.

#### PART XVIII. SECT. 2, SUB-SECT. 2.—B.

a. Lessee to repair—Lessor to pay value.]—MILLER v. KINSLEY (1864), 14 C. P. 188.—CAN.

b. To keep in good repair outside—

*Sect. 2.—Liability of landlord to repair: Sub-sect. 2, B., C. & D. (a).]*

**4573. What are external repairs—Boundary walls adjoining other buildings.]—GREEN v. EALES, No. 4599, *post*.**

**4574. — Windows—"Part of skin of house."]**—*BALL v. PLUMMER* (1879), *Times*, June 17, C. A. *Annotation:—Refd. Boswell v. Crucible Steel Co., [1925] 1 K. B. 119.*

—*See, also, No. 4658, post.*

**4575. — Reconstruction of drainage.]—HOWE v. BOTWOOD, No. 4494, *ante*.**

**4576. "Good & substantial repair"—Cleansing ornamental water.]—BIRD v. ELWES, No. 4461, *ante*.**

—*Lessee's covenant.]—See Sect. 3, sub-sect. 2, D. (b) i., iii., post.*

**4577. To put in good tenable repair—No obligation to repair for special purpose.]—Deft., in Nov. 1865, agreed in writing with plffs. as follows, "I hereby agree to let to you, for the term of five years, the whole of the warehouse & cellars, now occupied by P. & co., for the annual rent of £600, the building to be put by me into good tenable repair." Repairs were, thereupon, done by deft., who knew that the premises were to be used by plffs. in their business of silk & linen merchants & warehousemen; & in Jan. 1866, plffs., who had previously inspected the premises, entered into possession, making no complaint of their condition or want of repair. The building had originally been a dwelling-house, & had been converted into a warehouse by the addition of two storeys, without strengthening the outer wall, which was only fourteen inches thick, & as a warehouse it had been occupied by P. & co. By reason of the insufficient thickness of the outer wall, & the weight of the linen stored by plffs. on the premises, the outer wall began to give way some time between Mar. & June, & in Oct. 1866, a portion of it fell, rendering it necessary to pull down & rebuild the whole wall, which was done by deft., plffs. being for sometime deprived of the use of the premises, & otherwise sustaining damage thereby. In an action by plffs. to recover damages from deft. for an alleged breach of agreement to put the premises into "good tenable repair":—*Held*: deft.'s contract was clearly performed at the time plffs. took possession of the premises, & made no complaint of their state of repair: there was no contract on his part to put them into good tenable repair for any particular or specified purpose; & if plffs. required any extra support for their goods, they should have called deft.'s attention thereto whilst the repairs were going on.—*McClure v. Little* (1868), 19 L. T. 287; 32 J. P. 776.**

—*Lessee's covenant.]—See Sect. 3, sub-sect. 2, D. (b) ii., post.*

**4578. To keep in good tenable repair—Drains & sewers—Structural defect.]—A lease contained a covenant by the landlord to keep (*inter alia*) the drains & sewers in good tenable repair:—*Held*: this did not extend to the rectification of**

a structural defect in the drains, but was confined to keeping the drains as they existed in a condition of good tenable repair.—*HUGGALL v. MCKEAN* (1884), 1 Cab. & El. 391; 1 T. L. R. 53; 33 W. R. 588; *affd.*, *sub nom. HUGALL v. McLEAN* (1885), 53 L. T. 94, C. A.

*Annotations:—Consd. Murphy v. Hurly, [1922] 1 A. C. 369. Refd. Tredway v. Machin (1904), 91 L. T. 310; Torrens v. Walker, [1906] 2 Ch. 166; Griffin v. Pillet (1925), 70 Sol. Jo. 110.*

—*Lessee's covenant.]—See Sect. 3, sub-sect. 2, D. (b) iii., post.*

**4579. Keep in good condition—To put in good condition for purposes of tenancy.]—SANER v. BILTON, No. 4865, *post*.**

**4580. Repairs amounting to rebuilding.]—TORRENS v. WALKER, No. 4570, *ante*.**

—*See, also, Sect. 3, sub-sect. 2, D. (a) vii., post.*

### C. Notice to Repair.

**4581. General rule—Necessity for notice.]—**

(1) If plff. declares on a general covenant to repair a messuage, & assigns a breach, *per quod* he was put to expense, it is sufficient for a tenant to plead performance as to all except as to the repairs of a party wall, & that those repairs were rendered necessary, & were done under Fire Prevention (Metropolis) Act, 1774 (c. 78), & did not become necessary by deft.'s default, & that deft. was not the owner of the improved rent. If plff. is possessed of any facts to charge deft. with a proportion of the repairs, he ought to reply them.

(2) The lessor may charge the lessee without notice; for the lessor is not on the spot to see the repairs wanting: the lessee is; & therefore the lessee cannot charge the lessor for breach of repairs without notice, for the lessor may not know that repairs are necessary (*MANSFIELD, C.J.*).—*MOORE v. CLARK* (1813), 5 Taunt. 90; 128 E. R. 620.

*Annotations:—As to (2) Consd. Makin v. Watkinson (1870), L. R. 6 Exch. 25. Refd. Smith v. Peat (1853), 2 C. L. R. 424.*

**4582. — —.]—Upon a covenant by the lessor to keep in repair the main walls, main timbers, & roofs of the demised premises, the lessor cannot be sued for non-repair, unless he has received notice of want of repair.—*MAKIN v. WATKINSON* (1870), L. R. 6 Exch. 25; 40 L. J. Ex. 33; 23 L. T. 592; 19 W. R. 286.**

*Annotations:—Folld. Huggall v. McLean (1885), 53 L. T. 94; Torrens v. Walker, [1906] 2 Ch. 166. Consd. Murphy v. Hurly, [1922] 1 A. C. 369. Refd. L. & S. W. Ity. v. Flower (1875), 1 C. P. D. 77; Manchester Bonded Warehouse Co. v. Carr (1880), 5 C. P. D. 507; Melles v. Holme, [1918] 2 K. B. 100.*

**4583. — —.]—MANCHESTER BONDED WAREHOUSE Co. v. CARR, No. 3990, *ante*.**

**4584. — — Possibility of knowledge with landlord.]—In an action by a tenant against a landlord for breach of an agreement to keep drains in repair the jury found that neither party knew of the defective condition of the drains before the damage occurred, & that plff. had not, & deft. had, the means of knowing:—*Held*: deft. was not liable.—*HUGALL v. McLEAN* (1885), 53 L. T. 94; 33 W. R. 588; 1 T. L. R. 445, C. A.; *affg.*, S. C.**

*Rain discharge pipe stopped.]—HAMPTON v. GALLOWAY & SYKES (1899), 1 F. (Ct. of Sess.) 501; 36 Sc. L. R. 372.—SCOT.*

### PART XVIII. SECT. 2, SUB-SECT. 2.—C.

**4581 i. General rule—Necessity for notice.]—A covenant by a landlord to repair demised premises implies a condition that he shall have notice**

of the need of repair before his liability arises.—*KREITMAYER v. KENNEDY* (1878), 4 V. L. R. (L.) 215.—*AUS.*

**4581 ii. — —.]—TELFER BROTHERS v. FISHER (1910), 15 W. L. R. 400.—CAN.**

**4581 iii. — —.]—MURPHY v. HURLEY, [1921] 2 I. R. 335.—IR.**

**4581 iv. — —.]—BEAUMONT v. WHITCOMBE & TOMBS (1897), 16 N. Z. L. R. 133.—N.Z.**

**4581 v. — —.]—HAMILTON v. MONTROSE (DUKE) (1906), 8 F. (Ct. of Sess.) 1026.—SCOT.**

**4581 vi. — —.]—SMOOK v. DREYER, [1918] O. P. D. 1.—S. AF.**

*c. Exception to rule—Land let for grazing purposes—Covenant to keep fences in repair.]—The rule that a landlord who has covenanted to repair is not, in the absence of express provision, liable unless he has had express notice*

*sub nom.* HUGGALL v. MCKEAN (1884), 1 Cab. & El. 391.

*Annotations*.—*Fold.* *Torrens v. Walker*, [1906] 2 Ch. 166. *Consd.* *Murphy v. Hurly*, [1922] 1 A. C. 369. *Refd.* *Tredway v. Machin* (1904), 91 L. T. 310; *Griffin v. Pillet* (1925), 70 Sol. Jo. 110.

4585. ———.]—TREDWAY v. MACHIN, No.

4890, *post*.

4586. ———.]—TORRENS v. WALKER, No.

4570, *ante*.

4587. ———.]—FISHER v. WALTERS, No.

4509, *ante*.

4588. ——— **Personal knowledge of tenant.**]

—The implied obligation of a tenant of premises which the landlord has covenanted to keep in repair to give notice to the landlord of the want of repair of the premises before bringing an action against him for damages for breach of the covenant springs from the special knowledge which the tenant's occupancy of the premises is presumed to give him, coupled with the state of ignorance in which the absence of such occupancy is presumed to leave the landlord. *Semble*: no such implication arises in the case of a covenant by the landlord to keep in repair a sea wall erected by him for the common protection of a number of holdings.

Pltfs. were judicial tenants to deft. of adjoining holdings situated near the sea coast of Kerry. Deft., during the currency of these tenancies, erected a sea wall for the protection of the holdings from the incursions of the sea & employed a local agent to look after the wall. On the revision in 1916 of pltfs.' rents for a new statutory term the order of the chief comr., in the case of each tenant, was made on the basis that the landlord kept the wall in repair as theretofore. In Sept. 1918, the sea wall was damaged by high tides, with the result that pltfs.' holdings were flooded, & separate actions, which were tried together, were brought against the landlord to recover damages in respect of such floodings. No notice of any want of repair of the sea wall had been given either to the landlord or to his agent:—*Held*: (1) the acceptance by deft. of the enhanced rent on the basis of the condition imposed by the Land Commission was evidence of an agreement to be bound by the condition, whether that condition was authorised or not; (2) in the circumstances of the case notice to deft. of the want of repair of the sea wall was not a condition precedent to the maintenance of the actions.—*MURPHY v. HURLY*, [1922] 1 A. C. 369; 91 L. J. P. C. 116; 127 L. T. 49; 38 T. L. R. 386; 66 Sol. Jo. 314, H. L.

*Annotation*.—*As to* (2) *Refd.* *Griffin v. Pillet* (1925), 70 Sol. Jo. 110.

4589. **Exception to rule—Portion only of premises demised—Defective portion in landlord's control.**—The rule that a landlord who has covenanted with his tenant to keep the premises in tenantable condition is not liable for damage caused to the tenant by the condition of the premises becoming defective unless he had express notice of it has no application to a case in which he demises only a portion of the premises & retains in his own control the portion, the defective condition of which causes the damage.—*MELLES & Co. v. HOLME*, [1918] 2 K. B. 100; 87 L. J. K. B. 942; 119 L. T. 191; 62 Sol. Jo. 704, D. C.

*Annotations*.—*Consd.* *Murphy v. Hurly*, [1922] 1 A. C. 369. *Refd.* *Citron v. Cohen* (1920), 36 T. L. R. 560.

4590. ——— **Seawall erected by landlord to protect several holdings.**—*MURPHY v. HURLY*, No. 4588, *ante*.

4591. **Sufficiency of notice.**—*GRIFFIN v. PILLET*, No. 4891, *post*.

*See, also*, Sect. 3, sub-sect. 2, B. (c), *post*.

#### D. Breach of Covenant.

##### (a) In General.

4592. **Defence to breach of covenant—Interference by lessee.**—A covenant to repair a house, deft. would not suffer it, & demurred, but ordered to answer.

Pltf.'s bill was, that he leased a house to deft., & did covenant to build & repair it before a day, which being at hand, & showed that he had prepared timber & workmen to perform same; but deft., as well to have him break his covenant, as to free himself from his covenant to keep it in reparations, did interrupt & threaten the workmen, whereby they durst not proceed to repair, & so the houses were decayed, & pltf. had no remedy to force deft. to suffer him to repair: deft. demurred upon the bill, alleging pltf. had sufficient remedy by law, which kind of answer this ct. allowed not; therefore a subpoena is awarded against deft. to answer.—*WOOD v. TIRRELL* (1577), Cary, 59; 21 E. R. 32.

4593. ——— **Prior determination of tenancy by lessee—Under option to determine.**—In a lease of premises for a term of twenty-one years determinable by the lessee at the end of the first four years by a six months' notice, the lessor covenanted to rebuild the premises after the expiration of the first four years of the term upon a six months' notice from the lessee requiring him to do so. Before the expiration of the first four years of the term the lessor on many occasions told the lessee that he would be unable to procure the money for rebuilding the premises. The lessee in consequence of this statement by the lessor gave the requisite notice under the provisions of the lease to determine the term at the end of the first four years. After the determination of the lease he continued to occupy the premises for some months, paying rent to the lessor's mtgees., on the chance, as he stated, of the lessor's procuring the money to rebuild. The lessor being, however, unable to rebuild the premises, the lessee claimed damages against him for breach of the contract to do so:—*Held*: the covenant to rebuild never having been actually broken, because the lessee had before the time for its performance determined the term, he could not recover unless there had been a breach of contract by anticipation within the doctrine of *Hochster v. De la Tour* (1853), 2 E. & B. 678, & *Frost v. Knight* (1872), L. R. 7 Exch. 111, by reason of a wrongful repudiation of his covenant by the lessor before the time for performance; what had been said by the lessor did not under the circumstances of the case amount to such a repudiation; & if it did, such repudiation before the time of performance arrived would not amount to a breach of the contract, unless the lessee elected to treat it as putting an end to the contract except for the purposes of an action for such breach, & the lessee had not under the circumstances so elected; & he could not therefore maintain his claim. *Qu.*: whether the doctrine of *Hochster v. De la Tour* (1853), 2 E. & B. 678, can be applicable to the case of a lease or other contract containing various stipulations where the whole contract cannot be treated as put an end to upon the wrongful repudiation of one of the stipulations of the contract by the promisor.—*JOHNSTONE v.*

of the want of repair does not apply where a landlord has let his land to a tenant for grazing purposes & cove-

nanted to keep the fences in repair & look after the stock, & the landlord resides near the land & the tenant at

a distance.—*DUNLOP v. TROY, NICHOLSON, THIRD PARTY*, [1915] V. L. R. 639.—*AUS.*

**Sect. 2.—Liability of landlord to repair: Sub-sect. 2, D. (a) & (b); sub-sect. 3. Sect. 3: Sub-sects. 1 & 2, A.]**

**MILLING (1886)**, 16 Q. B. D. 460; 55 L. J. Q. B. 162; 54 L. T. 629; 50 J. P. 694; 34 W. R. 238; 2 T. L. R. 249, C. A.

**Annotations:—***Mentd.* Gueret v. Audouy (1893), 62 L. J. Q. B. 633; Rhymney Ry. v. Brecon & Merthyr Tydfil Junction Ry. (1900), 69 L. J. Ch. 813; Smith v. Butler, [1900] 1 Q. B. 694; Michael v. Hart, [1902] 1 K. B. 482; Dansk Rekyrliffel Syndikat Akt. v. Snell, [1908] 2 Ch. 127; General Billposting Co. v. Atkinson, [1908] 1 K. B. 537; *Re* Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 315; Bradley v. Newson, [1919] A. C. 16; Consorzio Veneziiano di Armamento e Navigazione v. Northumberland Shipbuilding Co. (1919), 88 L. J. K. B. 1194; *Re* Lavey, *Ex p.* Trustee, [1920] 1 K. B. 674; Nelson Murdoch v. Wood (1921), 126 L. T. 745; The British Trade, [1924] P. 104; Berners v. Fleming, [1925] Ch. 264.

**4594. — Loss or inconvenience to landlord.]—**

**HEWITT v. ROWLANDS**, No. 4607, *post*.

**4595. Anticipatory breach—Declaration by lessor of inability to perform.]—****JOHNSTONE v. MILLING**, No. 4593, *ante*.

**4596. Remedies for breach—Right to quit premises.]—**A. agreed, in consideration of £10, to let a house to B., which A. was to repair & execute a lease of within ten days, but B. was to have immediate possession, & in consideration of the aforesaid was to execute a counterpart & pay the rent. B. took possession & paid the £10 immediately, but A. neglected to execute the lease & make the repairs beyond the period of the ten days, notwithstanding which B. still continued in possession:—*Held*: B. could not, by quitting the house for the default of A., rescind the contract & recover back the £10 in an action for money had & received, but could only declare for a breach of the special contract; for a contract cannot be rescinded by one party for the default of the other, unless both can be put *in statu quo* as before the contract: & here B. had had an intermediate possession of the premises under the agreement.—**HUNT v. SILK** (1804), 5 East, 449; 2 Smith, K. B. 15; 102 E. R. 1142.

**Annotations:—***Refd.* Beed v. Blandford (1828), 2 Y. & J. 278; Blackburn v. Smith (1848), 2 Exch. 783. *Mentd.* Standish v. Ross (1849), 3 Exch. 527; Green v. Suddington (1857), 29 L. T. O. S. 144; Holbutt v. Hickson (1872), L. R. 7 C. P. 438; London & County Banking Co. v. London & River Plate Bank (1887), 4 T. L. R. 179; Cornwall v. Henson (1900), 69 L. J. Ch. 581; Hermann v. Charlesworth (1905), 21 T. L. R. 368; Abram S.S. Co. v. Westville Shipping Co., [1923] A. C. 773; Rowland v. Divall, [1923] 2 K. B. 500.

**4597. — ]—**In an agreement for a tenancy of buildings for a term, the landlord to do the repairs, there is no implied condition that the tenant may quit if the repairs are not done.—**SURPLICE v. FARNSWORTH** (1844), 7 Man. & G. 576; 8 Scott, N. R. 307; 13 L. J. C. P. 215; 3 L. T. O. S. 181; 8 Jur. 760; 135 E. R. 232.

**Annotations:—***Consd.* Johnstone v. Milling (1886), 16 Q. B. D. 460. *Expld.* Rhymney Ry. v. Brecon & Merthyr Tydfil Ry. (1900), 83 L. T. 111. *Refd.* Wilson v. Finch-Hatton (1877), 46 L. J. Q. B. 489; Hart v. Rogers, [1916] 1 K. B. 646.

**4598. — Action.]—****HUNT v. SILK**, No. 4596, *ante*.

**4599. — Time for bringing—Repudiation by lessor of liability.]—**(1) A covenant by a lessor to repair the external parts of the demised messuage comprises the boundary walls of it, though they adjoin other buildings. At all events the lessor is liable under it to compensate the lessee for the damage arising from non-repair of such a wall, which arises after the adjoining building has been

pulled down, though the damage be a consequence of such pulling down, he having made no attempt to prevent the damage arising from the further sinking of the wall, & though the adjoining building was pulled down in execution of powers given by an Act of Parliament, which contained a clause for the compensation of persons sustaining damage by the exercise of them. *Qu.*: whether in such a case an action will lie against the lessor before a reasonable time has elapsed for the restoration of the wall by him, & held that, even if so, an action would be maintainable before such reasonable time had elapsed, he having, on application, contested his liability to do repairs, & given an unqualified refusal to do them.

(2) In such an action, the lessee, after such refusal, having rebuilt an external wall, is entitled to recover the cost thereof, the jury having found that this was the proper mode of restoring it. He may also recover the price of damage done to plate glass & fixtures in consequence of the sinking of the wall.

(3) But the lessee cannot recover the rent paid by him for the occupation of other premises, during the progress of the repairs, though during that time the demised premises were not safely habitable.—**GREEN v. EALES** (1841), 2 Q. B. 225; 1 Gal. & Dav. 468; 11 L. J. Q. B. 63; 6 Jur. 436; 114 E. R. 88.

**4600. — Tenant holding under agreement for lease—Subject to conditions therein stated.]—**Deft., by agreement under seal, agreed to grant a lease of certain premises to pltf., which lease was to contain a covenant that he (deft.) would paint the outside of the premises once in every three years, & it was agreed that in the meantime, until the lease should be granted, pltf. should be tenant from year to year, "subject to the terms & conditions thereinbefore specified." In an action for breach of this agreement, the declaration treated it as containing an express covenant to paint once in three years:—*Held*: it was no variance.—**PRICE v. BIRCH** (1842), 4 Man. & G. 1; 1 Dowl. N. S. 720; 11 L. J. C. P. 193; 6 Jur. 265; 134 E. R. 1.

**4601. — On parol agreement—Subsequent written agreement silent as to repair.]—**An action may be maintained by a tenant against his landlord upon a parol agreement by the landlord to put a house in tenantable repair, although a written agreement for a lease made shortly afterwards is silent as to the terms of such parol agreement.

N. verbally agreed with M. upon Sept. 13 to put a house of N. in tenantable repair, if M. would become tenant thereof. An agreement for a lease made on Sept. 17 set out the terms of the tenancy, but was silent as to the terms of the verbal agreement of Sept. 13. An action having been brought by M. upon the verbal agreement, the jury found for pltf.:—*Held*: the verbal agreement sued on & the written agreement for a lease were independent agreements, & rule to set aside the verdict for misreception of evidence refused.—**MANN v. NUNN** (1874), 43 L. J. C. P. 241; 30 L. T. 526; 38 J. P. 776.

**Annotations:—***Apld.* Burtal v. Bianchi (1891), 65 L. T. 678. *Mentd.* Angell v. Duke (1875), 32 L. T. 320.

**— Measure of damages.]—***See* Sub-sect. 2, D. (b), *post*.

**Deduction of cost of repairs from rent.]—***See* Part XV., Sect. 5, sub-sect. 1, G., *ante*.

**PART XVIII. SECT. 2, SUB-SECT. 2.—D. (a).**

**4596 i. Remedies for breach—Right to quit premises.]—****BUTTIMER v. BETTZ** (1914), 26 W. L. R. 705; 6 W. W. R. 22.—**CAN.**  
**4596 ii. — ]—****HAIGH v. DFER**, [1918] N. Z. L. R. 638.—**N.Z.**

(b) *Measure of Damages.*

*See, generally, DAMAGES, Vol. XVII., pp. 78 et seq.*

**4602. Lessee's cost of executing repairs.]—**GREEN v. EALES, No. 4599, *ante*.

**4603. Damage consequent on fall of wall—Repairable by landlord.]—**GREEN v. EALES, No. 4599, *ante*.

**4604. Rent of other premises during repair.]—**GREEN v. EALES, No. 4599, *ante*.

**4605. Agreement to put in repair by fixed day—To what date assessable.]—**In an action for a lease it was a condition precedent that the intending lessors should complete by a fixed date certain specified works & render the house to be leased fit for habitation; the sum of Rs. 150 to be paid in respect of every day thereafter that the works remained uncompleted. In an action for damages:—*Held*: (1) the omission to complete the works was a continuous breach of contract after the fixed date, & the stipulated daily sum was not a penalty, but was recoverable down to the date of action as liquidated damages; (2) as the contract had been in effect abandoned, further damages down to the date of judgment were on the evidence rightly assessed as within the contemplation of both parties.—DE SOYSA v. DE PLESS POL, [1912] A. C. 194; 81 L. J. P. C. 126; 105 L. T. 642, P. C.

**4606. — Stipulation of liquidated damages for breach.]—**DE SOYSA v. DE PLESS POL, No. 4605, *ante*.

**4607. Difference between actual value & value if properly repaired—Computed from notice to repair to assessment of damages.]—**The landlord of a dwelling-house subject to the Rent Restrictions Acts had covenanted to "keep the cottage dry & the outside in repair." The cottage was one hundred & fifty years old, without any damp courses, & in a bad state of repair, the cost of the repairs would be about £600, & the tenant's furniture was injured by the damp. The tenant, after receiving a valid notice to quit, remained in possession as a statutory tenant & requested the landlord to comply with his covenant, but the latter repudiated liability. In a claim by the tenant against the landlord for damages for breach of the covenant:—*Held*: (1) the measure of damages was the difference in value to the tenant of the house during the period from the date of the request to the assessment of damages between the house in its unrepaired condition & the house in the condition in which it would be if the landlord, on receipt of the notice to repair, had fulfilled his obligation; (2) the damage to the tenant's furniture during the aforesaid period caused by the landlord's default in repairing. Both items would be subject to the extent of the landlord's obligation, having regard to the age & structure of the premises; (3) the fact that it was inconvenient or unprofitable to the landlord to fulfil his obligation should not be considered.—HEWITT v. ROWLANDS (1924), 93 L. J. K. B. 1080; 131 L. T. 757, C. A.

**4608. Damage to furniture.]—**HEWITT v. ROWLANDS, No. 4607, *ante*.

## SUB-SECT. 3.—FULFILMENT OF CONDITIONS PRECEDENT TO LIABILITY OF TENANT.

*See Sect. 3, sub-sect. 2, B. (b), post.*

## SECT. 3.—LIABILITY OF TENANT TO REPAIR.

## SUB-SECT. 1.—APART FROM COVENANT.

**Liability *ratione tenuræ*—Highway.]—***See* HIGHWAYS, Vol. XXVI., p. 433, No. 1517.

**Obligation not to commit or to prevent waste.]—***See* Part XIX., *post*.

## SUB-SECT. 2.—UNDER COVENANT.

A. *In General.*

**Nature of covenant—Runs with land.]—***See* Sect. 1, *ante*.

**4609. Implied obligation to use premises in tenant-like manner.]—**(1) Tenant at will is not liable to general repairs: he is bound to use the premises in a husband-like manner, but no farther.

(2) He [tenant at will] is bound to use the premises in a husband-like manner; the law implies this duty & no more. . . . A tenant from year to year is not liable to general repairs (GIBBS, C.J.).—HORSEFALL v. MATHER (1815), 1 Holt, N. P. 7, N. P.

*Annotation:—As to* (1) *Refd.* Wedd v. Porter, [1916] 2 K. B. 91.

**4610. —.]—**In an action by a landlord against his tenant for non-repair & waste, the first count of the declaration stated an agreement of demise of a messuage & premises, & assigned as the only breach, the non-repair of the windows & premises. The second count stated, that deft. became tenant; o plff. of a certain other messuage & premises on the terms of using the last-mentioned messuage & premises in a tenantable manner, & assigned as breaches the cutting down of shrubs & the removal of turf & flowers. It appeared that the only agreement of demise was that stated in the first count: plff. proved the breaches under both counts, & obtained a verdict on both:—*Held*: plff. could not retain the verdict on both counts; & the agreement to use the premises in a tenant-like manner, being implied by law from the relation of landlord & tenant, ought not to have been stated as a separate contract, but might have been alleged as part of the contract in the first count.—HOLFORD v. DUNNETT (1841), 7 M. & W. 348; 11 & W. 67; 10 L. J. Ex. 101; 151 E. R. 800.

*Annotations:—Mentd.* Deane v. Ivey (1843), 4 Q. B. 379; R. v. Gompertz (1846), 11 Jur. 204.

**4611. —.]—**WESTROPP v. ELLIGOTT, No. 4922, *post*.

**4612. Exclusion of implied covenant by express covenant.]—**By an agreement made & dated May 31, A. let to B. a house at "£80 a year, payable quarterly, to commence from Sept. 29, next." B. agreed to take the fixtures at a valuation. The following memorandum was at the foot of the agreement: "A. agrees to take the fixtures again at the expiration of the tenancy, provided they are in as good condition then as they now are;

## PART XVIII. SECT. 2, SUB-SECT. 2.—D. (b).

**4602 i. Lessee's cost of executing repairs.]—**NIXON v. DENHAM (1839), 1 Jebb & S. 416; 1 L. L. R. 100.—IR.

**4602 ii. —.]—**MACANDREW v. NAPIER (1883), 2 N. Z. L. R. 242

## (S. C.)—N.Z.

**d. — & loss of profit.]—**BANK OF VICTORIA v. SYNNOT (1885), 11 V. L. R. 598.—AUS.

**e. Loss sustained by privation of proper use of premises.]—**PHILIPS v. ST. JOHN WATER CO. (1858), 4 All. 24.—CAN.

## PART XVIII. SECT. 3, SUB-SECT. 2.—A.

**4609 i. Implied obligation to use premises in tenant-like manner.]—**SMITH v. HENDERSON (1897), 24 R. (Ct. of Sess.) 1102; 34 Sc. L. R. 821; 5 S. L. T. 96.—SCOT.

**1. Time for performance of covenant.]—**CASTLE v. ROHAN (1852), 9 U. C. R. 400.—CAN.

**Sect. 3.—Liability of tenant to repair: Sub-sect. 2, A. & B. (a) & (b) i. & ii.]**

& B. agrees to leave the premises in the same state as they now are." Though not so stated in the agreement, the house was, at the time of the making of that agreement, in the occupation of C., as tenant to A., who quitted on Sept. 26:—**Held:** (1) notwithstanding the existence of express terms of agreement, an implied contract arose on the part of B. to use the premises in a tenant-like manner; (2) under this agreement, the tenancy commenced on Sept. 29, & it was properly described in the declaration as an agreement to leave the premises at the expiration of the tenancy in the same state as they were in at the commencement of the tenancy, & not at the date of the agreement.—**WHITE v. NICHOLSON** (1842), 4 Man. & G. 95; 4 Scott, N. R. 707; 11 L. J. C. P. 204; 134 E. R. 40.

**4613.** —.—.]—**STANDEN v. CHRISTMAS**, No. 4555, *ante*.

**4614. Tenancy undertaken on special agreement as to repair—Sufficient consideration.]**—Declaration in *assumpsit* stated, that deft. had become & was tenant to pltf. of certain rooms, on the terms that deft. should not allow any nails to be driven into the walls, & that if any damage should arise from so doing, he would pay the costs of repairing same on vacating the apartments; & that, in consideration thereof, deft. promised pltf. to use the rooms in a tenant-like manner, & not to allow any nails to be driven into the walls, etc. The declaration then averred, that deft. quitted possession of the rooms, & alleged as a breach, that he did not use the rooms in a tenant-like manner, but, on the contrary thereof, pulled down bells & broke chimney pieces & stoves, & drove nails into the walls; & although the costs of repairing the injuries of the walls amounted to £150, he had not paid that sum, or any part thereof, to pltf.:—**Held:** this declaration showed a sufficient consideration for deft.'s promise, by alleging that he had become tenant on the terms of the special agreement, & that it was not necessary to allege that he became tenant to pltf. at his, pltf.'s, request.—**DIETRICHSEN v. GIUBILEI** (1845), 14 M. & W. 845; 3 Dow. & L. 292; 15 L. J. Ex. 73; 163 E. R. 718.

**B. Commencement and Duration of Liability.**

**(a) In General.**

**4615. Commencement—Habendum from date previous to execution—No liability during interval.]**—Where a lease is executed on a certain day, *habendum* from a previous day, the tenant who has entered between the two days is not liable on the covenant to repair for breaches committed during the interval. The operation of the *habendum* is prospective merely.—**SHAW v. KAY** (1847), 1 Exch. 412; 17 L. J. Ex. 17; 154 E. R. 175.

**Annotation:—****Reid** *Bird v. Baker* (1858), 1 E. & E. 12.

**— Action by assignee of reversion—Whether liability commences as at assignment.]—***See* Sub-sect. 2, F. (f) iii., *post*.

**— Fulfilment of conditions precedent by lessor.]—***See* Sub-sect. 2, B. (b), *post*.

**4616. Duration—House destroyed—By enemies.]**—If lessee covenant to repair a house, he ought to repair it though it be (1) burnt by lightning or (2) thrown down by enemies (*per Cur.*).—

**PARADINE v. JANE** (1647), Aleyn, 26; Sty. 47; 82 E. R. 897.

**Annotations:—***As to* (1) **Apld.** *Bullock v. Dommitt* (1796), 6 Term Rep. 650. **Cousd.** *Hare v. Groves* (1796), 3 Anst. 687; *Matthey v. Curling*, [1922] 2 A. C. 180. **Refd.** *Monk v. Cooper* (1727), 2 Stra. 783; *Clark v. Glasgow Assce.* (1854), 1 Macq. 668. *As to* (2) **Fold.** *Redmond v. Dainton*, [1920] 2 K. B. 256. **Generally, Refd.** *Brown v. Quilter* (1764), Amb. 619; *Belfour v. Weston* (1786), 1 Term Rep. 310; *Hart v. Windsor* (1844), 12 M. & W. 68; *Coward v. Gregory* (1866), 15 L. T. 279. **Mentd.** *Hadley v. Clarke* (1799), 8 Term Rep. 259; *Toutong v. Hubbard* (1802), 3 Bos. & P. 291; *Beale v. Thompson* (1803), 3 Bos. & P. 405; *Atkinson v. Ritchie* (1809), 10 East, 530; *Medeiros v. Hill* (1832), 8 Bing. 231; *Evans v. Hutton* (1842), 12 L. J. C. P. 17; *Spence v. Chodwick* (1847), 10 Q. B. 517; *Denton v. G. N. Ry.* (1856), 2 Jur. N. S. 185; *Hodgkinson v. Fernie* (1857), 3 C. B. N. S. 189; *Adams v. Royal Mail Steam Packet Co.* (1858), 5 C. B. N. S. 492; *Brown v. Royal Insee. Soc.* (1859), 28 L. J. Q. B. 275; *Hall v. Wright* (1859), E. B. & E. 765; *Pole v. Cetecovich* (1860), 9 C. B. N. S. 430; *Brown v. London Corpn.* (1861), 9 C. B. N. S. 726; *Lloyd v. Gilbert* (1865), L. R. 1 Q. B. 115; *Clifford v. Watts* (1870), L. R. 5 C. P. 577; *Carstairs v. Taylor* (1871), L. R. 6 Exch. 217; *The Teutonia* (1871), L. R. 3 A. & E. 394; *Howell v. Coupland* (1874), 22 W. R. 691; *Jackson v. Union Marine Insee.* (1874), L. R. 10 C. P. 125; *Nichols v. Marsland* (1876), 46 L. J. Q. B. 174; *River Wear Comrs. v. Adamson* (1877), 2 App. Cas. 743; *Sheffield Waterworks Co. v. Carter, Smeu v. Brooks* (1882), 8 Q. B. D. 632; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. 589; *Re Shipton, Anderson & Harrison's Arbitration*, [1915] 3 K. B. 676; *Leiston Gas Co. v. Leiston-cum-Sizewell U. C.*, [1916] 2 K. B. 428; *Tamplin S.S. Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 2 A. C. 397; *Chinese Mining & Engineering Co. v. Sale*, [1917] 2 K. B. 599; *Blackburn Bobbin Co. v. Allen*, [1918] 1 K. B. 540; *Ralli v. Compañia Naviera Sota y Aznar*, [1920] 2 K. B. 287.

**4617.** —.—.]—A lease of a dwelling-house contained a covenant by the lessee at all times during the term substantially to repair, uphold, support, sustain, & maintain the dwelling-house. During the currency of the lease the house was struck by a bomb discharged from an enemy aeroplane, & was damaged:—**Held:** the lessee was liable to repair the damage.—**REDMOND v. DAINTON**, [1920] 2 K. B. 256; 89 L. J. K. B. 910; 123 L. T. 297.

**4618.** —.—.]—**By lightning.]—****PARADINE v. JANE**, No. 4616, *ante*.

—.—.]—*See, also*, **CONTRACT**, Vol. XII., pp. 380, 382, Nos. 3138–3141, 3155.

**4619. — Repairs to be executed in specified year—"If lease then subsisting"—Tenancy terminated during specified year.]**—Where a lease contains a covenant to execute specific repairs in a particular year, if the lease shall be then subsisting, the obligation to perform the covenant attaches as soon as the year begins, & the fact that the lease is determined by the lessee by notice expiring before the end of the year does not relieve the lessee of his obligation to perform the covenant.

A lease contained (*inter alia*) the following covenant by the lessee: " & will in the year 1909, & also in the year 1910, if this lease shall so long last paint, varnish & grain all the inside wood & iron work usually painted, varnished or grained of the demised premises with three coats of good oil & white lead paint in a proper & workmanlike manner." The lessee died in 1915, & his exors., under a power in that behalf contained in the lease, gave six months' notice to the lessor to determine the lease on Mar. 1, 1916. On the determination of the term, the covenant not having been performed, the lessor claimed damages for the breach of it:—**Held:** the exors. were liable.—**KIRKLINTON v. WOOD**, [1917] 1 K. B. 332; 86 L. J. K. B. 319; 115 L. T. 920; 33 T. L. R. 108; 61 Sol. Jo. 147.

**4620. — House occupied by military authority**

**PART XVIII. SECT. 3, SUB-SECT. 2.—B. (a).**

**g. Duration—Until termination of term.]—****MADDOCK v. MALLETT** (1860), 12 I. C. L. R. 173; 12 Ir. Jur. 189.—**IR.**

—Expiry of term during occupancy.]—MATTHEY v. CURLING, No. 4857, *post*.

—Covenant to yield up premises in good repair.—Tenant holding over.]—See Nos. 4718, 4847, *post*.

—Destruction by fire.]—See Part XX., Sect. 2, sub-sect. 1, B., *post*.

—Covenant runs with the land.]—See Sect. 1, *ante*.

(b) Fulfilment by Lessor of Conditions Precedent.

i. Lessor to Put Premises in Repair.

**Dependent & independent conditions generally.]**

—See CONTRACT, Vol. XII., p. 413, Nos. 3331 *et seq*.

**4621. Tenant not liable until landlord's obligation fulfilled.]**—A covenant to keep a house in repair from & after the lessor hath repaired it, is conditional; & it cannot be assigned as a breach, that it was in good repair at the time of the demise, & that the lessee suffered it to decay, for the lessor must repair before the lessee is liable.—SLATER v. STONE (1622), Cro. Jac. 645; 2 Roll. Rep. 248; 79 E. R. 556.

**4622. —.]**—Agreement for a lease for five years, from Apr. 1, 1840, the landlord undertaking to erect, by that time, a new warehouse, on part of the ground to be demised, & to put the old warehouse in repair, the amount of rent to be determined with reference to the amount of the landlord's expenditure on the buildings. The new building was not erected, nor the old warehouse repaired, on Apr. 1, but no objection was made by the intended lessees, who then occupied part of the premises under a former agreement, & shortly afterwards the whole premises were destroyed by fire. Upon a bill filed by the landlord, for specific performance of the agreement, & for debts. to rebuild the premises, & to accept a lease:—*Held*: in such circumstances it was a condition precedent that the premises should be put in repair before the lease was granted, & as the landlord had not performed his engagement within the time limited, the contract could not be enforced in equity, & the bill dismissed.—COUNTER v. MACPHERSON (1845), 5 Moo. P. C. C. 83; 4 L. T. O. S. 449; 13 E. R. 421, P. C.

**4623. —.]**—In an action of covenant upon a farming lease, the declaration alleged (*inter alia*) that pltf. & deft. did, by the said instrument, covenant & agree that the lessor (deft.) should, within eighteen months from the date of the lease, build a new shed & stalls for feeding cattle complete, at the upper end of a certain barn, etc., the whole of which was agreed to be left to the superintendence of the lessee & the lessor's son:—*Held*: (1) the stipulation in the lease, that the work should be left to the superintendence of the parties named, was not a condition precedent to or concurrent with the covenant on the part of the deft. to do the work.

(2) The covenant is an absolute one, that deft. shall do the work within the period of eighteen months (PATTESON, J.).—JONES v. CANNOCK (1850), 5 Exch. 713; 19 L. J. Ex. 371; 16 L. T. O. S. 82, Ex. Ch.

*Annotations*:—As to (1) *Consd.* Westacott v. Hahn, [1917] 1 K. B. 605. *Refd.* Neale v. Ratcliff (1850), 15 Q. B. 916; G. N. Ry. v. Harrison (1852), 12 C. B. 576.

**4624. —.]**—Pltf. & defts. agreed, pltf. to let, & defts. to take, a messuage, barn, stable, & out-buildings; & defts. agreed to keep in repair the messuage, buildings & premises, same being

first put into repair by pltf. In an action of *assumpsit* for non-repair (declaration alleging that, although pltf., before the breach of promise, put the messuage, buildings & premises into repair, yet defts. did not keep same in repair; to which defts. pleaded that pltf. did not first put the messuage, buildings & premises into repair; & issue was taken thereon) it was proved, & found in terms by the jury, that pltf. had not put the whole premises into repair, but part only; & that defts. had not kept that part in repair; & the jury gave damages for the part:—*Held*: (1) the repair by pltf. was a condition precedent to the obligation on defts. to keep in repair; (2) on this contract, the condition precedent could not be divided, & pltf. could not recover for non-repair of any part of the premises without having first repaired the whole. *Qu.*: whether such a condition precedent might not be divided, if it related to subject matters clearly distinct in their nature; as if the contract in question had related to two dwelling-houses entirely separate from each other.—NEALE v. RATCLIFF (1850), 15 Q. B. 916; 20 L. J. Q. B. 130; 15 L. T. O. S. 475; 15 Jur. 106; 117 E. R. 704.

*Annotations*:—As to (1) *Folld.* Coward v. Gregory (1866), L. R. 2 C. P. 153. *Refd.* Rolt v. Cozens (1856), 18 C. B. 673.

**4625. —.]**—COWARD v. GREGORY, No. 4737, *post*.

**4626. —.]**—HENMAN v. BERLINER, No. 4470, *ante*.

**4627. Whether landlord's obligation devisible as to parts of demised property.]**—NEALE v. RATCLIFF, No. 4624, *ante*.

**4628. Whether notice to landlord required.]**—COWARD v. GREGORY, No. 4737, *post*.

**4629. Superintendence of work of landlord by named persons.]**—JONES v. CANNOCK, No. 4623, *ante*.

**4630. Promise by landlord before lease.]**—Premises were demised to a tenant under an agreement to keep & leave them in good repair. In an action against him for not leaving them in such repair, it would be a misdirection to tell the jury to regard a promise of the lessor to put the premises into repair made prior to the demise; but they may measure the extent of the repairs to be done by the age & class of the premises.—HAIRDANE v. NEWCOMB (1863), 3 New Rep. 139; 9 L. T. 420; 12 W. R. 135.

ii. Lessor to Provide Materials.

**4631. Whether condition or independent covenant.]**—ANON. (undated), Bro. N. C. 42; 73 E. R. 865.

**4632. —.]**—BROWNE v. WALKER (1687), 1 Lut. 394; 125 E. R. 207.

**4633. —.]**—The lessee covenanted to put a house in repair before June 1, "5,000 slates being found allowed & delivered by the lessor towards the repair," & afterwards to keep it in repair during the term. The lessor assigned a breach for not keeping in repair after June 1:—*Held*: no plea to say that the lessor had not after making the lease found allowed & delivered the slates, etc.—MUCKLESTONE v. THOMAS (1739), Willes, 146; 125 E. R. 1103.

**4634. —.]**—In an action on a covenant against a lessee for not repairing, the covenant adding "the lessor allowing & assigning timber for the repairs," it is necessary to aver that the lessor did

PART XVIII. SECT. 3, SUB-SECT. 2.—B. (b) i.

**4628 i. Whether notice to landlord required.]**—POYNTON v. CHAN (1910), App. D. 205.—S. AF.

**Sect. 3.—Liability of tenant to repair: Sub-sect. 2, B. (b) ii. & iii., & (c).]**

allow & assign timber, etc.—**THOMAS v. CADWALLADER** (1744), Willes, 496; 125 E. R. 1286.

**Annotations:—Distd.** Bristol (Dean & Chapter) v. Jones (1859), 28 L. J. Q. B. 201. **Consd.** Christie v. Borely (1860), 7 C. B. N. S. 561. **Refd.** Glazebrook v. Woodrow (1799), 8 Term Rep. 366; Neale v. Hatchell (1850), 15 Q. B. 916; Westacott v. Hahn, [1918] 1 K. B. 495.

**4635.** —.]—Where the tenant covenants to repair, if the lessor finds sufficient timber, the proviso restrains the covenant.—**DODD v. INNIS** (1772), Lofft, 56; 98 E. R. 530.

**4636.** — **Grant of timber as housebote.]—**In a lease for lives the lessee covenanted that he "would, from time to time, & at all times during the estate thereby granted, at his own proper costs & charges, well & sufficiently repair, amend, maintain, uphold & keep all & singular the thereby demised premises in all & all manner of needful & necessary reparations whatsoever; having or taking, in & upon the demised premises, competent & sufficient housebote, hedgebote, firebote, plowbote & gatebote for the doing thereof, without committing any waste or spoil." In an action by the lessor for not repairing:—**Held:** the lessee's covenant to repair was absolute: & the words "having or taking," etc., "without committing," etc., did not amount to a condition precedent that there should be a sufficient supply of that kind of timber on the premises; but only to a licence to the tenant to take it, if it were there, for repairs, even if made necessary by his own default, without being liable for waste.—**BRISTOL (DEAN & CHAPTER) v. JONES** (1859), 1 E. & E. 484; 28 L. J. Q. B. 201; 33 L. T. O. S. 8; 7 W. R. 307; 120 E. R. 991; *sub nom.* **BRISTOL (DEAN & CHAPTER) v. NUGENT**, 5 Jur. N. S. 956.

**4637.** — **Effect of word "agreed."]**—This, in my opinion, is an express covenant between the parties. . . . In 1 Roll. Abr. 518 C., pl. 2, it is laid down that "if a lease for years covenant to repair, provided always, & it is agreed that the lessor shall find great timber, this word 'agreed' will make a covenant" (**LORD CHELMSFORD**, C.).—**MILES v. TOBIN** (1867), 17 L. T. 432; 16 W. R. 465, L. C.

**Annotations:—Mentd.** Allen v. Seckham (1879), 11 Ch. D. 790; Bailey v. Icke (1891), 64 L. T. 789.

**4638.** — **Material to be provided on notice.]—**The tenant agreed to keep the buildings in good repair. The landlord, by a subsequent clause, agreed, on notice from the tenant, to find materials for repairs, the tenant doing the drawing & labour. A barn requiring repair the tenant gave the landlord notice to find materials, which he failed to do for more than the allowed period. The barn remained out of repair, in consequence of which a storm damaged the roof, & the rain entered & damaged the tenant's corn:—**Held:** the tenant was not entitled to damages for the injury done to his corn, for that his obligation to repair was not conditional on the landlord finding materials, & the damage arose from his own failure to carry out his part of the contract, & he ought to have repaired, & claimed the cost of the materials from the landlord.—**TUCKER v. LINGER** (1882), 21 Ch. D. 18; 51 L. J. Ch. 713; 46 L. T. 894; 30 W. R. 578, C. A.; *affd.* on other grounds (1883), 8 App. Cas. 508, H. L.

**Annotations:—Mentd.** Jersey v. Neath Union Grdns. (1888), 52 J. P. 582; Dashwood v. Magniac, [1891] 3 Ch. 306; Re Constable & Cranwick (1899), 80 L. T. 164; Produce Brokers Co. v. Olympia Oil & Cake Co., [1916] 1 A. C. 314.

**4639.** — **Dependent on provisions of lease as a whole.]—**(1) By an indenture of lease made in 1905 a farm in Middlesex was demised for a term

of twenty-one years. The lease contained, among the covenants by the lessee, the following covenant: " & also will from time to time during the term at his own cost (being allowed all necessary materials for this purpose (to be previously approved in writing by the lessors) & carting such materials free of cost a distance not exceeding five miles from the farm) when & so often as need shall require well & substantially repair & maintain . . . the farm house, stable, land & premises . . . with all manner of needful & necessary reparations . . . (damage by accidental fire excepted)". Towards the end of the deed there were certain covenants by the lessor. The deed contained a power to the lessor at any time to resume possession of & determine the tenancy as to any portion of the demised premises in the event of his selling or letting same for any purpose, with certain exceptions, on giving three months' notice, allowing a proportionate abatement of rent, provided that if more than twenty-six acres were taken the lessee might on giving notice determine the lease. The deed also gave the lessor power to determine the lease at the end of the first seven or fourteen years with a view to selling or letting the land for any purpose, with certain exceptions; & it gave the lessee an unfettered power to determine the lease at the same periods; in each case on giving twelve months' notice:—**Held:** the clause above set out within brackets, when read in conjunction with the rest of the deed, was a qualification of the lessee's covenant to repair, & not a covenant by the lessor to supply the materials necessary for the repairs.

(2) Whether the clause is intended to be a covenant by the lessor or a qualification of the lessee's covenant depends in each case upon the provisions of the lease as a whole. A clause may be both a covenant & a qualification:—**Held:** evidence of a custom that "the landlord provides the tenant with materials necessary for the proper repair & maintenance of the demised premises, lands, & hereditaments, & the tenant repairs & maintains same with such materials & provides the necessary cartage," was inadmissible inasmuch as it would be inconsistent with the terms of the lease, which dealt with this subject in a particular manner.—**WESTACOTT v. HAHN**, [1918] 1 K. B. 495; 87 L. J. K. B. 555; 118 L. T. 615; 34 T. L. R. 257; 62 Sol. Jo. 348, C. A.

**4640.** **What amounts to performance—Landlord ready & willing to supply.]—****MARTYN v. CLUE**, No. 4539, *ante*.

**4641.** **Agreement for lease—Decree for specific performance of agreement—Recovery of cost of materials.]—**An agreement was made between A. & B. that A. should grant to B. a lease of a certain farm, upon the same terms as those contained in a lease already granted by A. to C., & that B. should be at liberty to repair & alter the farm buildings, & that A. should find or pay for the requisite materials. B. was let into possession, & paid rent for some years but no lease was granted, & ultimately he filed a bill for specific performance, & an account of & payment for materials. A. objected that B. had committed breaches of covenant which would have entitled A. to determine the lease. The ct. being of opinion that it was doubtful whether A. could, in the circumstances of the case, have determined the lease for breaches of covenant, decreed specific performance, but ordered the lease to be ante-dated, so that the question might be tried at law:—**Held:** though the claim for materials might be a mere money demand, yet as the ct. decreed specific performance of the main part of the agreement, it had juris-

diction to give relief in respect of this claim also.—*LILLIE v. LEIGH* (1858), 3 De G. & J. 204; 44 E. R. 1247, L. J.J.

*Annotation* :—*Refd.* Rankin v. Lay (1860), 2 De G. F. & J. 65.

**4642. Evidence of custom to provide material—Where particular provision in lease.**—*WESTACOTT v. HAHN*, No. 4639, *ante*.

**Right of tenant to timber.**—*See* Sect. 7, *post*.

### iii. Appointment of Surveyor of Repairs.

**4643. Appointment condition precedent.**—The declaration stated, that by indenture pltf. demised a dwelling-house & premises to deft., & deft. thereby covenanted that he would expend £100 in substantial improvements of & additions to the dwelling-house, under the direction & with the approbation of some competent surveyor, to be named by & on the part of pltf. Breach, that deft. did not expend £100 on substantial improvements & additions to the dwelling-house, under the direction or with the approbation of a competent surveyor, to be named by & on the part of pltf., but neglected & refused so to do, although pltf. was always ready & willing to appoint a competent surveyor to approve of such substantial improvements & additions :—*Held* : the breach was bad, for that the appointment of a surveyor was a condition precedent to deft.'s liability to expend the £100.—*COOMBE v. GREENE* (1843), 11 M. & W. 480; 12 L. J. Ex. 291; 152 E. R. 891; *sub nom.* *COMBE v. GREEN*, 1 L. T. O. S. 148.

*Annotation* :—*Apld.* *Re* Northumberland Avenue Hotel Co., Fox & Braithwaite's Claim (1887), 56 L. T. 833.

**4644.** ———.]—By indenture of May 31, 1852, E. demised to deft. for ninety-nine years, a piece of land & four unfinished dwelling-houses; & deft. covenanted that he would on or before June 25, 1852, finish the dwelling-houses "under the direction & to the satisfaction of the surveyor of E.": Provided that, if default should be made, it should be lawful for E. "into the demised premises or any part thereof in the name of the whole, & repossess, retain, & enjoy same as of his former estate." By indenture of July 30, 1852, between E. of the one part, & pltf. of the other part, after reciting an indenture of lease of Feb. 18, 1852, whereby S. demised to E. certain land, including the land in question, for ninety-nine years, & that E. had made underleases, E. assigned to pltf. the leasehold premises, "& all the estate right, title, & interest of him the said E. in, to, or out of the premises," for the residue of the term of years granted by the aforesaid indenture of lease; subject, nevertheless, to the underleases thereinbefore referred to. Deft. did not complete the houses at the stipulated time; whereupon pltf. brought an action of ejectment against him. No surveyor had been appointed :—*Held* : the appointment of a surveyor was a condition precedent to the performance of deft.'s covenant to complete the houses.—*HUNT v. BISHOP* (1853), 8 Exch. 675; 1 C. L. R. 97; 22 L. J. Ex. 337; 21 L. T. O. S. 92; 155 E. R. 1523.

*Annotation* :—*Refd.* *Atkin v. Rose*, [1923] 1 Ch. 522.

**Agreement as to supervision of repairs by lessor.**—*See* No. 4623, *ante*.

### (c) Covenant to Repair after Notice.

*See* Law of Property Act, 1925 (c. 20), s. 146.

**4645. Who bound by notice—Where lessee grants underlease—Not underlessee.**—*SWETMAN v. CUSH* (1803), Cro. Jac. 8; 79 E. R. 8; *sub nom.*

*STRETTON v. CUSH*, 1 Brownl. 135; *sub nom.* *SWELNAM v. CUTS*, Moore, K. B. 680; *sub nom.* *STWETON v. CUSHE*, Yelv. 36.

*Annotations* :—*Distd.* Doe d. Brook v. Brydges (1822), 2 Dow. & Ry. K. B. 29. *Refd.* Nurse v. Frampton (1693), 1 Salk. 214.

**4646.** ———.]—In 1807 a lease was granted to F., containing a general covenant to repair, a covenant to repair within three months after notice, & a proviso for re-entry for breach. Pltfs., the assignees of the lessee, in 1808 granted an underlease to deft. with similar covenants, except that the notice was to be a two months' notice. In Sept. 1872, the premises being out of repair, the reversioner served on the premises a notice to repair pursuant to the terms of the lease of 1807. Deft. not having complied with this, pltfs., on Mar. 20, 1873, served him with a notice "to repair the premises in accordance with the terms of his lease"; & being threatened by the reversioner with proceedings to enforce a forfeiture, they entered & did the required repairs themselves, & before the expiration of two months after their notice brought an action against deft. upon the covenants in his lease :—*Held* : they were not entitled to recover substantial damages on the general covenant, the premises not being out of repair at the commencement of the action; nor could they sue on the special covenant, the action being brought too soon, as deft., being no party to the lease of 1807, was not bound by the earlier notice of Sept. 1872.—*WILLIAMS v. WILLIAMS* (1874), L. R. 9 C. P. 659; 43 L. J. C. P. 382; 30 L. T. 638; 22 W. R. 706.

*Annotation* :—*Consd.* *Clare v. Dobson*, [1911] 1 K. B. 35.

**4647. Additional covenant to leave in repair—Covenants separable—Notice not required at end of term.**—A covenant to repair during the term, after three months' notice, & to leave the premises in repair at the end of the term, are distinct clauses, & notice is not necessary to sustain an action for non-repair at the end of the term.—*HARPLET v. BUTCHER* (1622), Cro. Jac. 644; 79 E. R. 555; *sub nom.* *ANON.*, 2 Roll. Rep. 250.

**4648.** ———.]—A covenant to rebuild a house in two years, & sufficiently to repair same & all other buildings to be erected during the term, when, where, & as occasion should require, & same in all things sufficiently repaired, in the end of the term to yield up to the lessor, was followed by a covenant that the lessor might, twice or oftener in a year, enter to view the condition of the premises, & of all want of reparations leave notice in writing to repair within six months, within which time the lessee covenanted to repair accordingly :—*Held* : the first covenant was not so qualified by the last, but that pltf. might declare on the leaving the premises out of repair at the end of the term without averring or proving six months' notice to repair.—*WOOD v. DAY* (1817), 7 Taunt. 646; 1 Moore, C. P. 389; 129 E. R. 257.

*Annotations* :—*Folld.* Doe d. Morecraft v. Meux (1825), 7 Dow. & Ry. K. B. 98; Baylis v. Le Gros (1858), 4 C. B. N. S. 537.

**4649.** ———.]—Where there is a general covenant to repair, & leave in repair, & another covenant to repair on a month's notice if the declaration assign a breach on each of these covenants it is open to a special demurrer if the damages from each are not separately stated.—*WRIGHT v. GODDARD* (1838), 8 Ad. & El. 144; 3 Nev. & P. K. B. 361; 1 Will. Woll. & II. 230; 7 L. J. Q. B. 174; 2 Jur. 840; 112 E. R. 791.

*Annotation* :—*Mentd.* *Tronson v. Dent* (1853), 8 Moo. P. C. C. 419.

*Sect. 3.—Liability of tenant to repair: Sub-sect. 2, B. (c), & C. (a) & (b).]*

**4650. Additional covenant to repair generally.—Whether covenants separable.**—In an indenture of lease with a clause of re-entry, there is a general covenant on the part of the tenant to keep the premises in repair; & it is further stipulated by an independent covenant, that the tenant within three months from notice being served upon him by the landlord shall repair all defects specified in the notice. The landlord after serving him with a notice may within the three months bring an ejectment against him for a breach of the general covenant to repair.—*ROE d. GOATLY v. PAINE* (1810), 2 Camp. 520, N. P.

*Annotations:—Distd. Doe d. Morecraft v. Meux* (1825), 4 B. & C. 606. *Consd. Doe d. De Rutzen v. Lewis* (1836), 5 Ad. & El. 277. *Folld. Baylis v. Le Gros* (1858), 4 C. B. N. S. 537; *Few v. Perkins* (1867), L. R. 2 Exch. 92.

**4651.** ———.]—A covenant to repair at all times, when, where, & as often as occasion should require during the term, & at furthest within three months after notice of want of reparation, is one covenant; & it cannot be stated as an absolute covenant to repair at all times when, where, & as often as occasion shall require during the term.

This is one entire covenant, the whole of which must be taken together (*DALLAS, J.*).—*HORSEFALL v. TESTAR* (1817), 7 Taunt. 385; 1 Moore, C. P. 89; 129 E. R. 154.

*Annotations:—Consd. Baylis v. Le Gros* (1858), 4 C. B. N. S. 537. *Refd. Wood v. Day* (1817), 1 Moore, C. P. 389.

**4652.** ———.]—Covenants to repair generally & to repair within three months after notice in writing are independent covenants.—*DOE d. MORECRAFT v. MEUX* (1825), 4 B. & C. 606; 7 Dow. & Ry. K. B. 98; 4 L. J. O. S. K. B. 4; 107 E. R. 1185.

*Annotations:—Consd. Doe d. De Rutzen v. Lewis* (1836), 5 Ad. & El. 277. *Folld. Baylis v. Le Gros* (1858), 4 C. B. N. S. 537. *Consd. Few v. Perkins* (1867), L. R. 2 Exch. 92. *Refd. Jones v. Carter* (1846), 15 M. & W. 718; *Gregory v. Wilson* (1852), 9 Hare, 683; *Croft v. Lumley* (1858), 6 H. L. Cas. 672; *Dendy v. Nicholl* (1858), 4 C. B. N. S. 376; *Evans v. Wyatt* (1880), 43 L. T. 176; *Civil Service Co-op. Soc. v. McGrogan's Trustee*, [1923] 2 Ch. 347.

**4653.** ———.]—A general covenant to repair & further to repair within 3 months after notice from the lessor are separate & independent covenants, & a right of re-entry attaches for a breach of the former, though no notice be given under the latter.—*BAYLIS v. LE GROS* (1858), 4 C. B. N. S. 537; 31 L. T. O. S. 215; 22 J. P. 482; 4 Jur. N. S. 513; 140 E. R. 1201.

**4654.** ———.]—An indenture of lease, with a clause for re-entry, contained a general covenant on the part of the lessee to keep the premises demised in repair, & a further covenant that he would, within three months after notice being given to him by the landlord, repair all defects specified in the notice. The premises demised being out of repair, the landlord gave the lessee notice to repair, "in accordance with the covenants" of the lease. Before the expiration of three months ejectment was brought:—*Held*: the notice was not a waiver of the forfeiture incurred by the breach of the general covenant to repair, & the action was maintainable.—*FEW v. PERKINS* (1867), L. R. 2 Exch. 92; 36 L. J. Ex. 54; 16 L. T. 62; 15 W. R. 713.

*Annotation:—Apld. Cove v. Smith* (1886), 2 T. L. R. 778.

*See, generally, DEEDS, Vol. XVII., p. 397, Nos. 2061 et seq.*

**PART XVIII. SECT. 3, SUB-SECT. 2.—B. (c).**

**46501. Additional covenant to repair generally.—Whether covenants separable.**—*THISTLE v. UNION FORWARDING & RY. CO.* (1878), 29 C. P. 76.—*CAN.*

**PART XVIII. SECT. 3, SUB-SECT. 2.—C. (a).**

*h. Buildings in existence at demise.*—*PUHI MAIHI v. McLEOD*, [1920] N. Z. L. R. 372.—*N.Z.*

*k. Property specified.*—*MURMAN*

**Notice to repair—As basis of forfeiture—Under Conveyance Act, 1881 (c. 41), s. 14.]—See Part XXIV., Sect. 1, sub-sect. 4, D. (a), post.**

**C. What Property Included.**

**(a) In General.**

**4655. Pavement within the curtilage.**—*PYOT v. ST. JOHN (LADY)*, No. 4743, post.

**4656. Fixtures—Shelves.**—*PYOT v. ST. JOHN (LADY)*, No. 4743, post.

**4657.** ——— *Mill wheel.*—An agreement for the letting of a farm & mill provided that the tenant "should keep & leave the messuages & buildings in good & substantial repair," etc. In an action by the landlord to recover damages for non-repair of the mill wheel:—*Held*: the tenant was liable.—*OPENSHAW v. EVANS* (1884), 50 L. T. 156, D. C.

**4658.** ——— *Windows.*—In a lease of a house the term "fixture" means something which is affixed to the premises after the structure of the house is completed. It does not include things which form part of the original structure itself.

A tenant of business premises, the sides of which mainly consisted of plate glass windows of the ordinary kind which do not open, covenanted to repair (*inter alia*) the landlord's fixtures:—*Held*: as the windows formed part of the structure of the house, the covenant did not extend to them.—*BOSWELL v. CRUCIBLE STEEL CO.*, [1925] 1 K. B. 119; 94 L. J. K. B. 383; 132 L. T. 274; 69 Sol. Jo. 842, C. A.

**4659.** ——— *Utensils or movable chattels—Used on premises for business purposes.*—(1) A covenant in an indenture of lease by which the lessees, for themselves, their heirs, exors., administrators, & assigns, covenanted that they, their exors., administrators, & assigns, would not assign, underlet, or otherwise part with the possession of the demised premises without first obtaining the consent in writing of the lessor, is a covenant which touches & concerns the land, & therefore runs with the land, & the lessor can sue an assignee of the lessee for the breach of it. (2) Similar covenants to keep in repair the buildings, & to repair, renew, & replace tenant's fixtures & machinery fixed to the premises, run with the land, & bind the assignee; but not similar covenants as to mere utensils or movable chattels used in the business carried on in the demised premises & being there at the time of the demise.—*WILLIAMS v. EARLE* (1868), L. R. 3 Q. B. 739; 9 B. & S. 740; 37 L. J. Q. B. 231; 19 L. T. 238; 33 J. P. 86; 16 W. R. 1041.

*Annotations:—As to (1) Consd. Horsey Estate v. Steiger*, [1899] 2 Q. B. 79. *Apld. Re Stephenson, Poole v. Stephenson*, [1915] 1 Ch. 802. *Refd. West v. Dobb* (1869), L. R. 4 Q. B. 634; *Lepla v. Rogers*, [1893] 1 Q. B. 31; *Douglas v. Deroy* (1895), 39 Sol. Jo. 484; *Langton v. Henson* (1905), 92 L. T. 805; *Cohen v. Popular Restaurants*, [1917] 1 K. B. 480. *Generally, Mentd. Hardy v. Fothergill* (1888), 13 App. Cas. 351.

**4660.** ——— *Covenant runs with the land.*—*WILLIAMS v. EARLE*, No. 4659, ante.

*Compare Sect. 1, ante.*

———.]—*See, generally, Part XIV., ante.*

**(b) Buildings Erected Subsequent to Demise.**

**4661. General covenant—Subsequent buildings included.]—Covenant in a lease to repair, etc., prædmissa from the time of the lease to the determination thereof, & so well kept in repair**

*v. MINCHIN* (1910), 10 H. C. 313.—*S. AF.*

**PART XVIII. SECT. 3, SUB-SECT. 2.—C. (b).**

**1. Buildings not let into ground.]—**

shall give up at the end of term, not saying from time to time; afterwards the lessee built a malt-house, & if the covenant should extend to it was the question:—*Held*: it should in this case for it was a continuing covenant; & though the house had no actual, yet it had a potential being at the time of the lease.—*BROWN v. BLUNDEN* (1883), *Skin*. 121; 90 E. R. 56.

*Annotation*:—*Consd.* *Smith v. Mills* (1899), 16 T. L. R. 59.

**4662.** ———.]—(1) A lease contained a demise of three houses & a field to B. for a term of ninety-nine years, with a covenant on his part "well & sufficiently to repair, sustain, & keep the tenements or dwelling-houses, field or plot of ground & premises, & every part thereof, as well in houses, buildings, walls, hedges, ditches, fences, & gates, as in all other needful & necessary reparations whatsoever, when & so often as occasion shall require during the term, & at the end or other determination thereof the premises, so well & sufficiently repaired, into the hands & possession of the lessors peaceably to leave & yield up." B. granted an underlease of the field to one C., who granted other underleases to several persons, who erected houses in the field:—*Held*: the covenant to repair contained in the lease to B. did not extend to the houses erected during the term in the field.

Where there is a general covenant to repair & keep & leave in repair, the proper inference from that is that the party undertakes to repair newly erected buildings; on the other hand, where there is a particular covenant to repair demised buildings, then no such liability arises (*CHANNEL, B.*).

(2) I think that if an addition had been made to an old house, by putting up a lean-to, a barn, or a stable, it would have been part of the house within the meaning of the covenant; but I cannot see that the covenant applies to that which is a separate, new & independent dwelling-house (*BRAMWELL, B.*).—*CORNISH v. CLIFFE* (1864), 3 H. & C. 446; 34 L. J. Ex. 19; 11 L. T. 606; 29 J. P. 167; 11 Jur. N. S. 181; 13 W. R. 380; 159 E. R. 605.

*Annotations*:—*Consd.* *Hudson v. Williams* (1878), 39 L. T. 632. *Distd.* *Sunderland Orphan Asylum v. River Wear Comrs.* (1911), 106 L. T. 288.

**4663.** ———.]—By a lease dated 1837 the lessors demised to the lessee for ninety-nine years a piece of ground, "together with the messuages or tenements & all other erections & buildings which at any time hereafter during the said term shall be built on the same piece of ground or any part thereof," & the lessee covenanted to build on the ground demised two good & substantial brick messuages or tenements, & to repair & keep repaired "the said premises." The lessee built six houses, as to which it was impossible to say which two were actually completed first; but the judge came to the conclusion on the evidence that the six were built simultaneously & finished at the same time:—*Held*: the covenant to repair extended not only to the two houses which the lessee covenanted to build but to all the six houses.—*FIELD v. CURNICK*, [1926] 2 K. B. 374; 95 L. J. K. B. 756; 135 L. T. 474; 42 T. L. R. 510.

**4664. To repair buildings "to be erected"**—*Subsequent buildings included.*—Covenant by a tenant to erect three houses, & them to keep in repair, & the premises & the houses thereupon to be erected, to deliver up sufficiently repaired at

the end of the term; this covenant extends to all houses erected upon the premises before the end of the term.—*DOUSE v. EARLE* (1888), 3 Lev. 263; 83 E. R. 681; *sub nom.* *DOWSE v. CALE*, 2 Vent. 126.

**4665.** ——— *Built on adjoining waste with consent of landlord—Used with demised premises.*]

—Under a lease of a farm, the tenant was bound to keep in repair the buildings to be erected thereon. During the term the tenant, with the permission of the landlord, who was lord of the manor, built a house on the waste adjoining the farm, & he enjoyed it with the farm:—*Held*: the tenant was also under an obligation to keep this house in repair.—*WHITE v. WAKLEY* (No. 1) (1858), 26 Beav. 17; 22 J. P. 705; 4 Jur. N. S. 988; 53 E. R. 802; *sub nom.* *Re NEWBERRY*, *WHITE v. WAKLEY*, 28 L. J. Ch. 77; 32 L. T. O. S. 24; 6 W. R. 791.

**4666.** ———.]—*MINSHULL v. OAKES*, No. 4544, *ante*.

**4667.** ———.]—At the date of a lease, in 1779, the only building on any part of the demised land was the messuage or tenement mentioned in the first portion of the parcels. During the currency of the term, however, the various assignees of it from time to time built houses upon the land, so that at the expiration of the term in 1877, not only the site of the original messuage & garden, but also the one-acre field lying behind, was covered with numerous small houses, all of which were at that date out of repair, & a large number of them in a state of ruinous dilapidation. Defts. during the time the term was vested in them erected no buildings. Pltfs., as reversioners, sued defts., as assignees of the term, for damages in respect of all the buildings on the demised land, defts. contending that they were only liable in respect of the buildings erected on the first-mentioned piece or parcel of land, the site of the original messuage & garden:—*Held*: the covenant to repair extended to the whole of the demised land & the buildings thereon erected, & defts. were therefore liable to the full extent of pltf.'s claim.—*HUDSON v. WILLIAMS* (1878), 39 L. T. 632.

**4668.** ———.]—A co. from the year 1857 until the year 1912 continuously occupied & carried on the business of manufacturers of artificial manure & sulphuric acid on premises held by them under three successive leases, being (a) a lease for lives granted in 1857, (b) a lease for lives granted in 1868 in consideration of the surrender of the 1857 lease & including a small additional piece of land, & (c) a lease for fourteen years, but determinable by the co. on six months' notice, granted in 1912 in pursuance of an agreement made in 1910 (though subsequently varied in certain respects) immediately after the expiration of lease (b) by the cesser of the last life therein mentioned. Leases (b) & (c) contained a covenant to repair & yield up in repair the demised premises, including any existing or future "erections" or "buildings." The 1912 lease also contained a covenant to insure against damage by fire & to reinstate out of the policy moneys. Upon the premises the co., at their own expense, erected various ordinary buildings for the purposes of their manure manufacture, & also a complete set of sulphuric acid making plant on the "chamber

*ALLARDICE v. DISTEN* (1861), 11 C. P. 278.—*CAN.*

*m. Original buildings destroyed by fire.*—A lessee of land is liable to

his landlord for breaches of covenant to repair messuages & premises which had taken the place of others destroyed by fire, & which had been originally erected under the covenant to build,

notwithstanding that there was no obligation to build other premises.—*GREENE v. SOUTHCOOT* (1879), 6 Nfld. L. R. 176.—*NFLD.*

**Sect. 3.—Liability of tenant to repair: Sub-sect. 2, C. (b), & D. (a) i., ii. & iii.]**

process," consisting of pyrites burners, four reaction chambers, & two so-called "towers" usually known as a "Glover tower" & "Gay-Lussac tower." The "towers" & the three chambers were so erected before the 1868 lease, but the fourth chamber was put up between 1868 & 1910. Three of the chambers were of great size, approximately one hundred & forty feet long, twenty feet wide, & fourteen feet high, & each consisted of a rectangular leaden vessel supported by & enclosed in a substantial wooden framework, the lowest part of which consisted of a series of beams resting mainly on but not fixed to stone walls & pillars, except in the case of one chamber, which rested almost entirely on unfixed iron columns. The fourth chamber was really an open tank standing on a wooden platform upon beams themselves rested on the stone walls & pillars. Each of the "towers" was in effect an upright "chamber" enclosed in a wooden framework & supported by four wooden posts having iron "shoes" & resting by their own weight on a necessary foundation. In 1916 a fire occurred on the premises, & shortly afterwards deft. co. determined their lease & removed all that was left of the materials of the chambers & towers. In an action by the lessor for damages for breach of the covenants in the 1912 lease:—*Held*: the chambers & the towers must, having regard to all the circumstances, be regarded as integral portions of one composite building permanently annexed to the freehold, & not as chattels or as tenant's fixtures, & they were within the express terms of the covenant in the 1912 lease to repair & yield up.—*POLE-CAREW v. WESTERN COUNTIES & GENERAL MANURE CO.*, [1920] 2 Ch. 97; 89 L. J. Ch. 559; 123 L. T. 12; 36 T. L. R. 322, C. A.

**4669.** ———.]—*FIELD v. GURNICK*, No. 4063, *ante*.

**4670.** ——— **Erection of buildings not within covenant.]**—*SMITH v. MILLS* (1899), 16 T. L. R. 59; 44 Sol. Jo. 91.

**4671. To repair "demised premises"—"With all new erections"—Extends only to new erections.]**—Covenant to leave demised premises with all new erections well repaired, extends to the new erections only.—*LANT v. NOURIS* (1757), 1 Burr. 287; 97 E. R. 317.

*Annotations:—Refd.* *Monypenny v. Monypenny* (1859), 3 De G. & J. 572; *Stephens v. Junior Army & Navy Stores*, [1914] 2 Ch. 516.

**4672.** ——— **New buildings excluded.]**—*DOE d. WORCESTER TRUSTEES v. ROWLANDS*, No. 4821, *post*.

**4673.** ———.]—*CORNISH v. CLEIFE*, No. 4062, *ante*.

**4674. What amounts to new building—Not lean-to on old house.]**—*CORNISH v. CLEIFE*, No. 4062, *ante*.

**D. Nature and Amount of Repair.**

**(a) Under General Covenant to Repair.**

**i. In General.**

**4675. Covenants to be reasonably construed.]**—*SCALES v. LAWRENCE*, No. 4682, *post*.

**PART XVIII. SECT. 3, SUB-SECT. 2.—D. (a) i.**

**4675 i. Covenants to be reasonably construed.]**—A general covenant to repair must be construed with moderation & not with severity, so that nothing will be exacted at the expiration of the lease in the nature of repairs, except such as are necessary to make the premises reasonably fit for occupation by tenants of the class likely to occupy.—*ROYAL TRUST*,

*Co. v. R.*, [1924] Exch. C. R. 121.—*CAN.*

**4677 i. Reasonable fitness for occupation required.—Habitable repair.]**—*ROYAL TRUST Co. v. R.*, [1924] Exch. C. R. 121.—*CAN.*

**4678 i. ——— Tenantable repair.]**—Where a tenant accepted of premises "as in proper tenantable condition & repair" & bound himself to leave them "in good tenantable condition & repair at the expiry of this tack":

**4676. Sustaining & upholding premises.]**—*AUWORTH v. JOHNSON*, No. 5000, *post*.

**4677. Reasonable fitness for occupation required ——"Habitable repair."]**—The term "habitable repair" means a state of repair reasonably fit for the occupation of an inhabitant. Where a tenant takes premises which are out of repair, & agrees "to put the premises into habitable repair," this implies that he is to put them into a better state than that in which he found them; & regard being had to the state of the premises at the time of the agreement, & of their situation, & to the class of persons likely to inhabit them, he is to put them into a condition fit for a tenant to inhabit.

A covenant by a lessee, "to put premises into habitable repair," binds him to put them into such a state that they may be occupied, not only with safety, but with reasonable comfort, for the purposes for which they are taken.—*BELCHER v. M'INTOSH* (1839), 8 C. & P. 720; 2 Mood. & R. 186, N. P.

*Annotations:—Consd.* *Proudfoot v. Hart* (1890), 25 Q. B. D. 42; *Calthorpe v. McOscar*, [1923] 2 K. B. 573.

**4678. ——— Tenantable repair.]—Re ROMFORD GUARDIANS & WITHERS (1918), 144 L. T. Jo. 197.**

**4679. Substantial repairs requisite—Slight defects not considered.]**—*CONYSBIE'S CASE* (1639), March, 17; 82 E. R. 391.

**4680.** ———.]—*HARRIS v. JONES*, No. 4693, *post*.

**4681.** ———.]—*STANLEY v. TOWGOOD*, No. 4694, *post*.

**4682.** ———.]—On a covenant as often as necessary well & sufficiently to repair, cleanse, etc., & keep & leave in such repair, reasonable wear & tear excepted, the tenant, if he has repaired within a reasonable time before leaving, is only bound, in addition to the repair of the actual dilapidations, to clean the old paint, etc., & not to repaint, etc.

By the covenant deft. was bound to do all that was necessary to leave the house in a good condition, with reference to the obligation of a tenant. As to that, you must consider the character & condition of the house; thus, if he takes an old house, he must not let it tumble down, he must keep it up; but only as an old house. No tenant is bound to leave for his landlord a new house; but the house which he took, in a state of fit repair, as such house. If he has painted the outside in three years, & the inside within seven years, he is not bound to do it again when leaving, unless so far as is required by actual dilapidations or destruction of the paint; & so of other repairs. He may if he likes, have the benefit of his repairs, so as he leaves the premises in a fit state, reasonable wear & tear excepted. If he painted & papered within seven years, & there is no damage in the way of breaking down or tearing off, then the reasonable construction of the covenant is, that he should "cleanse" the old paint, etc., or renew it only where destroyed, & give up the house in a clean & fair condition, & for fair wear & tear he would not be liable. The landlord is not to claim for every crack in the glass or every scratch on the

*—Held*: he was bound to execute all ordinary repairs that were necessary during the tenancy to keep the premises in tenantable condition.—*TURNER'S TRUSTEES v. STEEL* (1900), 2 F. (Ct. of Sess.) 363; 37 Sc. L. R. 272; 7 S. L. T. 301.—*SCOT.*

**4678 ii.** ———.]—*DREW v. ZIEHL* (1918), 39 N. L. R. 258.—*S. AF.*

*n. Value of premises not to be diminished.]*—*HOLDERNESS v. LANG* (1886), 11 O. R. 1.—*CAN.*

paint. Such covenants must not be strained, but reasonably construed, on the principle of "give & take" (WILLES, J.).—*SCALES v. LAWRENCE* (1860), 2 F. & F. 289, N. P.

*Annotation*:—*Reid*. *Calthorpe v. McOscar*, [1923] 2 K. B. 573.

**4683.** ———.]—*PERRY v. CHOTZNER* (1893), 9 T. L. R. 488.

*Annotation*:—*Reid*. *Calthorpe v. McOscar*, [1923] 2 K. B. 573.

**4684. What included in term "repair"—**  
**"Good," "sufficient," "tenantable."**—*ANSTRUTHER-GOUGH-CALTHORPE v. McOSCAR*, No. 4710, *post*.

## ii. Condition of Premises at Time of Demise.

**4685. Liability of tenant determined in relation thereto.**—In an action on a covenant to keep premises in repair during the tenancy, the jury may take into consideration the state of repairs at the commencement of the demise, in order to assess the damages for which deft. is liable.—

*BURDETT v. WITHERS* (1837), 7 Ad. & El. 136; *Will. Woll. & Dav.* 444; 2 Nev. & P. K. B. 122; 6 L. J. K. B. 219; 1 Jur. 514; 112 E. R. 422.

*Annotations*:—*Consd.* *Payne v. Haine* (1847), 16 M. & W. 541. *Reid*. *Hart v. Windsor* (1843), 12 M. & W. 68; *Smith v. Peat* (1853), 9 Exch. 161.

**4686.** ———.]—*MANTZ v. GORING*, No. 4698, *post*.

**4687.** ———.]—A general covenant to repair must be construed to have conference to the condition of the premises at the time when the covenant begins to operate (*PARKE, B.*).—*WALKER v. HATTON* (1842), 2 Dowl. N. S. 203; 10 M. & W. 249; 11 L. J. Ex. 371; 152 E. R. 462.

*Annotations*:—*Mentd.* *Tindal v. Bell* (1843), 12 L. J. Ex. 160; *Logan v. Hall* (1847), 4 C. B. 598; *Smith v. Howell* (1851), 6 Exch. 730; *Broom v. Hall* (1859), 7 C. B. N. S. 503; *Williams v. Williams* (1874), L. R. 9 C. P. 659; *Clare v. Dobson*, [1911] 1 K. B. 35.

**4688.** ———.]—In covenant, on a lease of a farm & cottages, to keep & uphold & maintain the premises in good repair:—*Held*: the lessee or assignee was bound to keep up the cottages *in situ*, & to repair them if ruinous, or so as to replace them as nearly as might be in the position in which they were when demised; & liable, having pulled them down, for their value as they stood, without reference to the result of their removal as regarded the general improvement of the farm.

You may show their general condition to show the sort of repair sufficient to satisfy the covenant, but their being ruinous would be no answer to a covenant to keep them up in repair, which, even if they fell down, would compel you to rebuild them as nearly as might be in the same state, so as it was a tenantable state, in which they were when demised. The plea of payment into ct. admits the pulling down & the actual conversion of the materials, & the only question is as to the value of the cottages as they stood, & put in as good a state of repair as the covenant required (*WILLES, J.*).—*WOOLCOCK v. DEW* (1858), 1 F. & F. 337.

**4689.** ———.]—*LISTER v. LANE & NESHAM*, No. 4700, *post*.

**4690.** ———.]—**Deterioration of support of superstructure—Lessees not liable for absolute safety.**—A lease by the Mayor & Corpn. of London to a railway co. of portions of the substructure & supports of Smithfield Meat Market for the purposes of a station for a term of 100 years from Aug. 1, 1878, perpetually renewable, contained a covenant that the lessees would, during the term, "well & sufficiently maintain, uphold, support, & keep in good, substantial, & tenantable repair" all the demised premises, including the walls,

piers, pillars, supports, & roof forming part of the same. The substructure had been excavated & the supports for the roof constructed upon a standard of efficiency to the satisfaction of referees appointed on behalf of the lessors & lessees, in pursuance of an agreement of 1862. There was evidence that some of the iron girders supporting the roof & superstructure had become corroded & weakened, & in 1907 notice to repair according to the covenant was given to the lessees:—*Held*: upon the true construction of the lease, the lessors were entitled to require the lessees to maintain the demised premises at a standard of strength & stability corresponding with that originally fixed, & not merely in such a condition as would secure the absolute safety of the superstructure.—*Re LONDON CORPN., LONDON CORPN. v. GREAT WESTERN & METROPOLITAN RYS.*, [1910] 2 Ch. 314; 79 L. J. Ch. 622; 103 L. T. 20; 54 Sol. Jo. 562.

*Annotation*:—*Reid*. *Anstruther-Gough-Calthorpe v. McOscar*, [1924] 1 K. B. 716.

**4691. Ruinous condition of premises—Subsequent collapse—Extent of liability.**—*WOOLCOCK v. DEW*, No. 4688, *ante*.

**4692.** ———.]—*SCALES v. LAWRENCE*, No. 4682, *ante*.

## iii. Age of Premises.

**4693. Measure of extent of liability.**—A general covenant to repair, is satisfied by the lessee keeping the premises in substantial repair; a literal performance of the covenant is not to be required.

Deft. was only bound to keep up the house as an old house, not to give pltf. the benefit of new work (*TINDAL, C.J.*).—*HARRIS v. JONES* (1832), 1 Mood. & R. 173, N. P.

*Annotation*:—*Reid*. *Calthorpe v. McOscar*, [1923] 2 K. B. 573.

**4694.** ———.]—(1) A covenant to keep & leave a house in repair, is satisfied by keeping it in substantial repair, according to the nature of the building; & with a view to determine the relative sufficiency of the repair, the jury may inquire whether the house were new or old at the time of the demise.

(2) The lessee during the term erected a lean-to, with a roof so ill-constructed that it did not exclude the weather & so left it at the end of the term:—*Held*: this was a breach of his covenant to repair.

In all these cases the question is whether the premises have been kept in substantial repair as opposed to claims for fancied injuries (*TINDAL, C.J.*).—*STANLEY v. TOWGOOD* (1836), 3 Bing. N. C. 4; 2 Hodg. 132; 3 Scott, 313; 6 L. J. C. P. 129; 132 E. R. 310.

*Annotations*:—*As to* (1) *Expld.* *Young v. Mantz* (1838), 6 Scott, 277. *Consd.* *Proudfoot v. Hart* (1890), 25 Q. B. D. 42. *Reid*. *Hart v. Windsor* (1843), 12 M. & W. 68; *Payne v. Haine* (1847), 16 M. & W. 541; *Miller v. Burt* (1918), 63 Sol. Jo. 117; *Calthorpe v. McOscar*, [1923] 2 K. B. 573.

**4695.** ———.]—*MALDANE v. NEWCOMB*, No. 4630, *ante*.

**4696.** ———.]—*TORRENS v. WALKER*, No. 4570, *ante*.

**4697.** ———.]—*LURCOTT v. WAKELY & WHEELER*, No. 4757, *post*.

**4698.** ———.]—In an action for breach of a covenant to keep a house in repair, though deft. may show generally in what state the premises were at the commencement of the term, & whether they were new or old, it is not competent to him to show it in matters of detail.—*MANTZ v. GORING* (1838), 4 Bing. N. C. 451; 132 E. R. 861; *sub nom.* *YOUNG v. MANTZ*, 1 Arn. 108; 6 Scott, 277; 7 L. J. C. P. 204.

*Annotations*:—*Expld.* *Proudfoot v. Hart* (1890), 25 Q. B. D. 42. *Consd.* *Miller v. Burt* (1918), 63 Sol. Jo. 117. *Reid*. *Hart v. Windsor* (1843), 12 M. & W. 68.

**Sect. 3.—Liability of tenant to repair: Sub-sect. 2, D. (a) *iii.*, *iv.*, *v.* & *vi.*]**

**4699. — Natural operation of time & weather.]**

—Where a lessee covenants to keep old premises in repair, he is not liable for such dilapidations as result from the natural operation of time & the elements.—**GUTTERIDGE v. MUNYARD** (1834), 7 C. & P. 129; 1 Mood. & R. 334.

**Annotations:—****Expld.** Young v. Mantz (1838), 7 L. J. C. P. 204. **Consd.** Lister v. Lane & Nesham, [1893] 2 Q. B. 212; Lurcott v. Wakely & Wheeler, [1911] 1 K. B. 905; Miller v. Burt (1918), 63 Sol. Jo. 117; Hewitt v. Rowlands (1924), 131 L. T. 757. **Refd.** Torrens v. Walker, [1906] 2 Ch. 166. **Mentd.** Rapley v. Smart (1893), 38 Sol. Jo. 129.

**4700. —**—[**Ptfs.** granted to defts. a lease of a house in Lambeth, containing a covenant by the lessees that they would "when & where & as often as occasion shall require, well, sufficiently, & substantially, repair, uphold, sustain, maintain, amend & keep" the demised premises, & the same "so well & substantially repaired, upheld, sustained, maintained, amended & kept," at the end of the term yield up to the lessors. Before the end of the term one of the walls of the house was bulging out, & after the end of the term the house was condemned by the district surveyor as a dangerous structure & was pulled down. **Ptfs.** sought to recover from defts. the cost of rebuilding the house. The evidence showed that the foundation of the house was a timber platform, which rested on a boggy or muddy soil. The bulging of the wall was caused by the rotting of the timber. The house was at least 100 years old, & possibly much older. The solid gravel was seventeen feet below the surface of the mud. There was evidence that the wall might have been repaired during the term by means of underpinning:—**Held:** the defect having been caused by the natural operation of time & the elements upon a house the original construction of which was faulty, the defts. were not under their covenant liable to make it good.—**LISTER v. LANE & NESHAM**, [1893] 2 Q. B. 212; 62 L. J. Q. B. 583; 69 L. T. 170; 57 J. P. 725; 41 W. R. 626; 9 T. L. R. 503; 37 Sol. Jo. 558; 4 R. 474, C. A.

**Annotations:—****Apld.** Wright v. Lawson (1903), 68 J. P. 34; Torrens v. Walker, [1906] 2 Ch. 166. **Consd.** Lurcott v. Wakely & Wheeler, [1911] 1 K. B. 905. **Refd.** Toronto Suburban Ry. v. Toronto Corp'n., [1915] A. C. 590; Anstruther-Gough-Calthorpe v. McOscar, [1921] 1 K. B. 716; Hewitt v. Rowlands (1924), 93 L. J. K. B. 1080.

**4701. —**—[**MILLER v. BURT**, No. 4750, *post*.

—[**Compare** Nos. 4570, 4607, *ante*.

**4702. Tenant not justified in keeping in bad repair.]**—**Def't.**, on becoming tenant to **ptf.** of a farm & outbuildings, agreed to keep same, & at the expiration of the tenancy to deliver up same, in good repair, order & condition. Breach, that he did not keep & deliver up the farm, etc., in good repair, etc.:—**Held:** on this contract to keep the premises in good repair, the tenant was bound to put them in that condition, & the tenant was not justified in keeping them in bad repair because he found them in that condition, but the extent of that repair was to be measured by their age & class.

To keep in good repair presupposes the putting into it (**ROLFE, B.**).—**PAYNE v. HAINE** (1847), 16 M. & W. 541; 16 L. J. Ex. 130; 8 L. T. O. S. 414; 153 E. R. 1304; *sub nom.* **PAINE v. HAYNE**, 11 J. P. 402.

**Annotations:—****Apld.** Haldane v. Newcomb (1863), 3 New Rep. 139. **Apprvd.** Proudfoot v. Hart (1890), 25 Q. B. D. 42. **Apld.** Lister v. Lane & Nesham, [1893] 2 Q. B. 212. **Distd.** Henman v. Berliner, [1918] 2 K. B. 236. **Refd.** Burgess v. Wickham (1863), 3 B. & S. 669; Easton v. Pratt (1864), 2 H. & C. 676; Saner v. Bliton (1878), 7 Ch. D. 815; Catton v. Bennett (1884), 26 Ch. D. 161; Pontifex v. Foord (1884), 12 Q. B. D. 152; *Re Gaskell's*

*S. E.*, [1894] 1 Ch. 485; Jacob v. Down, [1900] 2 Ch. 156; Calthorpe v. McOscar, [1923] 2 K. B. 573. **Mentd.** Davis v. Underwood (1857), 22 J. P. 8; Wilson v. Finch-Hatton (1877), 46 L. J. Q. B. 489; Woodfield v. Bond, [1922] 2 Ch. 40.

**4703. —**—[**PROUDFOOT v. HART**, No. 4707, *post*.

**4704. —**—[**ANSTRUTHER-GOUGH-CALTHORPE v. McOSCAR**, No. 4710, *post*.

—[**Compare** No. 4682, *ante*.

**iv. Character and Locality of Premises.**

**4705. Measure of extent of liability.]**—**PAYNE v. HAINE**, No. 4702, *ante*.

**4706. —**—[**HALDANE v. NEWCOMB**, No. 4630, *ante*.

**4707. —**—(1) Under an agreement to keep a house in "good tenantable repair," & so leave the same at the expiration of the term, the tenant's obligation is to put & keep the premises in such repair as, having regard to the age, character, & locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it.

(2) A tenant who agrees to "keep" premises in good tenantable repair is not excused from doing so by reason that the premises were not in good tenantable repair at the time of the demise. He must in that case put the premises in good tenantable repair.

(3) If the paint is in such a state that the woodwork will decay unless it is repainted, it is obvious that the tenant must repaint. But I think that his obligation goes further than that. A house in Spitalfields is now painted in the same way as one in Grosvenor Square. If the tenant leaves a house in Grosvenor Square with painting only good enough for a house in Spitalfields, he has not discharged his obligation. He must paint it in such a way as would satisfy a reasonable tenant taking a house in Grosvenor Square (**LORD ESHER, M.R.**).

(4) As to the floor, it may have been rotten when the tenancy began. If it was in such a state when the tenancy began that no reasonable man would take the house with a floor in that state, then the tenant's obligation is to put the floor into tenantable repair. The question is, what is the state of the floor when the tenant is called upon to fulfil his covenant? If it has become perfectly rotten he must put down a new floor, but if he can make it good in the sense in which I have spoken of all other things—the paper, the paint, & the white-washing—he is not bound to put down a new floor. He may satisfy his obligation under the covenant by repairing it (**LORD ESHER, M.R.**).—**PROUDFOOT v. HART** (1890), 25 Q. B. D. 42; 59 L. J. Q. B. 389; 63 L. T. 171; 55 J. P. 20; 38 W. R. 730; 6 T. L. R. 305, C. A.

**Annotations:—****As to (1)** **Consd.** Lurcott v. Wakely & Wheeler, [1911] 1 K. B. 905; Anstruther-Gough-Calthorpe v. McOscar, [1924] 1 K. B. 716. **Refd.** Citron v. Cohen (1920), 36 T. L. R. 560; Hewitt v. Rowlands (1924), 93 L. J. K. B. 729. **As to (2)** **Consd.** Torrens v. Walker, [1906] 2 Ch. 166. **Refd.** Jacob v. Down, [1900] 2 Ch. 156; Wright v. Lawson (1903), 19 T. L. R. 203; Lurcott v. Wakely & Wheeler, [1911] 1 K. B. 905; Evans v. Shotton (1918), 87 L. J. Ch. 527; Woodfield v. Bond, [1922] 2 Ch. 40; Hewitt v. Rowlands (1924), 93 L. J. K. B. 729. **As to (3)** **Refd.** Evans v. Shotton (1918), 87 L. J. Ch. 527. **As to (4)** **Consd.** Lurcott v. Wakely & Wheeler, [1911] 1 K. B. 905. **Generally, Mentd.** Munday v. Norton, [1892] 1 Q. B. 403; Wynne-Finch v. Chaytor, [1903] 2 Ch. 475.

**4708. —**—[**LURCOTT v. WAKELY & WHEELER**, No. 4757, *post*.

**4709. Deterioration of locality—Standard of repair not thereby lowered.]**—The contention is that the fact that a neighbourhood has deteriorated ought to decrease the measure of damages for a

breach of a covenant to leave in repair. I think such a proposition is wholly untenable & that every case is to the exact contrary (LORD ESHER, *M.R.*).—*MORGAN v. HARDY* (1887), as reported in 35 W. R. 588, C. A.; *affd.*, *sub nom.* *HARDY v. FOTHERGILL* (1888), 13 App. Cas. 351, H. L.

*Annotations*.—*Expld.* *Anstruther v. Gough-Calthorpe v. McOscar*, [1924] 1 K. B. 716. *Refd.* *Joyner v. Weeks*, [1891] 2 Q. B. 31. *Mentd.* *Flint v. Barnard* (1888), 22 Q. B. D. 90; *Barnette, King* (1890), 63 L. T. 501; *Re Browne & Wingrove, Ex p. Ador*, [1891] 2 Q. B. 574; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Re Midland Coal, Coke, & Iron Co., Craig's Claim*, [1895] 1 Ch. 267; *Re New Oriental Bank Corpn.* (No. 2), [1895] 1 Ch. 753; *Re Panther Lead Co.*, [1896] 1 Ch. 978; *Kerr v. Kerr*, [1897] 2 Q. B. 439; *Re Perkins, Poyser v. Boyfus*, [1898] 2 Ch. 182; *Re McMahon, Fuller v. McMahon*, [1900] 1 Ch. 173; *Re Reits, Ex p. Clough*, [1904] 2 K. B. 769; *Chaplin v. Hicks* (1911), 27 T. L. R. 244; *Victor v. Victor*, [1912] 1 K. B. 247; *Re Hind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345; *Baker v. Lloyd's Bank*, [1920] 2 K. B. 322.

**4710.** ———.]—A lease of three newly erected houses made in 1825 for a term of ninety-five years contained a covenant by the lessee in very wide terms, the effect of which was, put shortly, that he would during the term well & sufficiently repair the premises with all manner of necessary reparations & would yield up at the end of the term the said premises so being in all things well & sufficient repaired. At the end of the term the assignee of the reversion brought an action against the assignees of the lease for breach of the above covenant. By an order of the ct. the assessment of the damages was referred to an arbitrator. At the beginning of the term the houses were country houses; at the end of the term the only tenants likely to occupy the houses or parts of them would be tenants on short terms. The arbitrator assessed the damages at two alternative sums. He computed the smaller sum on the basis that debts were liable to execute such repairs only as in view of the age, character, & locality of the premises would make them reasonably fit to satisfy the requirements of reasonably minded tenants of the class that would then be likely to occupy them. He found that tenants of this class would require only such repairs as would keep out wind & water:—*Held*: this was not the proper measure of liability; but debts were liable for the cost of doing all necessary acts well & sufficiently to repair the premises in the words of the covenant, that is to say, for the cost of putting them into that state of repair in which they would be found if they had been managed by a reasonably minded owner, having regard to their age, & to their character & ordinary uses, or the requirements of tenants of the class likely to take them, at the time of the demise or at the commencement of the term.

I do not think there is any substantial difference in construction between "repair," which must mean "repair reasonably or properly" & "keep in good repair" or "sufficient repair" or "tenantable repair." . . . An improvement of its tenants or its neighbourhood will not increase the standard of repair, nor will their deterioration lower that standard (*SCRUTTON, L.J.*).—*ANSTRUTHER-GOUGH-CALTHORPE v. McOSCAR*, [1924] 1 K. B. 716; 130 L. T. 691; *sub nom.* *CALTHORPE v. McOSCAR*, 93 L. J. K. B. 273; 40 T. L. R. 223; 68 Sol. Jo. 367, C. A.

**4711. Appreciation of locality—Standard of repair not thereby increased.**—*ANSTRUTHER-GOUGH-CALTHORPE v. McOSCAR*, No. 4710, *ante*.

#### v. Inherent Defect in Premises.

**4712. Fault in construction—House condemned as dangerous structure.**—*LISTER v. LANE & NESHAM*, No. 4700, *ante*.

**4713.** ———.]—If a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair.—*WRIGHT v. LAWSON* (1903), 68 J. P. 34; 19 T. L. R. 510, C. A.

*Annotation*.—*Consd.* *Lurecott v. Wakely & Wheeler*, [1911] 1 K. B. 905.

**4714.** ———.]—*TORRENS v. WALKER*, No. 4570, *ante*.

#### vi. Painting and Decorative Repairs.

**4715. Whether tenant liable for inside painting—“Substantially repair, uphold, & maintain.”**—Under a covenant, that the tenant “should & would substantially repair, uphold, & maintain,” a house, he is bound to keep up the inside painting.—*MONK v. NOYES* (1824), 1 C. & P. 265, N. P.

**4716.** ——— *Covenant to keep premises in proper repair—Provision for outside painting.*—In an action of covenant for breach of an agreement to repair, the covenant proved was to paint the outside wood & ironwork once in three years, & to do all things necessary for keeping the premises in proper repair:—*Held*: inside painting was not excluded from the covenant; & the jury were at liberty to give some damages on that account.—*HOPKINSON v. VIAND* (1847), 10 L. T. O. S. 108.

**4717.** ——— *Covenant for necessary repairs.*—An outgoing tenant of a house, under a covenant to keep it in necessary repair, & to deliver it up in all things well & sufficiently repaired, is bound to paint the inside of the house, though there is no express covenant to do so during the term, if the walls are so stained & blemished as that a skilful artist cannot, by mere painting over the stains & blemishes, put them into a proper state. So also, though the tenant has painted the outside of the house according to his covenant, he is yet liable to make good defects & faults in the external paint which may have arisen in the interval by ordinary wear & tear.—*JOHNSON v. GOOCH* (1848), 11 L. T. O. S. 315.

**4718.** ——— *“Tenantable repair.”*—Under an agreement for a lease for five years of a dwelling-house, the tenant was to leave the house in tenantable repair. In an action by the landlord at the end of the tenancy, which continued for seventeen years, for damages, upon the footing that the tenant was liable to paper & paint & leave the house in the same condition as when he took it:—*Held*: the landlord was not entitled to damages on that footing, but he was entitled to compensation for waste, the tenant being liable to paint sufficiently to preserve the woodwork, but not to do papering or decorative painting.—*CRAWFORD v. NEWTON* (1886), 36 W. R. 54; 2 T. L. R. 877, C. A.

*Annotation*.—*Consd.* *Proudfoot v. Hart* (1890), 25 Q. B. D. 42.

**4719.** ——— *“Well & substantially repair.”*—*MOXON v. TOWNSHEND (MARQUIS)* (1886), 3 T. L. R. 392, C. A.

**4720.** ——— *Repair & amend.*—Covenant to repair & amend, with power of entry to inspect the state of the premises, does not include a covenant to paint.—*DARLINGTON v. HAMILTON* (1854), Kay,

#### PART XVIII. SECT. 3, SUB-SECT. 2.— D. (a) v.

*o. Fault in construction.*—Under

a covenant to keep the premises in good repair during the continuance of the lease, a lessee is not bound to execute repairs, necessitated by faulty

construction of the building & not patent at the time of the execution of the lease.—*BARKER v. BECKETT & Co., LTD.* (1911), T. P. D. 151.—S. AF.

*Sect. 3.—Liability of tenant to repair: Sub-sect. 2, D. (a) vi., vii., viii. & ix., & (b) i.]*

550; 2 Eq. Rep. 906; 23 L. J. Ch. 1000; 24 L. T. O. S. 33; 69 E. R. 233.

*Annotations:—Mentl. Waddell v. Wolfe (1874), L. R. 9 Q. B. 516; Best v. Hamand (1879), 12 Ch. D. 1; Camberwell & South London Bldg. Soc. v. Holloway (1879), 13 Ch. D. 754; Creswell v. Davidson (1887), 56 L. T. 811; Re National Provincial Bank of England & Marsh, [1895] 1 Ch. 190; Re Lloyds Bank & Lillingston's Contract, [1912] 1 Ch. 601; Hurd v. Whaley (1918), 118 L. T. 593.*

**4721. Outside painting—Liability at end of term.]—JOHNSON v. GOOCH, No. 4717, ante.**

**4722. General decorative repair.]—CRAWFORD v. NEWTON, No. 4718, ante.**

**4723. —.]—PROUDFOOT v. HART, No. 4707, ante.**

**Relief against notice to effect decorative repairs.]—See Law of Property Act, 1925 (c. 20), s. 147.**

#### vii. Rebuilding.

**4724. Rebuilding whole premises—Premises falling down.]—WOOLCOCK v. DEW, No. 4688, ante.**

**4725. —Premises pulled down as dangerous structure.]—LISTER v. LANE & NESHAM, No. 4700, ante.**

**4726. Rebuilding subsidiary part—Floors.]—MANCHESTER BONDED WAREHOUSE CO. v. CARR, No. 3990, ante.**

**4727. —.]—PROUDFOOT v. HART, No. 4707, ante.**

**4728. —Bay window.]—WRIGHT v. LAWSON (1903), 68 J. P. 34; 19 T. L. R. 510, C. A.**

*Annotation:—Refd. Lurcott v. Wakely & Wheeler, [1911] 1 K. B. 903.*

**4729. —Wall.]—LURCOTT v. WAKELY & WHEELER, No. 4757, post.**

**4730. Damage by act of King's enemies.]—PARADINE v. JANE, No. 4616, ante.**

**4731. —.]—REDMOND v. DANTON, No. 4617, ante.**

**4732. Damage by lightning.]—PARADINE v. JANE, No. 4616, ante.**

**Under express rebuilding covenant.]—See Sect. 3, sub-sect. 2, D. (b) iv., post.**

**After damage by fire.]—See Part XX., Sect. 2, sub-sect. 1, B., post.**

#### viii. Repairs Amounting to Improvements.

**4733. Floor laid on new plan.]—A tenant under a covenant to repair is liable for repairs only, & is not liable for the extra expense of laying a new floor on an improved plan, or the like.—SOWARD v. LEGGATT (1836), 7 C. & P. 613, N. P.**

*Annotation:—Refd. Lister v. Lane & Nesham, [1893] 2 Q. B. 212.*

**4734. Alteration of character of road.]—LONDON CORPN. v. BARNES (1896), 12 T. L. R. 135, C. A.**

**4735. —.]—A covenant to contribute a proportionate part of the expenses of repairing & maintaining a road until undertaken by the local authority, does not extend to contributing a proportion of the expense of an entire reconstruction of the road. In construing such a covenant regard must be had to the standard of the condition of the road at the time when the covenant was entered into, & the obligation is to contribute a proportionate part of the expense of putting it into a state of repair corresponding**

to the standard contemplated or existing at that time. Where the road is reconstructed for the purpose of its being taken over by the local authority, the covenantor is liable to contribute a proportionate part of such expenses as would have been incurred in putting it into that state of repair, but is not liable to contribute to the expenses of such work as amounts to reconstruction.—SCOTT v. BROWN (1904), 69 J. P. 89; 4 L. G. R. 103, C. A.

**Repair of highways generally.]—See HIGHWAYS, Vol. XXVI., pp. 352 et seq.**

#### ix. Exception of Wear and Tear.

**4736. Meaning of fair wear & tear—No satisfactory definition.]—TERRELL v. MURRAY, No. 4749, post.**

**4737. Extent of exception—Lease of printing works with plant—Application to plant only.]—**

(1) By an indenture of lease made in 1851, H. demised to one C. certain print-works & premises, with the steam-engines, boilers, etc., belonging thereto, the lessee covenanting to keep the premises in good & tenable repair, "the main walls, roofs, slates, principal timbers, & the outside parts of the buildings, etc., & accidents by fire, lightning, etc., & the steam-engines, boilers, water-wheels & first motion therefrom respectively, by the fair & reasonable wear & usage thereof, only excepted," he, H. having first put the premises into good & tenable repair, pursuant to the covenant thereinafter entered into by him; & the lessor covenanted with the lessee that he, his heirs, etc., would forthwith put the premises into good & tenable repair, & would during the term keep & maintain "the whole of the main walls, roofs, slates, & principal timbers of the premises, & the steam-engines, water-wheels, & first motion therefrom, by the fair & reasonable wear & usage thereof, in good & tenable repair," etc. In an action by the assignees of the lessee, who had become bkpt., against deft., as exor. of J., who was assignee of the reversion of H., the lessor, the first count of the declaration assigned two breaches, first, the lessor having omitted to do so, that J. after he became assignee did not put the demised premises, or any part thereof, into good & tenable repair, secondly, that J., whilst such assignee, did not keep & maintain the main walls, roofs, slates, & principal timbers of the premises, & the steam-engines, etc., by the fair & reasonable wear & usage thereof, in good repair, etc. Deft. pleaded to the first breach, fifthly, that J. became assignee of the reversion by reason of the death of H.; that, in the lifetime of H., & before J. became such assignee, a reasonable time had elapsed, & all things had happened to entitle the lessee to have the covenant to put the premises into repair performed by the lessor; & that the covenant was wholly broken before J. became such assignee, sixthly, repeating the last plea; & further, that, after the death of H., the lessee sued J. & one R., as exors. of H., for the breach of covenant by H., & recovered by an award £1,080 2s. as damages in respect of that & the second breach of covenant, & that the award was a valid & binding award, & that the sum awarded, with costs, had been paid to G. before his bkpcy.:—*Held*: the fifth & sixth pleas were a good answer to the first breach,

#### PART XVIII. SECT. 3, SUB-SECT. 2.—D. (a) vii.

*p. Not bound to rebuild.]—A tenant of a house was bound by the lease to make repairs & improvements & to keep the premises in repair:—*

*Held*: he was only bound to make ordinary repairs, but not such extraordinary repairs as amounted to reconstruction of the premises or part of them.—*NAPIER v. FERRIER* (1847), 9 Dunl. (Ct. of Sess.) 1354; 19 Sc. Jur. 586.—*SCOT.*

#### PART XVIII. SECT. 3, SUB-SECT. 2.—D. (a) ix.

*q. Meaning of fair wear & tear.]—DREW v. ZIEHL* (1913), 39 N. L. R. 258.—*S. AF.*

*r. Extent of exception—Not to*

inasmuch as there could only be one breach of the covenant to put the premises into repair, & that had occurred in the lifetime of H.

(2) To the second breach, eighthly, that G. sued J. & recovered damages against him for a breach of the same covenant, & that the want of repair complained of in the same breach was only a continuance of the want of repair in respect of which such damages were awarded, ninthly, for defence on equitable grounds, a repetition of the allegations in the sixth & eighth pleas: & further, that G. did not expend the sum so recovered in putting the premises into repair, & that if he had done so, the want of repair complained of in the second breach would not have occurred:—*Held*: the eighth & ninth pleas were no answer, as this was a continuing breach, & the former recovery was no bar, even upon equitable grounds, but only matter in mitigation of damages.

(3) Deft. further pleaded to the second breach, tenthly, that such breach was caused by the default of G. in not keeping the demised premises, the main walls, etc., & the steam-engines, etc., excepted, in repair according to his covenant. Replication, that the demised premises never were put into repair pursuant to the lessor's covenant:—*Held*: the covenant by the lessor to put the premises into repair was a condition precedent, & therefore the replication was an answer to the plea.

(4) Eleventh plea, to the second breach, that the want of repair complained of was not occasioned by fair & reasonable wear & usage:—*Held*: the plea was bad, as the words in the covenant, "by the fair & reasonable wear & usages thereof," applied only to the "steam-engines, boilers, water-wheels, & first motion therefrom."

(5) Twelfth plea, to both breaches, that J. had no notice of the want of repair:—*Held*: want of notice was no answer, at all events, to the first breach.—*COWARD v. GREGORY* (1866), L. R. 2 C. P. 153; 36 L. J. C. P. 1; 15 L. T. 279; 12 Jur. N. S. 1000; 15 W. R. 170.

*Annotations*:—As to (1) *Refd.* *Jacob v. Down*, [1900] 2 Ch. 156. As to (2) *Refd.* *Hewitt v. Rowlands* (1924), 93 L. J. K. B. 729. *Generally, Refd.* *Mills v. East London Union* (1872), L. R. 8 C. P. 79.

**4738. — Destruction by reasonable user — Not arising through catastrophe.]—**MANCHESTER BONDED WAREHOUSE CO. v. CARR, No. 3990, *ante*.

**4739. — Damage by bursting of external pipe — Under control of lessor.]—**Where a lease contains a covenant by the lessee to keep the interior of the premises in good & tenantable repair & to deliver them up in good & tenantable repair on the expiry of the term, "reasonable wear & tear excepted," the tenant is not liable under the covenant for damage caused by the bursting of an outside water-pipe which belongs to the landlord & which the tenant is under no liability to repair & which the landlord after notice fails to repair.—*CITRON v. COHEN* (1920), 36 T. L. R. 560.

**Express covenant to leave premises in repair.]—**See Sub-sect. 2, D. (b) i., *post*.

Compare Sub-sect. 2, D. (a) iii., *ante*.

*dilapidations arising from neglect.]—*MORRIS v. CAIRNCROSS (1907), 9 O. W. R. 918; 14 O. L. R. 544.—*CAN.*

t. —.—.]—*RADLOFF v. KAPLAN* (1914), E. D. L. 357.—*S. AF.*

a. —.—.]—*AFRICAN THEATRES TRUST, LTD. v. ESTATE MCCUBBIN* (1919), 40 N. L. R. 277.—*S. AF.*

b. —.—.]—*Roof damaged by elements.]—*BAKER v. JOHNSTON & Co.,

LTD. (1902), 21 N. Z. L. R. 268.—*N.Z.*

c. *Exception of wear & tear & accidents by fire & tempest—Extent of exception—Damage by ice.]—*THISTLE v. UNION FORWARDING & RY. CO. (1878), 29 C. 1. 76.—*CAN.*

PART XVIII. SECT. 3, SUB-SECT. 2.—*D. (b) i.*

d. *To leave in repair—Allowance*

(b) *Under Particular Covenants.*

i. *To Leave Premises in Specified Condition.*

**4740. To leave in repair—Whether condition at commencement of term considered.]—**STANLEY v. TOWGOOD, No. 4694, *ante*.

**4741. —.—.]—**PAYNE v. HAINE, No. 4702, *ante*.

Compare Sub-sect. 2, D. (a) ii., *ante*.

**4742. —.—.]—**BROWN v. TRUMPER, No. 4849, *post*.

**4743. To leave premises as at commencement of term—Removal of shelf.]—**(1) Carrying away a shelf, though not stated to be a fixture, is a breach of covenant to leave the premises in the same order, etc.

(2) Leaving the glass of windows cracked is a breach of covenant to repair, etc.

(3) Not repairing a pavement is a breach of a covenant to leave the premises sufficiently maintained & repaired.

(4) A reversioner in fee of a house by one deed, & of a lease for years of land by another deed, may bring covenant on a lease against the person to whom both the house & land have been demised by the grantor of the reversions, although he derives his right from different titles.—*PYOT v. ST. JOHN (LADY)* (1613), Cro. Jac. 329; 79 E. R. 281; *affd. sub nom. ST. JOHN (LADY) v. PIOTT*, 2 Bulst. 102.

*Annotations*:—As to (4) *Appl.* *Twynnam v. Pickard* (1818), 2 B. & Ald. 105. *Refd.* *Kitchen v. Buckley* (1663), 1 Lev. 109; *Swansen Corpn. v. Thomas* (1882), 10 Q. B. D. 48.

**4744. — Leaving window glass cracked.]—***PYOT v. ST. JOHN (LADY)*, No. 4743, *ante*.

**4745. — Tenantable repair requisite.]—**Agreement to leave a farm as he found it, is an agreement to leave it in tenantable repair, if he found it so; & will maintain a declaration so laid.—*WINN v. WHITE* (1772), 2 Wm. Bl. 839; 96 E. R. 495.

*Annotations*:—*Mentd.* *Ricketts v. Salway* (1819), 1 Chit. 104; *Wallis v. Broadbent* (1836), 4 Ad. & El. 877.

**4746. — Tenant holding over—Whether condition at commencement of term considered.]—***JOHNSON v. ST. PETER, HEREFORD (CHURCH-WARDENS)*, No. 4847, *post*.

**4747. —.—.]—**CRAWFORD v. NEWTON, No. 4718, *ante*.

Compare Sub-sect. 2, D. (a) ii., *ante*.

**4748. — Third party in occupation at time of demise.]—**WHITE v. NICHOLSON, No. 4612, *ante*.

**4749. — Fair wear & tear excepted—Dilapidation from ordinary user.]—**The lease of a house contained a covenant by the lessee to deliver it up at the expiration of the term in as good repair & condition as it was in at the date of the lease, reasonable wear & tear excepted. There was no covenant to repair during the term. At the expiration of the term the lessor claimed for dilapidations, including sums for painting the outside woodwork of the house, for repointing brickwork, & for repairing parts of the kitchen floor which had become affected by dry rot:—*Held*: the lessee was not liable for these three items; the words "reasonable wear & tear" excluded dilapidations

for wear & tear.]—In an action by landlord against tenant for breach of a covenant contained in an informal lease of a house & land, whereby the tenant, who was to receive the premises "in the best condition," undertook "to give up the house in the same condition & repairs":—*Held*: in computing the damages for the breach, an allowance should be made for ordinary wear & tear; there was no warrant for reading an exception into the undertaking.

**Sect. 3.—Liability of tenant to repair: Sub-sect. 2, E. & F. (a) i.]**

A covenant to repair, uphold & maintain, or keep in good repair, raises a duty not to destroy the demised premises; & the pulling them down, wholly or partly, is a breach of such covenant (WILLES, J.).—*GANGE v. LOCKWOOD* (1860), 2 F. & F. 115, N. P.

**Annotation:—***Refd.* *Rose v. Spicer*, *Rose v. Hyman*, [1911] 2 K. B. 234.

**4771.** ———.]—On a covenant by lessee that there shall be no communication or way across the demised land to a certain other place; *qu.*: whether the mere opening of doors in a wall is a breach, without any user of the communication; but a user across the demised land may be a breach, even although the doors have been opened by a third party. *Qu.*: whether the opening of the doors would be a breach of a covenant to uphold & maintain all buildings & erections on the demised premises, but the covenant would not apply to a wall not on the demised premises, nor to any fence not permanent.—*BORGNIS v. EDWARDS* (1860), 2 F. & F. 111, N. P.

**4772.** ——— **Stopping up doors & windows.**—*EDGE v. PEMBERTON* (1843), 12 M. & W. 187; 1 Dow. & L. 467; 13 L. J. Ex. 48; 2 L. T. O. S. 152; 152 E. R. 1164.

**Annotations:—***Mentd.* *Times Fire Assco. v. Hawke* (1859), 28 L. J. Ex. 317; *Brennridge v. Latimer* (1864), 12 W. R. 878.

**4773.** ——— **Pulling down wall.**—(1) A covenant for a landlord to be allowed to come into a house to see the state of its repair at "convenient times" is not broken by his not being allowed to go into some of the rooms, if he has given no notice of his coming.

(2) A covenant by a lessee, that he will, during the term, repair, uphold, support, sustain, & maintain the brick walls to the demised premises belonging, is broken, if the lessee, during the term, pull down a brick wall which divides the court yard at the front of the house from another yard at the side of the house.—*DOE d. WETHERELL v. BIRD* (1833), 6 C. & P. 195; *subsequent proceedings* (1834), 2 Ad. & El. 161.

**4774.** ——— **Conversion of premises—House converted to shop.**—A private dwelling-house was demised for forty years, by lease, containing a covenant to repair & keep in repair the premises, & all such buildings, improvements, & additions as should be made thereupon by the lessee during the term, with a proviso for re-entry in case of breach of covenant. The lessee changed the lower windows into shop windows, & stopped up a doorway, making a new one in a different place, in the internal partition of the house:—*Held*: no forfeiture was incurred, the lessee's covenant being only against non-repair, & it being implied, by the terms of the lease, that additions & improvements were to be made.—*DOE d. DALTON v. JONES* (1832), 4 B. & Ad. 126; 1 Nev. & M. K. B. 6; 2 L. J. K. B. 11; 110 E. R. 403.

**Annotation:—***Refd.* *Doe d. Burrell v. Davis* (1851), 16 L. T. O. S. 389.

**4775.** ——— **Chapel converted to theatre—Sum deposited to secure reconversion at end of term.**—A piece of ground & the chapel then erected thereon were demised for a term of ninety-nine years less ten days from Christmas, 1842, & the lease contained covenants by the lessees to complete the chapel by a given date & to repair, maintain, & keep the chapel & the walls, fences,

& other appurtenances thereto belonging in good & substantial repair. The chapel was completed & was separated from the adjoining street by some iron railings, but it did not appear when these railings were erected. It was used as a place of religious worship for sixty years. The lease was then sold with the consent of the Charity Comrs. & the premises were adapted for a cinematograph theatre. For this purpose the purchasers removed the iron railings, opened a new door in the west wall of the building, & made various alterations in the interior. The vendor had neglected to comply with a notice to repair & the reversioner was entitled to possession under a proviso for re-entry for breach of covenant, subject to a claim by the purchasers for relief against forfeiture. The purchasers offered, as the conditions of obtaining relief, to deposit a sum of money to secure the restoration of the premises to their original condition at the end of the lease, & also to erect & maintain a movable fence of posts & chains in the line of the old fence in order to exclude the public from the premises:—*Held*: in view of the fact that the lease did not prohibit the contemplated user of the premises, none of the alterations, in the circumstances, constituted either a breach of covenant or waste, & relief ought to be granted on the terms proposed.—*HYMAN v. ROSE*, [1912] A. C. 623; 81 L. J. K. B. 1062; 106 L. T. 907; 28 T. L. R. 432; 50 Sol. Jo. 535, H. L.; *revsg.* S. C. *sub nom.* *ROSE v. SPICER*, *ROSE v. HYMAN*, [1911] 2 K. B. 234, C. A.

**4776.** **Removal of fixtures.**—A tenant of a house, covenanting to keep in repair the premises & all erections, buildings, & improvements erected on the same during the term, & to yield up the same at the end of the term, cannot remove a verandah erected during the term, the lower part of which is affixed to the ground by means of posts.—*PENRY'S ADMINISTRATRIX v. BROWN* (1818), 2 Stark. 403, N. P.

**Annotation:—***Refd.* *Doe d. Burrell v. Davis* (1851), 15 Jur. 155.

**4777.** ———.]—An assignee of the term removed during the term a dresser, kitchen range, water closet, & pipes connected therewith, & also gas pipes, but it was found that these things could have been restored before the end of the term, & they were removed in such a way as not to amount to leaving the premises in non-repair:—*Held*: not to amount to a breach of a covenant to uphold, maintain, & keep in repair at all times during the term, the demised premises, & all dressers, shelves, pipes, etc.: & all things fixed or fastened upon the premises.—*DOE d. BURRELL v. DAVIES* (1851), 16 L. T. O. S. 389; 15 Jur. 155.

—.]—*Sec. generally*, Part XIV., *ante*.

**4778.** **Building addition—Faulty construction.**—*STANLEY v. TOWGOOD*, No. 4694, *ante*.

**4779.** **Wall injured by bill posting.**—*HEARD v. STUART*, No. 4802, *post*.

**Failure to execute sufficient repair.**—*See* Sub-sect. 2, D., *ante*.

**F. Remedies for Breach.**

**(a) By and Against Whom Enforceable.**

**i. By Whom.**

**Assignee of reversion.**—*See* Sect. 1, *ante*.

**4780.** ——— **Damages caused before assignment.**—*ANON.* (1573), 3 Leon. 51; 74 E. R. 534.

**Annotation:—***Refd.* *Coward v. Gregory* (1866), 36 L. J. C. P. 1.

**PART XVIII. SECT. 3, SUB-SECT. 2.—**

**E.**  
**4774 1. Alteration — Conversion of**

**premises—House converted to shop.**—*ELLIOTT v. WATKINS* (1835), 1 Jo. Ex. 1r. 308.—*IR.*

**PART XVIII. SECT. 3, SUB-SECT. 2.—**  
**F. (a) i.**

**g. Not by assignees of rent.]—**

**4781.** ———.]—**MASCAL'S CASE** (1587), 1 Leon. 62; 74 E. R. 58.

**4782. Reversioner deriving right from different titles.**—**PYOT v. ST. JOHN (LADY)**, No. 4743, ante.

**4783. Reversion in husband & wife—Failure to repair during coverture—Action by husband alone or jointly with wife.**—Covenant against a lessee for years for not repairing during the coverture, where the reversion is granted to the husband & wife, may be either by the husband alone, or jointly with his wife.—**BRETT v. CUMBERLAND** (1616), Cro. Jac. 399; 3 Bulst. 164; 1 Roll. Rep. 359; 79 E. R. 341; *subsequent proceedings* (1619), Cro. Jac. 521.

*Annotations*:—**Apld.** *McNeillage v. Holloway* (1818), 1 B. & Ald. 218. **Refd.** *Helliar v. Caseborough* (1665), 1 Keb. 839; *Glover v. Cope* (1691), 1 Show. 284; *Bally v. Wells* (1769), 3 Wils. 25; *Rumsey v. George* (1813), 1 M. & S. 176. **Mentd.** *London City v. Vanaere* (1699), 12 Mod. Rep. 269.

**4784. Tenants in common—Necessity to join in action.**—Tenants in common join in covenant for repairs.—**KITCHIN & KNIGHT v. BUNKLEY** (1663), 1 Keb. 572; 1 Lev. 109; T. Raym. 80; 83 E. R. 1114; *sub nom.* *KITCHIN v. COMPTON*, 1 Sid. 157.

*Annotations*:—**Consd.** *Simpson v. Clayton* (1838), 4 Bing. N. C. 758; *Foley v. Addenbrooke* (1843), 4 Q. B. 197; *Thompson v. Hakewill* (1865), 19 C. B. N. S. 713. **Refd.** *Twynnam v. Pickard* (1818), 2 B. & Ald. 105; *Bradburne v. Botfield* (1845), 14 M. & W. 559; *Wakefield v. Brown* (1846), 9 Q. B. 209.

**4785.** ———.]—A declaration in covenant stated that, by indenture of lease, W. & A., who was seised in fee of an undivided fourth part of the demised premises, in trust for E. & F., M., who was seised in fee of another undivided fourth part, T. who was seised in fee of half, & G. & S., who had equitable interests in that half, jointly demised, according to their several existing estates, rights & interests, certain coal & iron mines, to deft. & two others, yielding & paying certain rents to E., F., W., A., M., S., G., & T. respectively, & to their respective heirs & assigns, according to their several & respective estates, rights & interests: that deft. & two other lessees covenanted with all the other parties, & each & every of them, their & each of every of their heirs, exors., administrators, & assigns, to repair the premises, etc., & to surrender them in good repair to the lessors, their heirs & assigns respectively, at the end of the term, & to work the mines properly. The declaration then deduced to pltf. a title to the moiety of T., & alleged, as breaches, the non-repair of the premises, & the improper working of the mines. There was also in a special covenant relating to the entry of the lessors to view the mines, a covenant that the lessors should be at liberty to use certain ropes, etc.:—**Plea**, that the said A. was the survivor of all the covenantors:—**Held**: the covenants in question were joint & not several, & the surviving covenantor ought to have been pltf. in the action. **Qu.**: whether one of several tenants in common, lessors, can sue on a covenant to repair made with all.—**BRADBURNE v. BOTFIELD** (1845), 14 M. & W. 559; 14 L. J. Ex. 330; 5 L. T. O. S. 496; 153 E. R. 597.

*Annotations*:—**Consd.** *Wakefield v. Brown* (1846), 9 Q. B. 209. **Refd.** *Beer v. Beer* (1852), 16 Jur. 223; *Scott v. Berry* (1865), 13 W. R. 844. **Mentd.** *Harrold v. Whitaker* (1846), 11 Q. B. 147; *Keightley v. Watson* (1849), 3 Exch. 716; *Palmer v. Mallet* (1887), 36 Ch. D. 411.

**4786.** ———.]—Covenant on a joint lease of certain land by two tenants in common, whereby they demised the land according to their several

estates to the lessees, who covenanted with them & their respective heirs & assigns to repair. It then deduced a title to pltf. as the assignees of one only of the undivided shares, traced the lease to defts.' testator, & assigned a breach by him of the covenant to repair in the time of pltf.:—**Held**: both the tenants in common of the reversion at the time of the breach ought to have joined as pltf. in the action.—**THOMPSON v. HAKEWILL** (1865), 19 C. B. N. S. 713; 35 L. J. C. P. 18; 13 L. T. 289; 11 Jur. N. S. 732; 14 W. R. 11; 144 E. R. 966.

*Annotations*:—**Refd.** *Roberts v. Holland*, [1893] 1 Q. B. 665; *United Dairies v. Public Trustee*, [1923] 1 K. B. 469.

**4787. Joint covenantors—Whether may join in action.**—Where, by indenture between A. & B. of the first part, C. of the second part, & D. of the third part, A. & B. did, with the assent to C., demise to D. for years, yielding & paying a certain rent to E. & the heirs of his body, & D. covenanted with A. & B. to pay the rent, & to repair, etc.:—**Held**: E. could not join with A. & B. in an action of covenant against D. for non-payment of rent & not repairing.—**SOUTHAMPTON (LORD) v. BROWN** (1827), 6 B. & C. 718; 5 L. J. O. S. K. B. 253; 108 E. R. 615.

**4788.** ———.]—B., being owner of land for a term of sixty-one years, granted to S. an annuity for lives, & for securing it, assigned it, wanting one day, to R. By indenture, reciting the above facts, R., at the request of S. & B., did demise & lease, & B. did grant, demise, lease, ratify & confirm, to O., the land of thirty-one years, ending some years before the term first mentioned, at a rent payable to S. while the land should remain subject to the annuity, & afterwards to B.; & O., for herself, her heirs, exors. & administrators, covenanted to & with S. & R. & their respective exors., administrators & assigns, & also to & with B., his exors., administrators & assigns, that she, O., her exors., administrators & assigns, would pay the rent to R., while the premises should remain subject to the annuity, & afterwards to B.: & that she, her exors., administrators or assigns, would perform certain repairs, & would surrender at the end of the thirty-one years to B. in good repair; & B., alone, covenanted for quiet enjoyment. There was also a covenant by O., with R., & B., to repair after certain notice:—**Held**: after the death of S., B. & R. might join in an action against the assignees of O. for breach of the first mentioned covenant to repair, the covenant being with S., B. & R. jointly, & running with the land.

A covenant to repair clearly runs with the land, & there is privity of estate between deft. & one of pltf. (**LORD DENMAN, C.J.**).—**WAKEFIELD v. BROWN** (1846), 9 Q. B. 209; 15 L. J. Q. B. 373; 7 L. T. O. S. 450; 10 Jur. 853; 115 E. R. 1254.

*Annotations*:—**Mentd.** *Harrold v. Whitaker* (1846), 11 Q. B. 147; *Magnay v. Edwards* (1853), 13 C. B. 479.

**4789.** ———.]—**SURVIVOR.**—**BRADBURNE v. BOTFIELD**, No. 4785, ante.

**4790. Heir of lessor—Breach in ancestor's time.**—(1) In covenant by an heir against a tenant for suffering premises to be out of repair, no objection can be taken to the breach though part of the time during which it states that deft. suffered the premises to be out of repair was in the lifetime of pltf.'s ancestor.

If a farm is out of repair in the life of the ancestor, & afterwards the heir brings an action, he shall recover damages for the whole time; but the heir

Pltf. sued defts., who were the assignees of the rent for the term which pltf. was to enjoy, on a covenant by

his lessor to repair, as being a covenant running with the land:—**Held**: they were not liable, for they had no

reversion, & the covenant would not run with the rent.—**McDOUGALL v. RIDOUT** (1851), 9 U. C. R. 236.—**CAN.**

**Sect. 3.—Liability of tenant to repair: Sub-sect. 2, F. (a) i. & ii., (b), (c), (d) & (e) i.]**

ought not to allege a breach in the ancestor's time because that belongs to the exor. (HOLT, C.J.).

(2) In such an action pltf. ought to have by way of damages, as much as will put the premises in proper repair.—*VIVIAN v. CHAMPION* (1705), 2 Ld. Raym. 1125; 1 Salk. 141; Holt, K. B. 178; 92 E. R. 245; *sub nom.* ANON., 11 Mod. Rep. 45.

**Annotations:—***As to* (1) *Reid*, Clow v. Brodgen (1840), 2 Man. & G. 39. *As to* (2) *Reid*, Turner v. Lamb (1845), 14 M. & W. 412; Smith v. Peat (1853), 9 Exch. 161; Yates v. Dunster (1855), 11 Exch. 15; Davies v. Underwood (1857), 3 Jur. N. S. 1223; Mills v. East London Union Grdns. (1872), 21 W. R. 142; Joyner v. Weeks, [1891] 2 Q. B. 31; Conquest v. Ebbetts, [1896] A. C. 490. *Generally*, *Mentd.* Durham & Sunderland Ry. v. Walker (1842), 2 Q. B. 940; Jones v. Simes (1890), 43 Ch. D. 607.

**4791. Lease by owner of equitable estate—Assignment since lease granted.]—**Declaration in covenant by A., the surviving lessor in a lease for years granted by A., B., & C., to deft., on a covenant to repair & leave in repair, assigning breaches in not repairing, & in not leaving in repair at the end of the term. Plea, that A., B., & C., from the time of making the demise until the death of B., & A. & C. afterwards, had a reversion for a longer term of years, expectant on the lease, & that after B.'s death, & before any breach of covenant, A. & C. assigned such reversion to D., & thenceforward ceased to have any reversion or interest in the demised premises. Replication, that A., B., & C. were not until the death of B., nor were A. & C. afterwards, possessed of the said reversion in the demised premises, in manner & form as alleged in the plea:—*Held*: bad, as being a departure from the declaration.—*GREEN v. JAMES* (1840), 6 M. & W. 656; 10 L. J. Ex. 73; 151 E. R. 575.

**Annotations:—***Reid*, Pargeter v. Harris (1845), 7 Q. B. 708; Poole v. Prew (1857), 29 L. T. O. S. 79; Stuart v. Joy, & Nance (1903), 90 L. T. 78.

**4792. Lease by tenant for life & reversioner—Executed by tenant for life only—Action by tenant for life.]—**By an indenture of demise expressed to be made between pltf., a tenant for a term of years, determinable on his life of the first part, Y., the reversioner, of the second part, & deft. of the third part; pltf. & Y. demised to deft. a farm & lands for a term of fourteen years, & deft. covenanted with pltf. & his assigns to repair, etc., & also to yield up the demised premises to pltf. in case he should be alive, or, in the event of his death, to Y., his heirs & assigns, at the end of the term. The lease was executed by pltf., but not by Y., & deft. entered into & held possession of the demised premises thereunder:—*Held*: pltf. was entitled to maintain an action against deft. for breach of his covenant to repair, & the reversioner not having executed the lease formed no answer or defence to such action.—*How v. GREEK* (1864), 3 H. & C. 391; 5 New Rep. 60; 34 L. J. Ex. 4; 11 L. T. 315; 10 Jur. N. S. 1187; 13 W. R. 80; 159 E. R. 583.

**4793. — Right of trustees of settlement to join.]—**Premises were devised to trustees upon trust to pay the rents & profits thereof to a person for life with remainder over. The tenant for life granted a lease of the premises by which the lessee covenanted to keep the premises in repair. The lessee having committed a breach of the covenant to repair:—*Held*: the tenant for life, in granting the lease, was by reason of Settled Land Act, 1882 (c. 38), s. 53, in the position of a trustee for all parties entitled under the settlement; therefore

the damages were recoverable by the tenant for life as trustee for the trust estate, & the trustees under the will were entitled to be joined as pltf. in the action; & deft. could not set up a set-off against the tenant for life alone.—*MITCHELL v. ARMSTRONG* (1901), 17 T. L. R. 495.

**Annotation:—***Reid*, *Re* Lacon's Settlement, Lacon v. Lacon, [1911] 2 Ch. 17.

**In cases of underleases.]—**See Part IV., Sect. 10, sub-sect. 2, C.; Sect. 11, sub-sect. 2, C., *ante*.

ii. *Against Whom.*

**Assignee of lessee.]—**See Sect. 1, *ante*.

**4794. Personal representative of lessee—Breach before tenant's death—& during representative's occupation.]—**ANON. (1573), 3 Leon. 51; 74 E. R. 534.

**Annotation:—***Reid*, Coward v. Gregory (1866), 36 L. J. C. P. 1.

—*See* EXECUTORS, Vol. XXIV., pp. 635, 641–643, Nos. 6615–6621, 6668–6674, 6678, 6693–6700.

**4795. Action by tenants in common—Lessee purchasing interest of one lessor.]—**To an action of covenant by tenants in common for not repairing a messuage: Plea, that the lessee, after the demise to him & before the breach complained of, had purchased the interest of one of the lessors, whereby the lessee became tenant in common of the premises with pltf. —*Held*: ill, on general demurrer, & the action was properly brought.—*YATES v. COLE* (1821), 2 Brod. & Bing. 660; 129 E. R. 1121; *sub nom.* GATES v. COLE, 5 Moore, C. P. 554.

**Annotation:—***Consd.* Badeley v. Vigurs (1854), 4 E. & B. 71.

**4796. — — — — —.]—***BADKLEY v. VIGURS* (1854), 4 E. & B. 71; 2 C. L. R. 1627; 23 L. J. Q. B. 377; 23 L. T. O. S. 297; 1 Jur. N. S. 159; 119 E. R. 28.

**4797. Action against one tenant in common.]—**Where, in covenant against an assignee of a lease, pltf. declared that all the right, etc., of the lessee vested in deft. by assignment, & that afterwards the premises were out of repair, & deft. pleaded in bar, that for one period he was possessed of one-sixth of the premises, as tenant in common with A. B. & C., & for another period, of one-third, as tenant in common with B. & C., & that no more or greater interest in the premises ever came to him by assignment:—*Held*: (1) the plea was bad in substance, as it could not be a bar to the whole action; (2) it was bad in form also, as it merely confessed that deft. had possession of part of the premises, & not that he was assignee. *Seemle*: deft. should have pleaded in abatement, & should have shown how the other persons became tenants in common with him.—*MERCERON v. DOWSON* (1826), 5 B. & C. 470; 8 Dow. & Ry. K. B. 264; 4 L. J. O. S. K. B. 211; 108 E. R. 179.

**Annotations:—***As to* (2) *Consd.* United Dairies v. Public Trustee, [1923] 1 K. B. 469. *Reid*, Heap v. Livingston (1843), 11 M. & W. 896; Norval v. Pascoe (1864), 4 New Rep. 390.

**4798. — Extent of liability.]—**A lease containing a covenant to repair became, by assignment, vested in two tenants in common:—*Held*: the lessor was entitled to recover from either of the two tenants in common the full amount of the damages that might be found due for a breach of the covenant.—*UNITED DAIRIES, LTD. v. PUBLIC TRUSTEE*, [1923] 1 K. B. 469; 92 L. J. K. B. 326; 128 L. T. 768; 39 T. L. R. 125; 67 Sol. Jo. 199.

**4799. Covenantor for securing performance of covenants.]—**By indenture of lease, reciting that

PART XVIII. SECT. 3, SUB-SECT. 2.—F. (a) ii.

h. *Personal representative of lessee.]—*MACNAMARA v. VINCENT (1852), 2 I. Ch. R. 481; 4 Ir. Jur. 197.—*IR*.

L. had agreed to take premises of C., & that it had also been agreed that R. should enter into the covenant after-mentioned for securing payment of the rent, it was witnessed that in consideration of the covenants after-mentioned on the part of L. to be performed, & particularly of the covenant thereafter entered into by R., the said C., at the request of R., demised to L., etc. L. & R. covenanted to C., that they would pay him the rent on the appointed days: & further, that L., his exors., etc., should & would keep the premises in repair. There were other covenants similarly framed to this last, for matters to be performed by L., & a proviso for re-entry if the rent should be in arrear, or if L., his exors., etc., should not perform the covenants in the indenture contained, on his & their part to be performed: & there was a covenant by C. to L. for quiet enjoyment, L., his exors., etc., paying the rent & performing the covenants in the indenture before contained:—*Held*: R. was jointly bound with L. by the covenant to repair, as well as the covenant to pay rent.—*COPLAND v. LAPORTE* (1835), 3 Ad. & El. 517; 111 E. R. 510.

**4800. Cestui que trust in occupation.]**—A lease of a house contained a covenant by the lessee for himself & his assigns to repair, & also a declaration that the lessee held the premises in trust for deft. Deft. occupied the premises during the whole of the term, as it was intended by the parties that she should do, & she paid the rent. Upon the expiry of the term the premises were out of repair:—*Held*: the fact of deft. having the beneficial interest in the lease did not, either by itself or coupled with the fact of occupation by her, create any equitable liability in her for the breach of the lessee's covenant.—*RAMAGE v. WOMACK*, [1900] 1 Q. B. 116; 69 L. J. Q. B. 40; 81 L. T. 526; 16 T. L. R. 63.  
*Annotation*:—*Mentd.* Hand v. Blow, [1901] 2 Ch. 721.

*See, further, TRUSTS & TRUSTEES.*

**Bankrupt tenant—Proof by landlord.]**—*See* BANKRUPTCY, Vol. IV., pp. 258, 259, Nos. 2449, 2450, 2458.

**In cases of underleases.]**—*See* Part IV., Sect. 10, sub-sect. 2, C.; Sect. 11, sub-sect. 2, C., *ante*.

#### (b) Forfeiture.

*See* Part XXIV., Sect. 1, *post*.

#### (c) Injunction.

**Injunction generally.]**—*See* INJUNCTION, Vol. XXVIII., pp. 355 *et seq.*

**4801. Pulling down buildings during term.]**—Covenant to repair, & at the end of the term surrender, buildings in good condition does not preclude an injunction against pulling them down, & carrying away the materials, just before the end of the term.—*LONDON CORPN. v. HEDGER* (1810), 18 Ves. 355; 34 E. R. 352.

**4802. To restrain breach of covenant to repair—Act also amounting to breaches of other covenants.]**—Pltfs. granted a lease of a house to deft. for twenty-one years, deft. covenanting (1) to keep the premises in good & substantial repair & condition; (2) not to make any alteration in the external appearance of the buildings; (3) not to do or suffer to be done any act or thing which might be or grow to the annoyance, damage or disturbance of the lessors or the neighbourhood;

(4) not to carry on upon any part of the premises any other business than that of a tailor; & (5) not to assign or part with the possession of the premises or any part thereof. Pltfs. held the house under a lease for ninety-nine years from the vicar of the parish, which contained similar covenants. The house adjoined the churchyard, & deft. let the wall of the house which faced the principal entrance to the church to a bill-posting co., who covered the wall with advertisements. The effect of this was to injure the wall, & there was evidence that it was an annoyance to the vicar of the church & members of the congregation. Pltfs. claimed an injunction to restrain deft. from allowing the wall to be used as a bill-posting station:—*Held*: there had been a breach of covenants (1), (2), & (3), & perhaps of covenants (4) & (5), & pltf. was entitled to an injunction.—*HEARD v. STUART* (1907), 24 T. L. R. 104.

**As remedy against waste.]**—*See* Part XIX., Sect. 4, sub-sect. 1, *post*.

#### (d) Specific Performance.

**Specific performance.]**—*See, generally, SPECIFIC PERFORMANCE.*

**4803. Whether decreed.]**—*LONDON (CITY) v. NASH*, No. 4702, *ante*.

**4804.** —.]—*LUCAS v. COMMERFORD* (1790), 3 Bro. C. C. 166; 8 Sim. 499; 1 Ves. 235; 8 L. J. Ch. 131; 29 E. R. 469, L. C.

*Annotations*:—*Expld.* Wilkins v. Fry (1816), 1 Mer. 241. *Consd.* Casberd v. A.-G. (1819), Dan. 238; Jenkins v. Portman (1836), 1 Keen, 435. *Refd.* Bracebridge v. Buckley (1816), 2 Price, 200; Williams v. Bosanquet (1819), 1 Brod. & Bing. 238. *Mentd.* Flight v. Bentley (1835), 7 Sim. 149; Moores v. Chout (1839), 8 Sim. 508; Robinson v. Rosher (1841), 1 Y. & C. Ch. Cas. 7; Arkwright v. Colt (1842), 2 Y. & C. Ch. Cas. 4; Moore v. Greg (1848), 2 Ph. 717; South Wales Ry. v. Wythes (1854), 24 L. J. Ch. 1; Cox v. Bishop (1857), 8 De G. M. & G. 815; Powell v. Alken (1858), 4 K. & J. 343; McCroight v. Foster (1870), 5 Ch. App. 607, n.; Friary Holroyd & Healey's Breweries v. Singleton, [1899] 1 Ch. 86.

**4805.** —.]—No specific performance of a covenant to repair.

The tenant cannot be compelled to repair. This ct., according to LORD THURLOW's opinion, would not entertain a bill for that purpose (*LORD ELDON, C.*).—*HILL v. BARCLAY* (1810), 16 Ves. 402; 33 E. R. 1037, L. C.; *subsequent proceedings* (1811), 18 Ves. 56, L. C.

**4806.** —.]—Though the ct. will not ordinarily decree specific performance of an agreement to repair, it is the habit of the ct. to decree specific performance of agreements involving the execution of leases, or other instruments containing covenants to repair.—*PAXTON v. NEWTON* (1854), 2 Sm. & G. 437; 65 E. R. 470.

**4807.** —.]—Though the ct. will not, as a rule, specifically enforce contract to build or repair, it will do so in cases where the contract for building is in its nature defined.—*HEPBURN v. LEATHER* (1884), 50 L. T. 660.

#### (e) Action for Damages.

##### i. In General.

**4808. Jurisdiction of court to assess—Lord Cairns' Act, 1857 (c. 27).]**—If an injunction can be supported to restrain the progress of dilapidations not completed at the date of the filing of the bill, then the above Act gives jurisdiction to assess damages in respect of such parts of the dilapidations as have been already effected at that date.—

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F. (d).

**4803 I. Whether decreed.]**—*BERNARD v. MEARA* (1861), 12 I. Ch. R. 389; J.—VOL. XXXI.

14 Ir. Jur. 333.—IR.

**4803 II.** —.]—*ARMSTRONG v. COURTENAY* (1863), 15 I. Ch. R. 138.—IR.

**4803 III.** —.]—On the ground of uncertainty the ct. will not specifically enforce a contract merely to repair a building.—*BARKER v. BECKETT & CO., LTD.* (1911), T. P. D. 151.—S. AF.

**Sect. 3.—Liability of tenant to repair: Sub-sect. 2, F. (e) i., ii. & iii., & (f) i.]**

**HINDLEY v. EMERY** (1865), L. R. 1 Eq. 52; 35 L. J. Ch. 6; 13 L. T. 272; 11 Jur. N. S. 874; 14 W. R. 25.

**Annotations:—***Apld.* **M'Rae v. L. B. & S. C. Ry.** (1868), 37 L. J. Ch. 287; *Refd.* **Hythe Corp. v. East** (1866), 35 L. J. Ch. 257; **Loods Industrial Co-op. Soc. v. Slack**, [1924] A. C. 851.

**4809. Covenant to put in repair—Damages assessed once for all.]—ANON.** (1573), 3 Leon. 51; 74 E. R. 534.

**Annotation:—***Expld.* **Coward v. Gregory** (1866), 36 L. J. C. P. 1.

**4810. ———.]—COWARD v. GREGORY**, No. 4737, *ante*.

**4811. Covenant to keep in repair—Damages may be recovered for each breach.]—**Upon a covenant to repair & keep in repair during the continuance of the term, an action may be maintained for breaches committed before the term has expired.—**LUXMORE v. ROBSON** (1818), 1 B. & Ald. 584; 106 E. R. 215.

**4812. ———. Damages in former action matter of mitigation.]—COWARD v. GREGORY**, No. 4737, *ante*.

**4813. Covenant to repair & leave in repair—Damages recovered during term—Action for not leaving in repair.]—**Certain premises were demised to the predecessors in title of plffs. for sixty-one years from Michaelmas 1837, subject to covenants to repair & deliver up in repair. The premises were sub-demised to the predecessors in title of deft. subject to the same covenants. On Apr. 4, 1894, an action was commenced by plffs. against deft. for damages for the breaches of the covenants, & £1,305 was recovered, none of which was expended in repairing the premises. On Sept. 19, 1898, the term of the underlease expired, & plffs. claimed the sum that it would cost to put the premises into such state of repair as deft. would be bound to leave them at the end of the term, making due allowance for the sum of £1,305 they had received:—*Held*: the previous action was no estoppel, & the true measure of damages of the breaches of covenant was the cost of putting the premises into the state of repair in which the tenant was bound to leave them at the expiration of the said term, less the sum of £1,305 & interest.—**EBBETTS v. CONQUEST** (1900), 82 L. T. 560; 16 T. L. R. 320; 44 Sol. Jo. 378, D. C.

**4814. Repairs done pending action—Mitigation of damages.]—ANON.** (1573), 3 Leon. 51; 74 E. R. 534.

**Annotation:—***Refd.* **Coward v. Gregory** (1866), 36 L. J. C. P. 1.

**4815. Compulsory purchase of tenant's interest—Liability of tenant to date of acquisition.]—**In 1859 plff. leased premises to the E. L. Poor Law Union for twenty-one years, & in 1869 the E. L. Union was dissolved under "Dissolved Boards of Management & Guardians Act, 1870," but the guardians were to continue in office for the purpose of the Act. In 1866 notice to treat in respect of the premises was served by a railway co. under their Act upon the guardians of the E. L. Union, & in 1867 an award of compensation to them was made, & in 1870 the guardians assigned the premises to the co. & gave up possession to them. The covenant to repair in the lease was broken before the notice to treat, & there were continuing

breaches thereof down to date of action, June, 1871. In June, 1866, the co. served plff. with notice to treat in respect of his interest in the premises, & he sent in his claim, but nothing further had been done upon it:—*Held*: the guardians of the E. L. Union were liable for the breach of the covenant to repair up to the date of the execution of the assignment to the co., & the damages were to be measured by the extent to which the reversion had been damaged.—**MILLS v. EAST LONDON UNION** (1872), L. R. 8 C. P. 79; 42 L. J. C. P. 46; 27 L. T. 557; 37 J. P. 6; 21 W. R. 142.

**Annotations:—***Consd.* **Matthey v. Curling**, [1922] 2 A. C. 180. *Refd.* **Joyner v. Weeks**, [1891] 2 Q. B. 31.

**Measure of damages.]—**See Sub-sect. 2, F. (f), *post*.

**ii. Defences.**

**4816. Release—Of all actions, duties & demands—Subsequent breach of covenant.]—**(1) A release of all actions, duties, & demands, made by a lessor to a lessee, will not discharge a subsequent breach of covenant to leave the premises in good repair.

(2) In covenant, if the breach be assigned according to the covenant, it is sufficient.—**HANCOCK v. FIELD** (1607), Cro. Jac. 170; 79 E. R. 149; *sub nom.* **HANCOCK v. CROUTH'S EXECUTORS**, Noy, 123. **Annotations:—***Refd.* **Whitton v. Bye** (1618), Cro. Jac. 486; **Porter v. Phillipps** (1621), Palm. 218; **Hen v. Hamson** (1663), 1 Keb. 510; **Thorpe v. Thorpe** (1696), Holt, K. B. 28; **Cage v. Acton** (1699), 1 Ld. Raym. 515.

**4817. ———. What amounts to.]—**By a lease in 1866 the lessee of a plot of land covenanted with the lessor to complete a coach-house & stable upon the land within six months to the satisfaction of the lessor, & to keep in repair the demised buildings. The lease contained a proviso for re-entry on breach of covenant. The plot was one of a number of building plots subject to a building scheme. The scheme was subsequently modified, & no coach-house or stable was ever built, the lessor approving & consenting to the alteration. In an action by the assignee of the lessor to recover possession for breach of the covenant to repair the coach-house & stable:—*Held*: the true inference was that the parties intended to release the covenant to repair as regards the coach-house & stable.—**GIBBON v. PAYNE** (1907), 23 T. L. R. 250, C. A.

—*See* CONTRACT, Vol. XII., pp. 497 *et seq.*

**4818. Accord & satisfaction.]—**In an action against deft., for breach of covenant, in not repairing & leaving in repair, he pleaded, that, after the expiration of the term, & before commencement of the suit, & whilst the premises were ruinous, prostrate, etc., an agreement had taken place between the parties, that in consideration that deft., at the request of plff., had become & then was the occupier of the premises, at a certain rent; & had also, at the request of plff., promised plff. to repair & amend the premises, on or before a certain day, he, plff., would forbear & give time to deft. until the day, for the due reparation, etc., without, in the meantime, commencing or prosecuting any action, in respect of the breaches of covenant; & in case the tenement should be so well repaired upon the day, he, plff., would relinquish & forego all claim upon him, deft. The plea then alleged, that, though deft. still & during the time continued tenant to the premises, & was ready to repair, so that the premises should be in a good

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**F. (e) ii.**

**k. Dilapidations caused by landlord—No defence.]—**Deft. covenanted

to repair, & that if he should fall the lessor might do it & sue for the sum expended. To an action for repayment of money thus spent, deft. pleaded that the

repairs were caused by plff. wilfully, maliciously, & in the dead hour of the night, & the possession of the premises thus disturbed, contrary to the lease:—*Held*: no defence, but the subject of

state by & on the day, whereof pltf. had notice; yet pltf. wrongfully commenced his suit before the day:—*Held*: ill, as it amounted to a plea of accord not executed; also, because there was no good consideration, either for deft.'s promise to pltf. to repair the premises before a certain day, or for pltf.'s promise to deft. to forbear to sue until that day.—*BAYLEY v. HOMAN* (1837), 3 Bing. N. C. 915; 3 Hodg 184; 5 Scott, 94; 6 L. J. C. P. 309; 132 E. R. 663.

—*J*.—See *CONTRACT*, Vol. XII., p. 437, Nos. 3534 *et seq.*

**Excuses for non-performance.**—See Sub-sect. 2, G., *post*.

### iii. Practice and Procedure.

See, generally, *PRACTICE*.

**4819. Service out of the jurisdiction**—R. S. C., Ord. 11, r. 1 (b).—An action against the assignee of a lease for breach of a covenant to repair contained in the lease is an action in which a contract or liability affecting land or hereditaments is sought to be enforced within above rule. Service of the writ of summons out of the jurisdiction may, therefore, be allowed in such an action where the land is situate within the jurisdiction.—*TASSELL v. HALLÉN*, [1892] 1 Q. B. 321; 61 L. J. Q. B. 159; 66 L. T. 196; 56 J. P. 520; 40 W. R. 221; 8 T. L. R. 210; 36 Sol. Jo. 202, D. C.

*Annotations*:—*Consd.* *Collins v. North British & Mercantile Insce.*, *Pratt v. Same*, [1894] 3 Ch. 228. *Refd.* *Frith v. De La Rivas & Palmer* (1893), 69 L. T. 383.

**Reference to arbitration—Matters of account.**—See *ARBITRATION*, Vol. II., pp. 621–623, Nos. 2495–2497, 2508, 2519.

**Agricultural holdings.**—See *AGRICULTURE*, Vol. II., pp. 46–48, Nos. 251–264.

### (f) Measure of Damages.

#### i. During Term.

See, generally, *DAMAGES*, Vol. XVII., pp. 130 *et seq.*

**4820. Whether injury to reversion—Or cost of repair.**—*VIVIAN v. CHAMPION*, No. 4790, *ante*.

**4821.** ————*J*.—In an action of covenant for non-repair of premises, held by deft. under a lease which has several years to run, the proper measure of damages is not the amount that would be required to put the premises into repair; but the amount to which the reversion is injured by the premises being out of repair.

In estimating the damages in cases where the lease has a long time to run, it is not fair to take the amount that would be necessary to put the premises into repair as the measure of the damages; for in such cases, when the damages are awarded to the landlord, he is not bound to expend them in repairs, neither can he do so without the tenant's permission to enter on the premises. The true question therefore is—to what extent is the reversion injured by the non-repair of the premises? If the lease had ninety-nine years to run, it could not make much difference in the value of the reversion whether the premises were now in repair or not. This lease, however, will expire in about six years. It appears also that this property originally consisted of a warehouse, a stable, & gardens; & pltf. say that the erection of the

present tenements was wrongful; but they (waiving that for the present) have sent surveyors who make an estimate amounting to between £150 & £160. Deft. says, "I may have done wrong by putting up these tenements, but on the covenants contained in this lease I am only bound well & sufficiently to repair & uphold, & if need be, to rebuild the warehouse & stable, & to keep the hedges, pales, & other fences in tenantable repair"; & I think that under this covenant deft. is only bound to keep in repair the buildings which were on the premises at the time of the granting of the lease, & to rebuild them if necessary, & to keep up the fences; & that in estimating the damage you ought not to take into consideration the new cottages that have been built since the granting of the lease. . . . For as the tenant is not only to repair but to rebuild if necessary, pltf. are entitled to have such parts of the premises, as this covenant relates to, kept always in good repair (*COLERIDGE, J.*).—*DOE d. WORCESTER TRUSTEES v. ROWLANDS* (1841), as reported in 9 C. & P. 734, N. P.

*Annotations*:—*Consd.* *Conquest v. Ebbetts*, [1896] A. C. 490. *Refd.* *Smith v. Peat* (1853), 9 Exch. 161; *Joyner v. Weeks*, [1891] 2 Q. B. D. 31.

**4822.** ————*J*.—*HENDERSON v. THORN*, No. 4842, *post*.

**4823.** ———— **Depends on length of unexpired term.**—*Scmble*: in covenant for non-repair, the declaration ought to state the term for which the premises were demised.

The damage for non-repair may surely be very different, if the reversion comes to the landlord in six months or in nine hundred years (*ALDERSON, B.*).—*TURNER v. LAMB* (1815), 14 M. & W. 412; 5 L. T. O. S. 287; 153 E. R. 535.

*Annotations*:—*Refd.* *Joyner v. Weeks*, [1891] 2 Q. B. 31; *Conquest v. Ebbetts*, [1896] A. C. 490.

**4824.** ————*J*.—A declaration in case, for injury to pltf.'s reversionary interest, by pulling down a messuage, alleged that, at the time of committing the grievance, the messuage "was in the possession & occupation of H. as tenant thereof, to pltf."; which allegation was traversed by plea, & issue joined thereon. At the trial it appeared that H. was tenant to pltf., but had given up possession to deft., shortly before the act complained of, without, however, assigning his interest:—*Held*: (1) the issue was properly found for pltf., the meaning of the allegation being that the tenant had a right to possession in point of interest, so that pltf. could sue as reversioner; (2) the proper measure of damage was the amount by which the land was lessened in value by deft.'s wrongful act.—*HOSKING v. PHILLIPS* (1848), 3 Exch. 168; 5 Ry. & Can. Cas. 560; 18 L. J. Ex. 1; 12 L. T. O. S. 198; 12 Jur. 1030; 154 E. R. 801.

*Annotations*:—*As to* (2) *Refd.* *Morgan v. Hardy* (1886), 17 Q. B. D. 770; *Rust v. Victoria Graving Dock Co. & London & St. Katharine Dock Co.* (1887), 36 Ch. D. 113; *Joyner v. Weeks*, [1891] 2 Q. B. 31. *Generally, Mend.* *Cotter v. Met. Ry.* (1864), 10 Jur. N. S. 1014.

**4825.** ————*J*.—A lessee paid a sum of money to his landlord for breaches of covenant to repair, committed during the occupation of his assignee & his assignee's successor:—*Held*: (1) he could recover damages against his assignee for the money paid for the non-repair during the assignee's occupation without showing an apportionment;

a cross-action only.—*KELLY v. MOULDS* (1863), 22 U. C. R. 467.—*CAN.*

### PART XVIII. SECT. 3, SUB-SECT. 2.—F. (a) II.

1. *Inspection of buildings.*—*HILLS v. UNION LOAN & SAVINGS CO.* (1899),

19 P. R. 1.—*CAN.*

### PART XVIII. SECT. 3, SUB-SECT. 2.—F. (f) I.

m. *General rule—Injury to reversion—Not cost of repairs.*—In an action on a lease, having many years

to run, for rent & non-repair of the premises:—*Held*: the reversioner, by reason of the length of the lease, was not restricted to nominal damages, but the measure of damages was the amount to which the reversion was injured by the premises being out of

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(2) he was entitled to recover from deft. substantial damages, & not nominal damages only.

The measure of damages for breach of a contract to repair, during the existence of the term, is the difference between the price for which the reversion would sell, if the covenant were unbroken, from that for which it would sell if the covenant were broken.—*SMITH v. PEAT* (1853), 9 Exch. 161; 2 C. L. R. 424; 23 L. J. Ex. 84; 22 L. T. O. S. 106.

*Annotations:—**Reid. Davis v. Underwood* (1857), 22 J. P. 8; *Joyner v. Weeks*, [1891] 2 Q. B. 31; *Gooch v. Clutterbuck* (1899), 68 L. J. Q. B. 808.

**4826. — Premises compulsorily acquired during term.]—***MILLS v. EAST LONDON UNION*, No. 4815, *ante*.

**4827. — —.]—***WILLIAMS v. WILLIAMS*, No. 4646, *ante*.

**4828. — Taking all circumstances into account.]—**(1) In an action for damages for breach of covenant to keep demised property in repair, the proper measure of damages is the difference in value between the reversion with the covenant performed & the value of that reversion with the covenant unperformed.

(2) In the case of an underlease, if the underlease discloses the fact that it is an underlease, the liability of the underlessor to his superior landlord is a material circumstance to be taken into account in ascertaining the amount of damages to be paid by the underlessee to the underlessor for breach of covenant to keep in repair.—*EBBETT v. CONQUEST*, [1895] 2 Ch. 377; 64 L. J. Ch. 702; 73 L. T. 69; 44 W. R. 56; 11 T. L. R. 454; 39 Sol. Jo. 583; 12 R. 430, C. A.; *affd. sub nom. CONQUEST v. EBBETTS*, [1896] A. C. 490, II. L.

*Annotations:—**As to (1) Reid. Molyneux v. Richard* (1903), 75 L. J. Ch. 39; *Stephens v. Junior Army & Navy Stores*, [1914] 2 Ch. 516. *As to (2) Reid. Clare v. Dobson*, [1911] 1 K. B. 35; *Ellis v. Torrington* (1919), 89 L. J. K. 13, 369.

**4829. Action by life tenant—Injury to life estate.]—**Where freehold premises are upon lease, & there are several interests, viz. tenant for life, remainder in tail, & the reversion in fee; & there is a breach of covenant which gives the tenant for life a right of action, he can only recover such damages as are commensurate with the injury done to his life estate, & not the damages which may be sustained by the reversioner.—*EVELYN v. RADDISH* (1817), Holt, N. P. 543, N. P.

**4830. Action by lessee & underlessee—Lessee's interest liable to forfeiture.]—**A. covenanted with B. to keep certain premises in repair, but allowed them to become dilapidated, & the cost of repair would amount to £40. B. had covenanted with C., the ground landlord, duly to pay rent, which he had failed to pay, so that B.'s reversion may have been forfeited & of no value:—*Held*: in an action by B. against A., the damages should be what it would cost to put the premises in repair, not what might be the value of B.'s reversionary interest in the premises.—*DAVIES v. UNDERWOOD* (1857), 2 H. & N. 570; 27 L. J. Ex. 113; 30 L. T. O. S.

*repair. ATKINSON v. BEARD* (1861), 11 C. P. 245.—*CAN.*

**n. — —.]—***BECKFORD v. BRANDLE* (1920), 50 D. L. R. 450.—*CAN.*

**4831 i. Whether damages nominal.]—**In an action, during the continuance of the term demised, for damages occasioned by the non-repair of premises, pursuant to a covenant in the lease:—*Held*: the judge was right in refusing to direct the jury to find only nominal damages for pltf.—*BELL v. HAYDEN* (1859), 9 I. C. L. R. 301.—*IR.*

**4831 ii. —.]—**In an action brought during the term for breach of covenant to repair, if the evidence shows that the premises were dilapidated before action brought, the lessor is entitled to nominal damages, although the lessee expended money after the commencement of the action in putting them into repair.—*MORONY v. FERGUSON* (1874), 1 R. 8 C. L. 551.—*IR.*

**4831 iii. —.]—***BEATTIE v. QUIREY* (1876), 1 R. 10 C. L. 516.—*IR.*

**4831 iv. —.]—***METGE v. KAVANAGH* (1877), 1 R. 11 C. L. 431.—*IR.*

154; 22 J. P. 8; 3 Jur. N. S. 1223; 6 W. R. 105; 157 E. R. 235.

*Annotations:—**Reid. Williams v. Williams* (1874), L. R. 9 C. P. 659; *Morgan v. Hardy* (1886), 17 Q. B. D. 770; *Joyner v. Weeks*, [1891] 2 Q. B. 31.

**4831. Whether damages nominal.]—**Where tenant for years agrees to keep the premises in repair during the tenancy, & before the expiration of the term, an action is brought against him for breach of this agreement, pltf. is entitled to recover nominal damages only.—*MARRIOTT v. COTTON* (1848), 2 Car. & Kir. 553, N. P.; *subsequent proceedings*, 11 L. T. O. S. 64.

*Annotations:—**Reid. Davies v. Underwood* (1857), 30 L. T. O. S. 154; *Joyner v. Weeks*, [1891] 2 Q. B. 31.

**4832. —.]—***SMITH v. PEAT*, No. 4825, *ante*.

**4833. — No injury to reversion—Such injury avoided by landlord's own acts.]—***WILLIAMS v. WILLIAMS*, No. 4646, *ante*.

**4834. — Sufficiency of proof of identity of premises.]—**In an action for non-repair of premises mentioned in the declaration only as "the premises particularly described in the lease," it was proved that there had been a notice to repair the premises, particularly describing them, & that before action pltf.'s surveyor had made an estimate of the dilapidations, & stated the amount to deft., who promised to pay it, & that particulars of breaches had been delivered in the action in the same terms as the notice to repair:—*Held*: it not appearing that there were any other premises of the non-repair of which pltf. complained against deft. or that the latter could have been misled, there was sufficient evidence of the amount of the damage; & the judge ought not to have directed a verdict for nominal damages on the ground that the admission, the notice, & the particulars were not identified with the premises demised & referred to in the declaration.—*MAPLETON v. RAWLINGS* (1854), 3 C. L. R. 237; 24 L. T. O. S. 134.

**As between lessor & underlessee.]—**See Part IV., Sect. 10, sub-sect. 2, C., *ante*.

**As between lessee & underlessee.]—**See Part IV., Sect. 11, sub-sect. 2, C., *ante*.

**ii. After Determination of Term.**

**4835. Cost of repairs.]—***SHORTTRIDGE v. LAM-PLUGH* (1700), 2 Ld. Raym. 798; 7 Mod. Rep. 71; 92 E. R. 33.

**4836. — Loss of rent during repairs.]—**If a tenant, who is bound to repair, leave, & at the end of the tenancy the premises be out of repair, the jury may give the landlord, in an action against the tenant, not only the amount of the actual expense of the repairs, but also a compensation for the loss of the use of the premises while they were undergoing repair.—*WOODS v. POPE* (1835), 6 C. & P. 782, N. P.

*Annotation:—**Mentd. Wye Shipping Co. v. Chemin de fer Paris-Orleans*, [1922] 1 K. B. 617.

**4837. — —.]—***BIRCH v. CLIFFORD* (1891), 8 T. L. R. 103.

*Annotation:—**Mentd. Wye Shipping Co. v. Chemin de fer Paris-Orleans*, [1922] 1 K. B. 617.

**o. Term almost ended—Cost of reconstruction.]—***HEPENSTALL v. WICKLOW COUNTY COUNCIL*, [1921] 2 I. R. App. 165.—*IR.*

**PART XVIII. SECT. 3, SUB-SECT. 2.— F. (f) ii.**

**4835 i. Cost of repairs.]—***BUSCOMBE v. STARK*, [1917] 1 W. W. R. 204; 23 B. C. R. 155.—*CAN.*

**4835 ii. —.]—***SARAFALI TYABALI v. SUBRAYA BATERAYA & NAROTAMDAS CANDAS* (1895), 1 L. R. 20 Bom. 439.—*IND.*

**4838.** — **Set-off of repairs by sub-lessee.]**—A sub-lessee of premises, who held over after the expiration of the original lessee's lease, did repairs to the amount of £38.—*Held*: in an action of covenant on the lease against the original lessee for repairs, as the repairs done by the sub-lessee were done at a period subsequent to the estimate made of the repairs necessary, the original lessee was entitled to set off this £38 & the lessors were only entitled to a sum sufficient to put the premises in repair.—*HARE v. COLEMAN* (1846), 6 L. T. O. S. 413.

**4839.** — **Premises pulled down at termination of term.]**—Covenant to yield up demised premises at the expiration of term in good repair. During the term, lessor verbally arranged with a builder to pull down the premises. This arrangement was not reduced into writing until Mar. 1864. The term expired Dec. 25, 1863, on which day lessee yielded up the premises out of repair. On the following day, Dec. 26, the builder took possession, & shortly afterwards pulled down. In an action by lessor against lessee for breach of the covenant to yield up in repair:—*Held*: the lessor was entitled to recover substantial damages, notwithstanding the agreement, made before the expiration of the term, for the demolition of the premises; for the said agreement was, & continued during the term, by parol only, & was not enforceable either at law or in equity.

*Qu.*: however, if the said agreement had been a binding one, & thereby the lessor, before the term expired, had parted with his interest in the premises, whether the damages recoverable by him would have been substantial, or nominal only.—*RAWLINGS v. MORGAN* (1865), 18 C. B. N. S. 776; 6 New Rep. 122; 34 L. J. C. P. 185; 12 L. T. 348; 11 Jur. N. S. 564; 13 W. R. 746; 144 E. R. 650

*Annotations*:—*Consd.* *Inderwick v. Leech* (1885), 1 T. L. R. 484; *Morgan v. Hardy* (1886), 17 Q. B. D. 770; *Joyner v. Weeks*, [1891] 2 Q. B. 31. *Refd.* *Calthorpe v. McOscar*, [1923] 2 K. B. 573. *Mentd.* *Lidgett v. Secretan* (1871), L. R. 6 C. P. 616.

**4840.** — **—.]**—A lessor has a vested right of action upon the breach of a covenant to yield up premises in good repair, & is entitled to compensation according to the exact amount of dilapidation at the termination of the tenancy; & where premises have been pulled down by the lessor at the expiration of the lease, his rights under the covenant are not thereby diminished.—*INDERWICK v. LEECH* (1885), 1 T. L. R. 484.

*Annotations*:—*Consd.* *Joyner v. Weeks*, [1891] 2 Q. B. 31. *Refd.* *Ebbets v. Conquest* (1895), 64 L. J. Ch. 702; *Calthorpe v. McOscar*, [1923] 2 K. B. 573.

**4841.** — **—.]**—Where a lessee has covenanted to leave the premises in repair at the end of the term, the rule as to the measure of damages, on breach of the covenant, is that the damages are such a sum as it will cost to put the premises into the state of repair in which the lessee was bound to leave them; & that rule is not affected by the fact that, before the expiration of the term, the lessor has relet the premises on the expiration of the term to a third person, who has covenanted to alter & rebuild the premises.—*JOYNER v. WEEKS*, [1891] 2 Q. B. 31; 60 L. J. Q. B. 510; 65 L. T. 16; 55 J. P. 725; 39 W. R. 583; 7 T. L. R. 509, C. A.

*Annotations*:—*Consd.* *Henderson v. Thorn*, [1893] 2 Q. B. 164; *Lewis v. Baker*, [1905] 1 Ch. 46; *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Ry. of London*, [1912] A. C. 673. *Refd.* *Barff v. Probyn* (1895), 73 L. T. 118; *Conquest v. Ebbets* (1896), 45 W. R. 59; *Rose v. Spicer*, *Rose v. Hyman*, [1911] 2 K. B. 234; *Stephens v. Junior Army & Navy Stores*, [1914] 2 Ch. 516; *Hill v. Showell* (1916), 87 L. J. K. B.

1106; *Ellis v. Torrington* (1919), 89 L. J. K. B. 369; *Calthorpe v. McOscar*, [1923] 2 K. B. 573. *Mentd.* *Celia S.S. v. Volturmo S.S.*, [1921] 2 A. C. 544.

**4842.** — **Less damages recovered during term.]**

—Two years before the expiration of a lease the lessor brought an action against the lessee for breach of covenant to repair; the lessee paid into ct. the sum of £235, which was accepted in satisfaction. No repairs were in fact done. At the expiration of the term another action was brought by the same lessor for breach of covenants to repair & leave in repair. The particulars in this action included the items of non-repair in respect of which the claim was made in the first action; it also included other items. The official referee assessed the damages by ascertaining the amount required to put the premises into repair, together with a sum for any depreciation that would have accrued had the repairs been done on the first occasion between that date & the end of the term, & deducting from such amount the sum received by the lessor in the first action:—*Held*: the official referee had adopted the right method of assessing the damages in the second action, & the sum paid into ct. in respect of the first action must not be treated as the equivalent of putting the premises into repair, but as representing the loss to the lessor measured by the depreciation in the saleable value of the reversion.—*HENDERSON v. THORN*, [1893] 2 Q. B. 164; 62 L. J. Q. B. 586; 69 L. T. 430; 57 J. P. 679; 41 W. R. 509; 37 Sol. Jo. 457; 5 R. 404.

**4843.** — **—.]**—*EBBETS v. CONQUEST*, No. 4813, *ante*.

**4844.** — **Though landlord liable to do substantial repairs.]**—Pltf. having recovered a verdict under £20 as damages for his inability to let a house for six weeks, in consequence of deft. having omitted to do certain repairs to which he was liable as tenant, the ct. refused to disturb the verdict, notwithstanding the substantial repairs were to be done by pltf.—*WOODS v. POPE* (1835), 1 Bing. N. C. 467; 1 Scott, 536; 131 E. R. 1197.

**As between lessor & underlessee.]**—*See* Part IV., Sect. 10, sub-sect. 2, C., *ante*.

**As between lessee & underlessee.]**—*See* Part IV., Sect. 11, sub-sect. 2, C., *ante*.

### iii. Action by Heir or Assignee of Reversion.

**4845. Heir—Breach partly in time of ancestor.]**—*VIVIAN v. CHAMPION*, No. 4790, *ante*.

**4846. Assignee of reversion—Damages only from time of assignment.]**—*ANON.* (1573), 3 Leon. 51; 74 E. R. 534.

*Annotation*:—*Expld.* *Coward v. Gregory* (1866), 36 L. J. C. P. 1.

**4847.** — **—.]**—A. demised to B., for a term of years, two messuages; the lease contained a covenant by B., that he would, during the term, keep the premises in repair, & leave them, at the end of the term, in good repair & in the same state as they were in at the beginning. At the end of the term, the messuages were out of repair, & had been converted into a single house. B. held on without a fresh lease, & C. afterwards purchased the reversion of A., & B. continued to hold on under C.:—*Held*: (1) B. was not liable in *assumpsit* on an implied contract to put the messuages in such repair, & in the same state, as they were in at the commencement of the term; (2) supposing B. so liable, C. had no right of action for breaches of the contract committed before he purchased the reversion.—*JOHNSON v. ST. PETER, HEREFORD (CHURCHWARDENS)* (1836),

**Sect. 3.—Liability of tenant to repair: Sub-sect. 2, F. (f) iii., (g), & G. Sect. 4.]**

4 Ad. & El. 520; 1 Har. & W. 720; 6 Nev. & M. K. B. 106; 5 L. J. K. B. 116; 111 E. R. 883.  
*Annotation:—As to (2) Refd. Wedd v. Porter, [1916] 2 K. B. 91.*

**4848. ———.]—MARTYN v. WILLIAMS, No. 4552. ante.**

**4849. ———.]—(1)** Demise for seven years, with a proviso that, notwithstanding anything before contained, if notice should not be given to determine the lease at the end of the seven years, it should be considered a lease upon the same covenants, from year to year, until notice to determine it:—*Held*: the demise continued after the seven years until put an end to by notice, & the covenants continued binding.

(2) Covenant by farm tenant "well & substantially" to repair & keep in "good substantial repair," & so "well & substantially repaired" to yield up at the end of the term:—*Held*: the tenant was bound to give up the premises in as good a state of repair as when he took possession, & they must be inferred to have been then in a tenable state.

(3) The landlord having become changed during the term, & a claim for dilapidations being now made by the existing landlord:—*Held*: the tenant was entitled to an inquiry as to the state of repair when the present landlord's title accrued.—*BROWN v. TRUMPER* (1858), 26 Beav. 11; 53 E. R. 800.

*Annotation:—Refd. Calthorpe v. McOscar, [1923] 2 K. B. 573.*

**4850. ———.]—WEDD v. PORTER, No. 5006, post.**

**4851. ——— Lease containing general covenant to repair & covenant to repair after notice.]—MASCAL'S CASE** (1587), 1 Leon. 62; 74 E. R. 58.

*(g) Refusal to Renew.*

See Part IX., Sect. 2, sub-sect. 9, B. (a), ante.

*G. Excuses for Non-Performance.*

**4852. Non-execution of deed—Lease by Royal Patent.]—**An action of covenant will lie for a breach by a patentee of the Crown, although he did not sign or seal any counterpart; for his acceptance of the deed shall bind him as strongly as if it had been an indenture.—*BRETT v. CUMBERLAND* (1619), Cro. Jac. 521; Godb. 276; 2 Roll. Rep. 63; 79 E. R. 416.

*Annotations:—Folld. Lyme Regis Corpn. v. Henley* (1834), 1 Blug. N. C. 222. *Mentd. Norton v. Acklane* (1640), Cro. Car. 579; *Thursby v. Plant* (1669), 1 Saund. 237; *Jenkins v. Hermitage* (1674), Freem. K. B. 377; *London (City) v. Vanacro* (1699), 12 Mod. Rep. 269; *Nicholl v. Allen* (1862), 1 B. & S. 935.

**4853. ——— Execution by lessee after date—No execution by lessor.]—**Declaration in covenant on an indenture of Mar. 25, 1838, made between pltf. & deft., whereby pltf. then demised to deft. a certain messuage, with the appurtenances, for the term of seven years, & deft. did thereby covenant with pltf. that he would yearly, & every year during the term, keep the premises in good repair, & give them up in good repair, at the end of the term; by virtue of which demise deft. entered upon & enjoyed the said demised premises. The breach laid was for not keeping the premises in repair during the term. Deft., after setting out the deed on oyer, pleaded that his part of the indenture was executed by him after the alleged day of the execution thereof; & that pltf.'s part was never executed by him, or by any agent of his thereunto lawfully authorised; nor was there ever any demise of the said premises to deft., from the said day for the said term; nor was there ever

any lease of any part of the said premises put in writing & signed, or made, signed, sealed, or delivered by pltf., or by any agent of his thereunto lawfully authorised by writing or otherwise; & that, although before the making of the indenture, to wit, on Mar. 25, 1838, pltf. demised the said premises for the term of one year, & so on from year to year, by virtue of which demise deft. entered & occupied the premises for a term, to wit, for nine years, which term had ended before the commencement of the suit, deft. never did occupy the said premises under any demise from pltf. other than that last mentioned, or for any term granted by the indenture, & that there never was any consideration for the execution by deft., on his part, of the indenture, & that his covenant therein was void. Verification:—*Held*: in substance a good answer to the action. *Qu.*: whether the plea did not amount to an argumentative denial of the execution of the deed by deft.—*PITMAN v. WOODBURY* (1848), 3 Exch. 4.

*Annotations:—Consd. Swatman v. Ambler* (1852), 8 Exch. 72. *Distd. Toler v. Slater* (1867), L. R. 3 Q. B. 42. *Refd. Wheatley v. Boyd* (1851), 7 Exch. 20; *British Empire Assce. v. Browne* (1852), 12 C. B. 723; *Shepherd v. Hodsman* (1852), 16 Jur. 948; *Wood v. Copper Miners' Co.* (1854), 14 C. B. 428. *Mentd. Cottee v. Richardson* (1851), 7 Exch. 143; *Morgan v. Pike* (1854), 14 C. B. 473.

—.]—See DEEDS, Vol. XVII., p. 222, Nos. 373-375.

**4854. Eviction by landlord from demised premises—Eviction from whole.]—(1)** If, to covenant for not repairing certain premises demised, deft. plead that pltf. before the cause of action accrued entered & pulled down the premises & expelled him, pltf. may reply that he did not expel, etc., *modo et forma* etc.

(2) But to an action of covenant for not repairing several premises deft. cannot plead an expulsion by pltf. from part.—*HODGSKIN v. QUEENBOROUGH* (1738), Willes, 129; 125 E. R. 1093.

**4855. ——— Eviction from part.]—HODGSKIN v. QUEENBOROUGH, No. 4854. ante.**

**4856. ———.]—**An eviction of a tenant, by his landlord, from part of the demised premises, creates a suspension of the entire rent, but *semble*: by such an eviction the tenancy is not determined, nor is the tenant discharged from any other of his covenants with regard to the premises, save that for the payment of rent.—*MORRIS v. CHADWICK* (1849), 13 L. T. O. S. 208.

—.]—See Part XXV., Sect. 1, post.

**4857. Eviction by title paramount—Occupation by military authorities.]—**A lessee, under a lease expiring on Mar. 25, 1919, covenanted to keep the demised premises, consisting of a mansion house & some fourteen acres of land, in repair & to deliver them up in a state of repair at the end of the term; to insure against fire &, in case of fire, forthwith to lay out all moneys to be received in respect of the insurance in rebuilding & reinstating the premises; &, if such moneys were insufficient, to provide the deficiency. The term was afterwards assigned to an assignee who entered into possession, & who died leaving his exors. in possession. The War Office then requisitioned the premises for the internment of prisoners of war & took possession. In Feb. 1919, while the War Office was still in possession, the house was destroyed by fire. Nothing was done towards reinstating the house & the War Office did not give up their possession until June 4, 1919, after the expiration of the term. The lessee had paid the rent up to Christmas, 1918. In an action brought on June 6, 1919, by the lessor against the lessee for the rent due on Mar. 25, 1919, & for damages for breaches of the aforesaid covenants, deft. contended that he was not liable

on the grounds, (a) that he was evicted by title paramount & that the lease was thereby determined; (b) frustration of the purpose for which the lease was granted; & (c) prevention by the lawful acts of the military authorities:—*Held*: there had been no eviction by "title paramount" in the proper sense, the lessee remained liable on the repairing covenant in the lease notwithstanding his having been deprived of possession by the exercise of lawful powers, & the terminable occupation by the military authorities, for which compensation might prove to be recoverable, was no answer to the obligations of the repairing covenant, & therefore the lessee was liable both for the quarter's rent & on the repairing covenant.—*MATTHEY v. CURLING*, [1922] 2 A. C. 180; 91 L. J. K. B. 593; 127 L. T. 247; 38 T. L. R. 475; 66 Sol. Jo. 386, H. L.

**4858. Neglect by landlord of precedent obligation.**—Defts. were the owners of two houses in a street numbered 38 & 40 & of a gateway under 40 & adjoining 38. In 1857 they demised the house No. 38 for a term of twenty-one years the lease containing a covenant by the lessee to repair all walls & party walls belonging to the premises. In 1865 they granted a lease to pltf. of the house No. 40 for a term of eleven years subject to a similar covenant to repair walls & party walls. The wall on the side of the gateway separating it from No. 38 was a party wall between the gateway & the house No. 38 to the height of the first floor. The house of pltf., No. 40, was built so as to extend in part over the top of the gateway & to rest upon this party wall between the gateway & the house No. 38 & to be supported by it. Pltf.'s covenant to repair did not extend to this wall & there was no covenant by defts. to keep it in repair. In 1874 it was discovered that the walls of that part of No. 40 which was above the gateway were giving way. The damage was owing to the failure of support from the party wall which had bulged in consequence of the pressure upon it from pltf.'s premises.—*Held*: there was no implied covenant on the part of defts. to support pltf.'s premises, although it might be an answer to an action upon pltf.'s covenant to repair, that the repair had been rendered impossible by the neglect of some precedent obligation on the part of defts.—*COLBECK v. GIRDLEERS CO.* (1876), 1 Q. B. 1. 234; 45 L. J. Q. B. 226; 34 L. T. 350; 40 J. P. 596; 24 W. R. 577.

*Annotation*:—*Consd. Sack v. Jones*, [1925] Ch. 235.

**4859. Employment of competent workmen.**—Breach of a covenant to repair is not excused because the covenantor has *bond fide* employed persons to repair. If the covenantor's agents have in fact not repaired, the breach is not such as equity will relieve against.—*NOKES v. GIBBON* (1856), 3 Drew. 681; 26 L. J. Ch. 433; 29 L. T. O. S. 139; 21 J. P. 659; 3 Jur. N. S. 726; 61 E. R. 1063.

*Annotation*:—*Mentd. Hughes v. Met. Ry.* (1876), 1 C. P. D. 120.

**Relief from forfeiture for breach.**—*See* Part XXIV., Sect. 1, sub-sect. 4, D. (b), *post*.

#### SECT. 4.—LANDLORD'S RIGHT OF ENTRY TO VIEW AND REPAIR.

**4860. "At a convenient time"**—May not enter on Sunday.—*KENT'S (EARL) CASE* (1588), Gouldsb. 76; 75 E. R. 1006.

**4861.**—Distinguished from "within convenient time"—Landlord not entering within two years.—*KENT'S (EARL) CASE* (1588), Gouldsb. 76; 75 E. R. 1006.

**4862.**—Landlord coming without notice—Access to certain rooms refused.—*DOE d. WITHERELL v. BIRD*, No. 4773, ante.

**4863. Whether licence implied—No right reserved.**—A landlord has no right to enter his tenant's premises to repair them, without some stipulation to that effect.—*BARKER v. BARKER* (1829), 3 C. & P. 557, N. P.

**4864.**—Landlord entering at instance of tenant.—*FEARNLEY v. REINDALL* (1859), 1 F. & F. 719.

**4865.**—Landlord under covenant to repair—Entry for reasonable time.—*Seemle*: an injury to or the destruction of demised premises, resulting from the use of them by the tenant in a reasonable & proper manner, having regard to the class of tenement to which they belong, is not waste. In a lease of a newly-constructed grain warehouse there was a covenant by the lessor that he would during the term "keep the main walls & main timbers of the warehouse in good repair & condition." The lessee entered under the lease & stored grain in it, in as the ct. held upon the evidence a reasonable & proper way. After a short time a beam which supported one of the floors broke, & ultimately the external walls sank & bulged outwards, & the lessor spent a large sum in repairing the premises. In an action by the lessor to recover from the lessee what he had thus expended:—*Held*: (1) the lessee had not been guilty of waste; (2) the lessor was bound under his covenant to put the walls & main timbers in good repair, having regard to the class of buildings to which the warehouse belonged, & not merely to the condition of the particular building; (3) the covenant implied a licence by the tenant to the landlord to enter upon the premises for a reasonable time for the purpose of executing the necessary repairs.

(4) The lease contained a proviso, that in case the warehouse, or any part thereof, should at any time during the term "be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident," the rent, or a just proportion thereof, should cease or abate so long as the premises should continue wholly or partly untenable or unfit for use or occupation in consequence of such destruction or damage. During the period in which the lessor was executing the repairs the lessee was excluded from the use & occupation of the whole or a part of the premises, & he claimed an abatement of rent under the proviso:—*Held*: the words "inevitable accident" imported something *ejusdem generis* with what had been previously mentioned, & did not apply to that which, though not avoidable so far as the lessee was concerned, was not in its nature inevitable, but resulted from the default of the lessor, & the lessee was not entitled to an abatement of rent.—*SANER v. BILTON* (1878), 7 Ch. D. 815; 47 L. J. Ch. 267; 38 L. T. 281; 26 W. R. 391.

*Annotations*:—As to (1) *Fold. Manchester Bonded Warehouse Co. v. Carr* (1880), 5 C. P. D. 507. As to (4) *Fold. Manchester Bonded Warehouse Co. v. Carr* (1880), 5 C. P. D. 507.

**4866.**—Landlord under covenant to repair in superior lease—Entry by leave of sub-lessee's weekly tenant.—A lessor who, in the absence of express power in the lease, enters upon the demised premises to repair them on breach of the lessee's covenant to repair, even though under a superior lease the lessor is liable to forfeiture for non-repair & though he enters by leave of weekly sub-tenants, commits a trespass which will be restrained by injunction.—*STOCKER v. PLANET BUILDING SOCIETY* (1879), 27 W. R. 877, C. A.

# SECT. 5.—LIABILITY FOR INJURIES DUE TO WANT OF REPAIR.

## SUB-SECT. 1.—WANT OF REPAIR AMOUNTING TO PUBLIC NUISANCE.

### A. Liability of Tenant.

See, generally, NUISANCE.

**4867. *Prima facie* liable.]**—If the owner of a house is bound to repair it, he & not the occupier, is liable to an action on the case for an injury sustained by a stranger from the want of repair.

I agree that the tenant as occupier is *prima facie* liable to the public, whatever private agreement there may be between him & the landlord. But if he can show that the landlord is to repair, the landlord is liable for neglect to repair (BULLER, J.).

If we were to hold that the tenant was liable in this case, we should encourage circuity of action, as the tenant would have his remedy over against the landlord (HEATH, J.).—**PAYNE v. ROGERS** (1794), 2 Hy. Bl. 350; 126 E. R. 590.

**Annotations:**—**Consd.** Russell v. Shenton (1842), 3 Q. B. 449; Todd v. Flight (1860), 9 C. B. N. S. 377. **Reid.** Chauntler v. Robinson (1849), 4 Exch. 163; Bishop v. Bedford Charity Trustees (1859), 5 Jur. N. S. 488; Gwinnell v. Eamer (1875), L. R. 10 C. P. 658; Nelson v. Liverpool Brewery Co. (1877), 2 C. P. D. 311; Heaven v. Pender (1882), 30 W. R. 749; Cavalier v. Pope, [1906] A. C. 428. **Mentd.** Alabaster v. Harness, [1894] 2 Q. B. 897.

**4868. — Injury to adjoining premises.]**—The repairing & amending of a ruinous house is *prima facie* the duty of him who occupies the premises, & does not devolve upon the owner merely as such. Therefore, a declaration in case for omitting to amend & keep in repair in a substantial & lasting manner a messuage & premises whereby pltf.'s adjacent premises suffered damage, is bad on general demurrer if it charge deft. as the "owner & proprietor" of such messuage & premises, unless it also allege some ground of liability. The words "owner & proprietor" do not necessarily import that the party is occupier.

There is no obligation towards a neighbour to repair cast by law on the owner of a house, merely as owner, or to keep it in repair in a lasting & substantial manner; the only duty is to keep it in such a manner & in such a state that the neighbours may not be injured by its fall. A house may therefore be in a ruinous state provided it be shored up sufficiently; or a house, if it be ruinous, may be pulled down altogether. The owner is not bound to keep it in a state of substantial repair. All he is bound to do is to prevent it from being a nuisance (POLLOCK, C.B.).—**CHAUNTIER v. ROBINSON** (1849), 4 Exch. 163; 19 L. J. Ex. 170; 14 L. T. O. S. 107.

**Annotations:**—**Consd.** Todd v. Flight (1860), 9 C. B. N. S. 377. **Reid.** Solomon v. Vintners Co. (1859), 4 H. & N. 585; Gandy v. Jubber (1864), 5 B. & S. 78; Ross v. Fedden (1872), 26 L. T. 966; Hargroves, Aronson v. Hartop (1905), 74 L. J. K. B. 233; Sack v. Jones, [1925] Ch. 235.

**4869. —]**—A landlord is liable for an injury to a stranger by the defective repair of demised premises only when he has contracted with the tenant to repair, or when he has been guilty of misfeasance, as, for instance, in letting the premises in a ruinous condition; in all other cases he is exempt from responsibility for accidents happening to strangers during the tenancy. Defts. let to F. a house by an agreement in writing, by which F. agreed "to do all necessary repairs to the said premises except main walls, roof, & main timbers. There was no agreement by defts. to repair, & the house was in good condition at the time of letting it. Owing to defts.' negligence in not repairing a part of the main walls, a chimney pot

during the tenancy of F. fell upon pltf., who was a servant of F., & injured him:—**Held:** (1) pltf. was not entitled to recover compensation from defts. for the injury sustained him; (2) this would not be altered by a custom amongst landlords to do external repairs in the absence of any express provision in the agreement for letting, since such custom would not create an obligation to repair, for the neglect of which they could have been sued by their tenant.—**NELSON v. LIVERPOOL BREWERY Co.** (1877), 2 C. P. D. 311; 46 L. J. Q. B. 675; 25 W. R. 877.

**Annotations:**—As to (1) **Reid.** Heaven v. Pender (1882), 9 Q. B. D. 302; Barham v. Ipswich Dock Comrs. (1885), 54 L. T. 23; Cavalier v. Pope, [1906] A. C. 428; Blacker v. Lake & Elliot (1912), 106 L. T. 533.

— **Nuisance not arising out of want of repair.]**—**See** NUISANCE.

**4870. Bankruptcy of tenant—Liable until lease taken over by assignee or surrendered to landlord.]**—A lease made to a person who seeks the benefit of Judgements Act, 1838 (c. 110), remains vested in him until it be taken to by the assignees, or given up to the landlord. Defts., being the owners of a house & premises, demised the same on Apr. 1, 1853, to M. for thirty years, at a rent payable quarterly, with a right of re-entry if the rent should at any time be in arrear more than fifteen days. M. occupied the fifth floor himself for some time, & let out the rest of the house to separate weekly lodgers, each of whom had a right to draw water from a tank in the area, & to use the area for the purpose of doing so. In Mar. M. let the fifth floor to T., a weekly lodger, & then ceased to reside in the house, never paying the quarter's rent due at Lady Day 1858, or at the Midsummer following, & both were still in arrear at the time the action was brought. T. had the same privilege of using the area & tank as the other lodgers. In July M. became insolvent, & about July 25 he gave up the lease to the official assignee, & was discharged upon July 30. In the same month defts. gave notice to the lodgers that the rent must be paid to them, & two of the lodgers did so pay the rent. On or about Aug. 7, T., who was the tenant of the first floor, received a notice from the inspector of nuisances to repair a grating in front of the house; this notice was immediately handed by him to defts. & they repaired the grating. In Nov. defts. called upon the assignees to elect whether they would take the lease or not; & upon their refusal to take it, defts. took possession of it, & of the house & premises. Upon Aug. 4, pltf. suffered an injury by falling through a grating in an area belonging to the house, & being part of the premises so let with the house. It was admitted that the injury was occasioned by the negligence of some person or persons in not keeping the grating in repair:—**Held:** there was no evidence to go to the jury that defts. before the time of the accident had avoided the lease & entered into possession of the premises, & had thus become answerable for the negligence by which pltf. was injured.—**BISHOP v. BEDFORD CHARITY TRUSTEES** (1859), 1 E. & E. 714; 29 L. J. Q. B. 53; 1 L. T. 214; 6 Jur. N. S. 220; 8 W. R. 115; 120 E. R. 1078, Ex. Ch.

### B. Shifting of Liability to Landlord.

#### (a) Landlord under Covenant to Repair.

See, generally, NUISANCE; NEGLIGENCE.

**4871. Landlord liable—Circuity of action.]**—**PAYNE v. ROGERS**. No. 4867, ante.

**4872. — Injury caused by negligence of workmen.]**—Case lies against the landlord of a house demised by lease, who, under his contract with his

tenant employs workmen to repair the house, for a nuisance in the house occasioned by the negligence of his workmen.—**LESLIE v. POUNDS** (1812), 4 Taunt. 649; 128 E. R. 485.

*Annotations*.—**Refd.** *Laugher v. Pointer* (1826), 5 B. & C. 547; *Rich v. Basterfield* (1847), 4 C. B. 783.

**4873.** —[—]**NELSON v. LIVERPOOL BREWERY Co., No. 4869, ante.**

**4874.** —[—]**MILLS v. TEMPLE-WEST** (1885), 1 T. L. R. 503, D. C.

**4875.** —[—]**TREDWAY v. MACHIN, No. 4890, post.**

**4876.** —[—]**GRIFFIN v. PILLET, No. 4891, post.**

**4877. Landlord undertaking repairs by custom.**—**NELSON v. LIVERPOOL BREWERY Co., No. 4869, ante.**

**4878. Lessor imposing covenant on lessee—Liability for lessee's negligence in performing covenant.**—The Victoria Dock Co., in pursuance of their powers, in 1858 demised a portion of their dock wall, or bank, to the Thames Graving Dock Co., the lessees covenanting to construct a graving dock on land of their own, & make & at all times maintain a channel through the demised part of the wall into such graving dock. The Graving Dock Co. constructed their dock & the channel in accordance with the covenants in the lease. The undertaking of the Thames Graving Dock Co. was afterwards acquired by the Victoria Graving Dock Co. The Victoria Docks Co. was afterwards amalgamated with the London & St. Katharine's Dock Co. On Jan. 18, 1881 there was an unusually high tide & a strong gale, which was at its height at the highest point of the tide. The high tide & gale combined forced the water in the graving dock, which had entered it through the channel demised by the said lease, over the banks & flooded pltf.'s land. Pltf. sued both cos. for damages. The ct. came to the conclusion, upon the evidence, that the banks of the graving dock had not been properly maintained, at the height required by the comrs. of sewers for the district:—**Held**: neither the height of the tide nor the force of the wind, nor the coincidence of their happening together, could be considered as the act of God in the sense which would discharge the Graving Dock Co. from liability. The St. Katharine's Dock Co., being under a liability to maintain their own wall, & having leased it with a covenant which bound the lessees to make an opening in it, were in the same position as if it had been cut by a contractor employed by them, & were liable for any damage resulting from their lessees' neglect in taking proper precautions against the natural results of such opening.—**BURT v. VICTORIA GRAVING DOCK Co., LTD. & LONDON & ST. KATHARINE'S DOCK Co.** (1882), 47 L. T. 378.

**Necessity for notice of want of repair.**—*See* Sub-sect. 1, B. (c), *post*.

(b) *Defect Existing When Premises Let or Re-let.*

*See, generally, NEGLIGENCE; NUISANCE.*

**4879. Whether landlord liable—Defect existing**

**when premises let—Misfeasance of landlord.**—An action lies against the owner of premises who lets them to a tenant in a ruinous & dangerous condition, & who causes or permits them so to remain until by reason of the want of reparation they fall upon & injure the house of an adjoining owner.

If the wrong causing the damage arises from the non-feasance or the misfeasance of the lessor, the party suffering damage from the wrong may sue him (**ERLE, C.J.**).—**TODD v. FLIGHT** (1860), 9 C. B. N. S. 377; 30 L. J. C. P. 21; 3 L. T. 325; 7 Jur. N. S. 291; 9 W. R. 145; 142 E. R. 148.

*Annotations*.—**Distd.** *Pretty v. Bickmore* (1873), L. R. 8 C. P. 401. **Refd.** *Gwinnett v. Eamer* (1875), L. R. 10 C. P. 658; *Nelson v. Liverpool Brewery Co.* (1877), 2 C. P. D. 311; *Heaven v. Pender* (1882), 30 W. R. 749; *Hall v. Norfolk*, [1900] 2 Ch. 493.

**4880.** —[—]**NELSON v. LIVERPOOL BREWERY Co., No. 4869, ante.**

**4881. —Covenant by tenant to repair—Defect not concealed at time of demise.**—The owner of a house having a coal vault entrance covered by a plate in a public street, who has let the premises to a tenant by a lease containing the usual covenant on the part of the lessee to repair, is not responsible to a passenger for injury caused through the defective condition of the coal plate, if the lessor has not concealed from the tenant its dangerous state at the time of the demise. The occupier & not the owner of the premises is, in such case, the person liable for the nuisance.—**Pretty v. Bickmore** (1873), L. R. 8 C. P. 401; 28 L. T. 704; 37 J. P. 552; 21 W. R. 733.

*Annotations*.—**Fold.** *Gwinnett v. Eamer* (1875), L. R. 10 C. P. 658. **Refd.** *Nelson v. Liverpool Brewery Co.* (1877), 2 C. P. D. 311; *Barham v. Ipswich Dock Comrs.* (1885), 54 L. T. 23; *Hall v. Norfolk*, [1900] 2 Ch. 493. **Mentd.** *Heaven v. Pender* (1882), 30 W. R. 749; *Jones v. Rev* (1910), 103 L. T. 165.

**4882. —Defect unknown to lessor at time of demise.**—A. was injured by the giving way of a grating in a public footway, which was used for a coal shoot & for letting light into the lower part of premises adjoining. These premises were at the time of the accident under lease to B., who covenanted to repair & keep in repair all except the roofs, main walls, & main timbers. At the time of the demise the grating was unsafe; but there was no evidence that G., the landlady, had any knowledge of its unsafe state; & the jury found that no blame was attributable to her for not knowing it:—**Held**: no action was maintainable against C.—**GWINNELL v. EAMER** (1875), L. R. 10 C. P. 658; 32 L. T. 835, D. C.

*Annotation*.—**Mentd.** *Jones v. Rev* (1910), 103 L. T. 165.

**4883. —Failure to determine periodic tenancy—After nuisance created—Landlord ignorant of nuisance.**—The owner of a messuage & premises, attached to which was an area, let the same to a tenant from year to year, & died, having devised the property, with an iron grating over the area improperly constructed & out of repair so as to amount to a nuisance, to deft. Deft., having no notice of the nuisance, suffered the tenant to remain in the occupation of the premises, upon the

**PART XVIII. SECT. 5, SUB-SECT. 1.—B. (a).**

**4873 i. Landlord liable.**—**KENNEDY v. BRUCE**, [1907] S. C. 845.—**SCOT.**

**4873 ii.** —[—]**CAPE TOWN MUNICIPALITY v. PAINE**, [1923] App. D. 207.—**S. AF.**

**PART XVIII. SECT. 5, SUB-SECT. 1.—B. (b).**

**4880 i. Whether landlord liable—Defect existing when premises let.**—**CULL v. GREEN** (1925), 27 W. A. L. R. 62.—**AUS.**

**4880 ii.** —[—]**Held**: the landlord & tenant were both liable for damages arising from a nuisance created by the landlord in the house, & continued to be used by the tenant while occupying it.—**MCCALLUM v. HUTCHISON** (1858), 7 C. P. 508.—**CAN.**

**4881 i.** —[—]**Covenant by tenant to repair—Defect not concealed at time of demise.**—Where a landlord is the owner of premises containing a nuisance such as fixtures dangerous in their use, & where in such circumstances he leases the premises to a

tenant, & the fixtures when used by the tenant create a danger, the landlord is liable to third persons for any resulting damage, if the use to which the tenant puts the premises & the fixtures was contemplated by the lease or incidental to the purposes for which the premises were leased. The landlord's liability in such circumstances exists notwithstanding the lease contains the lessee's covenant to repair.—**O'LEARY v. SMITH**, [1924] 2 D. L. R. 531; 2 W. W. R. 227; 34 Man. L. R. 386.—**CAN.**

**Sect. 5.—Liability for injuries due to want of repair:**  
**Sub-sect. 1, B. (b) & (c), & C.; sub-sect. 2, A. (a).]**

same terms as before, receiving rent. The wife of A. having sustained damage by reason of the dangerous condition of the grating:—*Held*: deft., as reversioner, was liable to an action for the damage thereby occasioned.—**GANDY v. JUBBER** (1865), 5 B. & S. 485; 9 B. & S. 15; 29 J. P. 645; 13 W. R. 1022; 122 E. R. 911, Ex. Ch.

**Annotations**:—*Consd.* Sandford v. Clarke (1888), 21 Q. B. D. 398. *Refd.* Gwinnell v. Eamer (1875), L. R. 10 C. P. 658; Bowen v. Anderson, [1894] 1 Q. B. 164. *Mentd.* Bartlett v. Baker (1864), 3 H. & C. 153; A.-G. v. Tod Heatley, [1897] 1 Ch. 560; Edell v. Dulieu, [1923] 1 K. B. 533; Mellows v. Low, [1923] 1 K. B. 522; Queen's Club Gardens Estates v. Bignell, [1924] 1 K. B. 117.

**4884.** ————]—*Ptff.* was injured through a defect in the condition of a coal plate in the pavement in front of a house let by deft. on a weekly tenancy, & such defect, though not shown to have been in existence at the commencement of the tenancy, had existed for nearly two years before the accident:—*Held*: having regard to the nature of the tenancy, there had been a reletting of the premises after the nuisance was created, & deft. as reversioner was liable.—**SANDFORD v. CLARKE** (1888), 21 Q. B. D. 398; 57 L. J. Q. B. 507; 59 L. T. 226; 52 J. P. 773; 37 W. R. 28, D. C.

**Annotations**:—*Consd.* Bowen v. Anderson, [1894] 1 Q. B. 164. *Mentd.* Queen's Club Gardens Estates v. Bignell, [1924] 1 K. B. 117.

**4885.** ————]—A., the landlord of a house let on a weekly tenancy, was sued for personal injury to B., a passenger, owing to a defect in the coal plate of house. The defect had existed some months, but there had been no reletting, & the evidence was not clear whether the defect was owing to tenant's negligence or to the defective structure:—*Held*: the liability of A. was not to be determined as if he had relet the house each week, but depended on whether the defect was caused by tenant's negligence or a structural defect, both of which were questions for a jury.—**BOWEN v. ANDERSON**, [1894] 1 Q. B. 164; 58 J. P. 213; 42 W. R. 236; 38 Sol. Jo. 131; 10 R. 47, D. C.

**Annotations**:—*Mentd.* Simmons v. Crossley, [1922] 2 K. B. 95; Mellows v. Low, [1923] 1 K. B. 522; Queen's Club Gardens Estates v. Bignell, [1924] 1 K. B. 117.

**4886. Whether injury due to defect or to tenant's negligence—Question for jury.**—**BOWEN v. ANDERSON**, No. 4885, *ante*.

**Necessity for knowledge of defect by landlord.**—*See* Sub-sect. 1, B. (c), *post*.

**(c) Knowledge of, or Notice to Landlord.**

*See, generally*, NEGLIGENCE; NUISANCE.

**4887. Necessity for.]**—Where premises occupied by a tenant from year to year are in such a state as to be themselves a nuisance, an action may be maintained, by a person damaged thereby, against the reversioner, upon proof that after the commencement of the nuisance, & before the cause of action arose, deft. might have terminated the tenancy by notice to quit, but omitted to do so; & deft. cannot relieve himself from his liability by showing that he did not become possessed of the reversion, or begin to receive rent, until after the creation of the nuisance, & that he never had any notice of its existence.—**GANDY v. JUBBER** (1864), 5 B. & S. 78; 3 New Rep. 569; 33 L. J. Q. B. 151; 9 L. T. 800; 28 J. P. 517; 10 Jur.

N. S. 652; 12 W. R. 526; 122 E. R. 762; *reversd.* on other grounds (1865), 9 B. & S. 15, Ex. Ch.

**Annotations**:—*Refd.* Gwinnell v. Eamer (1875), L. R. 10 C. P. 658; Sandford v. Clarke (1888), 21 Q. B. D. 398. *Mentd.* Bartlett v. Baker (1864), 3 H. & C. 153; Bowen v. Anderson, [1894] 1 Q. B. 164; A.-G. v. Tod Heatley, [1897] 1 Ch. 560; Edell v. Dulieu, [1923] 1 K. B. 533; Mellows v. Low, [1923] 1 K. B. 522; Queen's Club Gardens Estates v. Bignell, [1924] 1 K. B. 117.

**4888.** ————]—**GWINNELL v. EAMER**, No. 4882, *ante*.

**4889.** ————]—*Held*: the landlord was not liable as he had no notice of the defective condition of the premises.—**BROGGI v. ROBINS** (1899), 15 T. L. R. 224, C. A.

**Annotations**:—*Fold.* Tredway v. Machin (1904), 91 L. T. 310. *Distd.* Cavalier v. Pope (1905), 74 L. J. K. B. 857.

**4890.** ————]—A landlord is not liable to his tenant for personal injuries caused by the defective condition of the demised premises unless the landlord has agreed to repair the premises, & has received notice of the want of repair.

If there is a contract as between the landlord & tenant that the landlord will repair the premises, that is, during the currency of the term, the landlord is not under any obligation unless there be an express contract to that effect, to perform repairs unless & until notice of the necessity for these repairs has been given to him (**COLLINS, M.R.**).—**TREDWAY v. MACHIN** (1904), 91 L. T. 310; 53 W. R. 136; 20 T. L. R. 726; 48 Sol. Jo. 671, C. A.

**Annotations**:—*Consd.* Melles v. Holme, [1918] 2 K. B. 100; Murphy v. Hurly, [1922] 1 A. C. 369. *Distd.* Griffin v. Pillet (1925), 70 Sol. Jo. 110.

**4891. Sufficiency of notice.]**—In the lease of a dwelling-house the lessor covenanted to keep the exterior of the premises in good & substantial repair. During the currency of the term the lessee wrote to the lessor on Apr. 2, 1924, that "steps to the front door want attention." Thereupon the lessor communicated with his builders, who on Apr. 8, inspected the premises & reported that "the front steps are in a dangerous condition, & being so defective we have put the matter in hand." The builders obtained an estimate for the work, & on Apr. 16 the steps were repaired. In the meantime, however—namely, on Apr. 14, while the lessee, who was unaware that the steps were dangerous, was leaving the house the steps collapsed & he fell into the cellar below sustaining serious injuries. In an action by the lessee to recover damages for breach of the lessor's covenant to repair:—*Held*: (1) the letter of Apr. 2 was a sufficient notice of want of repair, although it did not specify the precise degree of non-repair; (2) even if that letter could not be relied upon as express notice of non-repair it gave the lessor a right of entry, & the actual knowledge of the condition of the steps acquired by him on Apr. 8 through his agents the builders prevented him setting up the absence of express notice; (3) having actual knowledge on Apr. 8 of the dangerous condition of the premises the lessor was bound to take immediate steps to render the premises temporarily safe if the permanent repairs could not be executed at once; (4) the lessor had committed a breach of covenant; & (5) the lessee having been injured owing to that breach was entitled to recover damages.—**GRIFFIN v. PILLET**, [1926] 1 K. B. 17; 95 L. J. K. B. 67; 134 L. T. 58; 70 Sol. Jo. 110.

*See, also*, Sub-sect. 1, B. (a), (b), *ante*.

**PART XVIII. SECT. 5, SUB-SECT. 1.—**

**B. (c).**

**4887 i. Necessity for.]**—Where a tenant allows a nuisance to exist on

the premises, the landlord, as well as the tenant, will be liable in damages, if by his conduct he supports the tenant in maintaining the nuisance.—

**BOOK v. SCHROEDER & LAND** (1894), 9 E. D. C. 106.—S. AF.

**4887 ii.** ————]—**GILLISON v. THOMAS' ESTATE**, [1920] E. D. L. 146.—S. AF.

*C. Nuisance in respect of Public Health.*

See LOCAL GOVERNMENT; NUISANCE; PUBLIC HEALTH.

## SUB-SECT. 2.—WANT OF REPAIR NOT AMOUNTING TO PUBLIC NUISANCE.

*A. Landlord's Liability.**(a) No Covenant by Landlord to Repair.*

**4892. No liability.—To tenant.]—**LANE v. COX, No. 4896, *post*.

**4893. — To sub-tenant.]—**Where a landlord is under no liability to his tenant to repair the premises, & a sub-tenant of such tenant, as to part of the premises receives personal injuries, owing to the defective state of the premises, the landlord is under no liability to such sub-tenant. —NORRIS v. CATMUR (1885), Cab. & El. 576

**4894. —.]—**Defts., who were the owners of considerable house property, let a house to a tenant who subsequently sub-let it to a co. whose manager resided on the premises with his wife (pltf.) & his family; defts. were not liable to do any repairs in the house. In the lavatory of the house was a water tank, which became insecure, owing, as was alleged, to the vibration caused by an engine & machinery upon adjoining premises of defts., which were used by them for the purpose of generating electricity for the lighting of their property. Complaints of the insecurity of the water tank were made by pltf. & her husband to the tenant, who forwarded them to defts. Ultimately defts. sent two workmen, who were their own servants, to do the necessary repairs, & an iron bracket was fixed underneath the tank to support it. Three months afterwards the bracket fell upon pltf. & seriously injured her. The jury found that the bracket fell by reason of the working of defts.' engine, that the working of the engine amounted to a nuisance, & that the work of repair in putting up the bracket was done in an improper & negligent manner & the apparatus left in a condition dangerous to persons properly using the lavatory:—*Held*: (1) pltf. had no cause of action against defts. on the ground of nuisance, because she had no interest in the premises or right of occupation in the proper sense of the term; (2) she could not recover on the ground of negligence, for there was no contractual relation between pltf. & defts., & the doing of the repairs

was a voluntary act on the part of defts. not done in the discharge of a duty to pltf.; & as defts. had no control of the premises, there was no invitation on their part to pltf., but at the utmost an innocent representation as to the state of the premises, which, as they had employed apparently competent men to do the repairs, gave pltf. no cause of action.—MALONE v. LASKEY, [1907] 2 K. B. 141; 76 L. J. K. B. 1134; 97 L. T. 324; 23 T. L. R. 399; 51 Sol. Jo. 356, C. A.

*Annotations:—Generally.* *Mentd.* Blacker v. Lake & Elliot (1912), 106 L. T. 533; White v. Steadman (1913), 109 L. T. 249.

**4895. — To tenant's customers or guests.]—**A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening in consequence during the term.—ROBBINS v. JONES (1863), 15 C. B. N. S. 221; 3 New Rep. 85; 33 L. J. C. P. 1; 9 L. T. 523; 12 W. R. 248; 143 E. R. 708; *sub nom.* ROBBINS v. JONES, 10 Jur. N. S. 239.

*Annotations:—Folld.* Lane v. Cox (1896), 66 L. J. Q. B. 193. *Apprvd.* Cavalier v. Pope, [1906] A. C. 428. *Folld.* Bromley v. Mercer, [1922] 2 K. B. 126. *Refd.* Ryall v. Kidwell, [1914] 3 K. B. 135; Dobson v. Horsley, [1915] 1 K. B. 634; Fairman v. Perpetual Investment Bldg. Soc., [1923] A. C. 74. *Mentd.* Gautret v. Egerton (1867), 1 R. 2 C. P. 371; Hamilton v. St. George, Hanover Square Vestry (1873), L. R. 9 Q. B. 42; Silverton v. Marriott (1888), 59 L. T. 61; Horridge v. Makinson (1915), 84 L. J. K. B. 1294.

**4896. —.]—**Apart from contract, there is no duty upon the owner of an unfurnished house as between him & his tenant to see that the house is let to the tenant in a safe condition at the commencement of the term, & if the tenant, or the customer or guest of the tenant, suffer injury during the term by reason of the unsafe condition of the house, no action for negligence will lie against the owner.—LANE v. COX, [1897] 1 Q. B. 415; 66 L. J. Q. B. 193; 76 L. T. 135; 45 W. R. 261; 13 T. L. R. 142; 41 Sol. Jo. 142, C. A.

*Annotation:—Refd.* Cavalier v. Pope, [1906] A. C. 428.

**4897. — Stranger.]—**The landlord cannot be made liable in an action for personal injuries caused to a stranger by the dilapidated condition of demised premises.—COPP v. ALDRIDGE & CO. (1895), 11 T. L. R. 411.

**4898. — Want of repair unavoidable by reasonable care.]—**Where the owner & occupier of a building lets the lower floor to a tenant, & remains himself in occupation of the upper floors & roof, he is under no liability to the tenant, either implied from the contract between them or arising

PART XVIII. SECT. 5, SUB-SECT. 2.—*A. (a).*

**4892 i. No liability.—To tenant.]—**BETCHER v. HAGELL (1906), 38 N. S. R. 517; 1 E. L. R. 20.—CAN.

**4892 ii. —.]—**A landlord who lets a house in a dangerous state incurs no liability to his tenant for accident during the term unless he has contracted to keep it in repair.—IANNONE v. GRASSBY (1922), 32 Man. L. R. 164; 68 D. L. R. 100; [1922] 2 W. W. R. 1189.—CAN.

**4892 iii. —.]—**HENDERSON v. MUNN (1888), 15 R. (Ct. of Sess.) 859; 25 Sc. L. R. 619.—SCOT.

**4892 iv. —.]—**HARDIE v. SNEDDON, [1917] S. C. 1.—SCOT.

**4895 i. — To tenant's customers or guests.]—**M'ILWAINE v. STEWART'S TRUSTEES (1914), 51 Sc. L. R. 831.—SCOT.

**4897 i. — Stranger.]—**MC EWAN v. MILLS (1865), 4 W. W. & A'B. 118.—AUS.

**4897 ii. —.]—**O'LEARY v. SMITH, [1925] 2 D. L. R. 1022; 2 W. W. R. 81; 35 Man. L. R. 77;

*revsq.* [1924] 2 D. L. R. 531; 2 W. W. R. 227; 34 Man. L. R. 386.—CAN.

**4897 iii. —.]—**HENDERSON & THOMSON v. STEWART (1818), Hume, 522; 15 Sh. (Ct. of Sess.) 668, n.—SCOT.

**p. — To tenant's daughter.]—**A lessee covenanted with the lessor to keep the premises in repair, & his daughter, living with him at the time of the accident, was injured by the fall of a verandah attached to the building:—*Held*: the daughter had no right of action for damages on account of the accident against the lessor, nor could she be considered as standing in the position of a stranger.—MEHR v. McNAB (1894), 24 O. R. 653.—CAN.

**q. — Absence of negligence.]—**WESTON v. POTTERROW INCORPORATION OF TAILORS (1839), 1 Duul. (Ct. of Sess.) 1218; 14 Fac. Coll. 1232.—SCOT.

**r. —.]—**NORTH BRITISH STORAGE & TRANSIT CO. v. BURNES (STEELE'S TRUSTEES), [1920] S. C. 194; 1 S. L. T. 115; 67 Sc. L. R.

## 155.—SCOT.

**t. —.]—**CAMPBELL v. KENNEDY (1864), 3 Macph. (Ct. of Sess.) 121; 37 Sc. Jur. 62.—SCOT.

**a. — Where tenant aware of deficiency.]—**WHEELER v. VAN REENEN (1883), 2 S. C. 269.—S. AF.

**b. Culvert on tenant's land.—Reserved to landlord.—Landlord liable.]—**ANDERSON v. CLELAND, [1910] 2 I. R. 334.—IR.

**c. Liability.—Damage by snow.—Faulty construction of roof.]—**LEID v. BAIRD (1876), 4 R. (Ct. of Sess.) 234; 14 Sc. L. R. 160.—SCOT.

**d. — Where landlord knows of danger.]—**HALL v. HUBNER (1897), 24 R. (Ct. of Sess.) 875; 34 Sc. L. R. 653; 5 S. L. T. 25.—SCOT.

**e. —.]—**CALDWELL v. M'CALLUM (1901), 4 F. (Ct. of Sess.) 371.—SCOT.

**f. —.]—**DICKIE v. AMICABLE PROPERTY INVESTMENT BUILDING SOCIETY, [1911] S. C. 1079.—SCOT.

**Sect. 5.—Liability for injuries due to want of repair:**  
*Sub-sect. 2, A. (a), (b) & (c), & B. Sect. 6:*  
*Sub-sects. 1, 2 & 3. Sect. 7.]*

from duty independent thereof, to make compensation for damage done to goods stored on this floor by an escape of water from the roof caused by an accident, such as a rat gnawing a hole in a water-pipe, which could not have been prevented by the exercise of reasonable care & vigilance.—**CARSTAIRS v. TAYLOR** (1871), L. R. 6 Exch. 217; 40 L. J. Ex. 129; 19 W. R. 723.

*Annotations:—*Consd. **Hargroves, Aronson v. Hartopp**, [1905] 1 K. B. 472; **Stanton v. Southwick**, [1920] 2 K. B. 642; **Cockburn v. Smith**, [1924] 2 K. B. 119. *Refd.* **Blake v. Woolf**, [1898] 2 Q. B. 426; **Hart v. Rogers**, [1916] 1 K. B. 646. *Mentd.* **Ross v. Fedden** (1872), L. R. 7 Q. B. 661; **Humphries v. Cousins** (1877), 2 C. P. D. 239; **Gill v. Edouin** (1894), 11 T. L. R. 93.

**4899. Repairs done voluntarily by landlord—Injury due to negligent repair.]—MALONE v. LASKEY**, No. 4894, *ante*.

*(b) Express or Implied Covenant by Landlord to Repair.*

*See, generally, NEGLIGENCE.*

**4900. Express covenant—Whether tenant's wife can sue.]—**The owner of a dilapidated house contracted with his tenant to repair it, but failed to do so. The tenant's wife, who lived in the house & was well aware of the danger, was injured by an accident caused by the want of repair:—*Held*: the wife, being a stranger to the contract, had no claim for damages against the owner.—**CAVALIER v. POPE**, [1906] A. C. 428; 75 L. J. K. B. 609; 95 L. T. 65; 22 T. L. R. 648; 50 Sol. Jo. 575, H. L.

*Annotations:—*Refd. **Cameron v. Young**, [1908] A. C. 176; **Middleton v. Hall** (1912), 108 L. T. 804; **Ryall v. Kidwell**, [1914] 3 K. B. 135. *Consd.* **Dobson v. Horsley**, [1915] 1 K. B. 634. *Refd.* **Lewis v. Ronald** (1909), 101 L. T. 534; **Bromley v. Morcer**, [1922] 2 K. B. 126; **Fairman v. Perpetual Investment Bldg. Soc.**, [1923] A. C. 74. *Mentd.* **Blacker v. Lako & Elliot** (1912), 106 L. T. 533; **Bates v. Batey**, [1913] 3 K. B. 351; **White v. Stoddman**, [1913] 3 K. B. 340; **Lucy v. Bayden**, [1914] 2 K. B. 318; **Brackley v. Mid. Ry.** (1916), 85 L. J. K. B. 1596; **Cockburn v. Smith**, [1924] 2 K. B. 119.

**4901. — Or his children.]—**In Scotland, as well as in England, the wife & children of the tenant of a dwelling-house are not entitled to recover damages from the landlord for loss & injury through illness caused by the insanitary state of the premises, inasmuch as they were not parties to the contract of tenancy.—**CAMERON v. YOUNG**, [1908] A. C. 176; 77 L. J. P. C. 68; 98 L. T. 592, H. L.

*Annotation:—*Refd. **Ryall v. Kidwell**, [1913] 3 K. B. 123.

— — — — — *See, also, HIGHWAYS*, Vol. XXVI., p. 434, No. 1520.

**4902. Implied covenant—Housing & Town Planning Act, 1909 (c. 44), ss. 14, 15—Whether tenant's wife can sue.]—**By the above two sects. it is provided that in the case of certain houses mentioned in the first, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation, & that it shall be kept by the

landlord in all respects reasonable fit for human habitation during the continuance of the holding. **Pltfs.**, husband & wife, resided in a house, under a tenancy agreement, which came within the Act. The tenancy was that of the husband, the wife being no party to the contract. Owing to the defective state of the staircase of the house, the wife of the tenant sustained injuries:—*Held*: in the absence of any contractual relationship between the wife of the tenant & the landlord, there was no liability on the part of the latter towards the former as to the condition of the premises.—**MIDDLETON v. HALL** (1912), 108 L. T. 804; 77 J. P. 172; 11 L. G. R. 660, n.

*Annotation:—*Consd. **Ryall v. Kidwell**, [1914] 3 K. B. 135.

**4903. — Whether stranger can sue.]—**The infant daughter of the tenant of a house to which the provisions of the above sects. applied was injured owing to the defective condition of the premises. In an action brought on her behalf against the landlords for damages:—*Held*: the contract created by the statute was between the landlord & tenant only, & consequently no action was maintainable by **pltf.** for the breach by the landlords of the condition to keep the house reasonably fit for human habitation.—**RYALL v. KIDWELL & SON**, [1914] 3 K. B. 135; 83 L. J. K. B. 1140; 111 L. T. 240; 78 J. P. 377; 30 T. L. R. 503; 12 L. G. R. 997, C. A.

*Annotations:—*Refd. **Dobson v. Horsley**, [1915] 1 K. B. 634; **Cockburn v. Smith** (1923), 40 T. L. R. 113.

**4904. — Who is landlord for purposes of Act—Mortgagee in receipt of rent.]—BOND v. BUSFIELD** (1913), 48 L. J. C. C. 54.

**4905. — Whether notice of defect necessary.]—FISHER v. WALTERS**, No. 4569, *ante*.

**Injury to stranger by breach of contractual duty.]—***See CONTRACT*, Vol. XII., pp. 49, 50, Nos. 269-276.

*(c) Common Staircase.*

*See Part X., Sect. 5, sub-sect. 2, ante.*

*B. Tenant's Liability.*

*See NEGLIGENCE.*

**SECT. 6.—BOUNDARIES, FENCES AND PARTY WALLS.**

**SUB-SECT. 1.—BOUNDARIES.**

*See, generally, BOUNDARIES*, Vol. VII., pp. 263 *et seq.*

**Duties of tenant—To keep distinct.]—***See BOUNDARIES*, Vol. VII., p. 271, Nos. 43, 44.

**To maintain.]—***See BOUNDARIES*, Vol. VII., p. 281, Nos. 120-123.

**Rights of landlord when boundaries confused—Delimitation by court.]—***See BOUNDARIES*, Vol. VII., p. 271, Nos. 43, 44.

**Ascertained by commission.]—***See BOUNDARIES*, Vol. VII., pp. 273, 274, Nos. 67, 69-71.

*E. Co.* (1894), 11 S. C. 240.—S. AF.

**h. — To tenant—After notice.]—**Where the tenant of a house informed the landlord that the floor of a sloping concrete yard attached to the house had become slippery & dangerous by wear & tear, & thereafter the tenant fell in crossing the yard & broke her leg.—*Held*: the landlord was liable in damages for the injury.—**TEK v. MCILWRAITH** (1905), 19 E. D. C. 282.—S. AF.

**k. — — — — —.]—SALMON v. DEDLOW** (1912), T. P. D. 971.—S. AF.

**PART XVIII. SECT. 5, SUB-SECT. 2.—A. (b).**

**4900 l. Express covenant—Whether tenant's wife can sue.]—SHIELDS v. DALZIEL** (1897), 24 R. (Ct. of Sess.) 849; 34 Sc. L. R. 635; 5 S. L. T. 17.—SCOT.

**l. — Liability—To tenant.]—****HUGHES v. SAWYERS** (1885), 11 V. L. R. 75.—AUS.

**m. — No liability for injury—Where tenant aware of disrepair.]—**An express contract between a landlord & his tenant that the former is to repair

the demised premises does not render him liable for an injury to the tenant arising from want of repair, although the tenant has notified him of the disrepair. In such a case the tenant should himself repair, at the expense of the landlord.—**BROWN v. TORONTO GENERAL HOSPITAL TRUSTEES** (1893), 23 O. R. 599.—CAN.

**n. — Whether stranger can sue.]—****KENNEDY v. BRUCE**, [1907] S. C. 845.—SCOT.

**o. — Landlord must be aware of defect.]—GILLISON v. THOMAS' ESTATE**, [1920] E. D. L. 146.—S. AF.

## SUB-SECT. 2.—FENCES.

See, generally, BOUNDARIES, Vol. VII., p. 281, Nos. 125 *et seq.*

**Liability for repairs—Occupier.]—See** BOUNDARIES, Vol. VII., p. 292, Nos. 185–187.

**4906. — Not owner in fee.]—An action on the case for not repairing fences, whereby another party is damaged, can only be maintained against the occupier, & not against the owner of the fee, who is not in possession.—CHEETHAM v. HAMPSON (1791), 4 Term Rep. 318; 100 E. R. 1041.**

**Annotations:—**Consd. Russell v. Shenton (1842), 3 Q. B. 449; Todd v. Flight (1860), 9 C. B. N. S. 377. Refd. Gwinnell v. Eamer (1875), L. R. 10 C. P. 658.

**— Fence adjoining railway.]—See** RAILWAYS.

**Breach of covenant to maintain—What amounts to.]—See** BOUNDARIES, Vol. VII., p. 293, Nos. 195, 196.

**— Tenant entitled to supply of wood.]—See** BOUNDARIES, Vol. VII., p. 293, No. 197.

**— Remedy.]—See** BOUNDARIES, Vol. VII., p. 296, Nos. 211–213.

**4907. — Mandatory injunction.]—Where the lessee of a brickfield, contrary to the covenants in his lease, caused the fall of one of the fences bounding the field, by excavating the clay from under it:—Held: a mandatory injunction in a negative form should be granted to compel the restoration of the fence to its former condition.—NEWTON v. NOCK (1880), 43 L. T. 197.**

**Duty to fence.]—See** ANIMALS, Vol. II., p. 225, Nos. 174–181.

## SUB-SECT. 3.—PARTY WALLS.

See Law of Property Act, 1925 (c. 20), sched. I., Part V., s. 1.

**4908. Wall built under Fire Prevention (Metropolis) Act, 1774 (c. 78)—Tenant under covenant to repair—Whether moiety of cost recoverable from landlord.]—The tenant of a house covenanted in his lease to pay a reasonable share & proportion of supporting, repairing, & amending all party walls, etc., & to pay all taxes, duties, assessments, & impositions, parliamentary & parochial, "it being the intention of the parties that the landlord should receive the clear yearly rent of £60 in net money without any deduction whatever." During the lease, the proprietor of the adjoining house built a party wall between that house & the house demised, under the above Act:—Held: the tenant, not the landlord, was bound to pay the moiety of the expense of the party wall.—BARRETT v. BEDFORD (DUKE) (1800), 8 Term Rep. 602; 101 E. R. 1589.**

**Annotation:—**Consd. Moore v. Clark (1813), 5 Taunt. 90.

**4909. — ]—A tenant under covenant to repair, cannot maintain an action under the above Act against the landlord, for a moiety of the expense of rebuilding a party wall, which being out of repair, the tenant pulled down & re-built at the joint expense of himself & the occupier of the adjoining house, to whom he had given the notice required by the statute, in his landlord's name, but without his authority.—PIZEY v. ROGERS (1826), Ry. & M. 357, N. P.**

**4910. — Tenant's covenant to repair not expressly extended to party walls.]—A lessee for twenty-one years at a peppercorn rent for the first half year. & a rack rent for the rest of the**

**term, who by agreement was to put the premises in repair, & covenanted to pay the land tax & all other taxes, rates, assessments, & impositions, having assigned his term for a small sum in gross, was held not to be liable to pay the expense of a party wall, either by the provisions of the statute or the covenant: but that charge must in such case be borne by the original landlord. Sect. 41 of the above Act intended to throw that burden on persons to whom long leases had been granted with a view to an improvement of the estate, & who afterwards underlet at a considerable increase of rent. *Semble*: a lessee of such a term, who afterwards sold a lease for a sum in gross, would also be liable within this Act.—SOUTHALL v. LEADRETT (1789), 3 Term Rep. 458; 100 E. R. 676.**

**Annotation:—**Distd. Barrett v. Bedford (1800), 8 Term Rep. 602.

**4911. — ]—MOORE v. CLARK, No. 4581, ante.**

**4912. — Liability of lessor at rack rent.]—The lessor of a house at rack rent, there being no other person entitled to any kind of rent, is liable to contribute to the expenses of a party wall under the above Act, though the lessee has improved the house demised.—BEARDMORE v. FOX (1799), 8 Term Rep. 214; 101 E. R. 1352.**

**Annotation:—**Foll'd. Lambo v. Hemans (1819), 2 B. & Ald. 467.

**4913. — Tenant at fixed rent.]—The assignee of the lessor of premises at a fixed rent which he considerably improved & thereby rendered of greater annual value is not the owner of the improved rent within the above Act.—LAMBE v. HEMANS (1819), 2 B. & Ald. 467; 106 E. R. 437.**

**Annotation:—**Refd. Collins v. Wilson (1828), 4 Bing. 551.

**4914. Wall rebuilt under Metropolitan Building Act, 1855 (c. 122)—Tenant paying for work in excess of that required by Act—Whether recoverable from lessor.]—BRYER v. WILLIS, No. 3861, ante.**

See BOUNDARIES, Vol. VII., p. 296, Nos. 214 *et seq.*

## SECT. 7.—TENANT'S RIGHT TO TIMBER FOR REPAIRS.

**Right to cut trees—Housebote.]—See** AGRICULTURE, Vol. II., pp. 69, 77, 78, Nos. 460, 559–571.

**4915. Effect of provision for housebote—Implied reservation of other timber.]—ANON. (undated), Cary, 17; 21 E. R. 10.**

**4916. — Whether right passes to executor.]—ANON. (1550), Dal. 4; 123 E. R. 228.**

**4917. — Whether right passes to assignee.]—L'ISLE v. MARTIN (1624), Lat. 98; 82 E. R. 293.**

**4918. — To be taken from specific wood not part of the demised premises—Right to take housebote on land leased.]—ANON. (1550), Dal. 4; 123 E. R. 228.**

**— Whether supply a condition precedent to repair.]—See** No. 4636, ante.

**4919. Estovers — Appurtenant to house.] — (1) Covenant by lessee for him & his exors. to repair binds the assignee. Lessee covenants to discharge the lessor *de omnibus oneribus*, etc., etc., to repair, the assignee is bound.**

**(2) Estovers granted to repair a house are appurtenant to it.—WINDSOR (DEAN & CHAPTER) v. HYDE (1601), 5 Co. Rep. 24 a; 77 E. R. 87; sub**

**PART XVIII. SECT. 6, SUB-SECT. 2.**  
**p. Liability for repairs—Not land-**  
**lord.]—PATRICK v. HARRIS'S TRUSTEES**  
**(1904), 6 F. (Ct. of Sess.) 985.—SCOT.**

**q. Transferring fence—Not breach**  
**of covenant to repair.]—LEIGHTON v.**  
**MEDLEY (1882), 1 O. R. 207.—CAN.**  
**r. Lessor's covenant to supply**

**materials—Referable only to fences**  
**existing at date of lease.]—PAWSON v.**  
**TANGYE, [1919] 1 W. W. R. 888.—**  
**CAN.**

**Sect. 7.—Tenant's right to timber for repairs. Part XIX. Sects. 1 & 2: Sub-sect. 1. A.]**

*nom.* HYDE v. WINDSOR (DEAN & CANONS), Cro. Eliz. 552; *sub nom.* HYDE v. WINDSOR (DEAN & CANONS), Moore, K. B. 399.

*Annotations:—As to (1) Consd.* Bally v. Wells (1769), Wilm. 341; Adams v. Gibney (1830), 6 Bing. 656; Pentfold v. Abbott (1862), 32 L. J. Q. B. 67. *Reid.* Tremere v. Morison (1834), 1 Bing. N. C. 89; Taylor v. Caldwell (1863), 3 B. & S. 826; Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc. (1898), 68 L. J. Q. B. 111.

**4920. — Covenant to take—Word "grant" not required.]—**Covenant to take estovers good without the word "grant." To justify taking wood, the use for which it was taken must be shown.—PURFIE v. GRAYME (1611), Cro. Jac. 291; 79 E. R. 250.

*Annotation:—Mentd.* Harrington v. Bush (1708), 11 Mod. 219.

**4921. House falling per vim venti—Right of tenant to timber for rebuilding.]—**If tenant for life

or years falls timber, or pulls down the house, the lessor shall have the timber. If a house falls down *per vim venti*, the particular tenants have a special property in the timber to re-build the house.—BOWLES'S CASE (1615), 11 Co. Rep. 79 b; 77 E. R. 1253; *sub nom.* BOWLES v. BERRIE, 1 Roll. Rep. 177.

*Annotations:—Consd.* Boydell v. M'Michael (1834), 3 Tyr. 974. *Reid.* Seeheverel v. Dale (1627), Poph. 193; Tooker v. Annesley (1832), 5 Sim. 235; Waldo v. Waldo (1841), 12 Sim. 107; Leigh v. Dickeson (1883), 12 Q. B. D. 194. *Mentd.* Oxford's Case (1615), 1 Rep. Ch. 1; R. v. Hampden (1837), 3 State Tr. 826; Petty v. Goddard (1662), O'Bridg. 35; Skelton v. Bide (1665), O'Bridg. 390; Harris v. Belchey (1679), 2 Show. 91; Abraham v. Bubb (1680), Freem. Ch. 53; Bamfield v. Popham (1702), P. Wms. 54; Carrick v. Errington (1726), Mos. 8; Gore v. Gore (1733), Kel. W. 254; Hooker v. Hooker (1734), 2 Barn. K. B. 379; Cunningham v. Moody (1748), 1 Ves. Sen. 174; Aston v. Aston (1749), 1 Ves. Sen. 264; Garth v. Cotton (1753), 3 Atk. 751; Goodright v. Larmer v. Searle (1756), 2 Wils. 29; Doe d. Willis v. Martin (1790), 4 Term Rep. 39; Williams v. Williams (1808), 15 Ves. 419; A.-G. v. Marlborough (1818), 3 Madd. 498; Chambers v. Taylor (1837), 2 My. & Cr. 376; Gent v. Harrison (1859), John. 517.

## Part XIX.—Waste.

### SECT. 1.—IN GENERAL.

**4922. Whether covenant not to commit waste implied.]—**When real property is let for a rent, the terms on which both parties contract regulate the way in which the real property is to be dealt with. In the absence of any express terms, the law implies, from the mere relation of landlord & tenant, that it is the duty of the tenant to do or to leave undone some things, & a promise is implied from the mere relation of landlord & tenant on which an action lies for a breach of that duty. The most important of these, in the case of an agricultural holding, are not to commit waste & to manage the property in a husbandlike manner (LORD BLACKBURN).—WESTROPP v. ELLIGOTT (1884), 9 App. Cas. 815; 52 L. T. 147, 11 L.

**4923. —.]—**WHITHAM v. KERSHAW, No. 5058, *post*.

**4924. —.]—**DEFRIES v. MILNE, No. 5050, *post*.

**4925. Effect of statutory enactment on common law doctrine of waste—Agricultural Holdings Act, 1883 (c. 61).]—**MEUX v. COBLEY, No. 4935, *post*.  
*See* Agricultural Holdings Act, 1923 (c. 9).

**In respect of settled estates.]—***See* SETTLEMENTS.

### SECT. 2.—WHAT IS WASTE.

#### SUB-SECT. 1.—VOLUNTARY WASTE.

##### A. In General.

**4926. Reasonable user of premises.]—**SANER v. BILTON, No. 4865, *ante*.

**4927. —.]—**MANCHESTER BONDED WAREHOUSE CO. v. CARR, No. 3990, *ante*.

**4928. Acts not precluded by the contract.]—**MEUX v. COBLEY, No. 4935, *post*.

**4929. —.]—**WEST HAM CENTRAL CHARITY BOARD v. EAST LONDON WATERWORKS CO., No. 4932, *post*.

#### PART XIX. SECT. 2, SUB-SECT. 1.—A.

**4930 i. Changing nature of thing demised.]—**CARDEN v. BUTLER (1832), Hayes & Jo. 112.—*IR*.

**4930 ii. —.]—**BURNE v. MADDEN (1835), L. & G. temp. Plunk. 493.—*IR*.

**4930 iii. —.]—**The lessee of meadow & pasture land, being about to convert the land into a public cemetery, was restrained from so doing.—HUNT v. BROWNE (1837), Sau. & So. 178.—*IR*.

**4930 iv. —.]—**Meadow land, which has not been broken up during the twenty years which immediately preceded the execution of a lease, is, as

#### **4930. Changing nature of thing demised.]—**

It is generally true, that the lessee has no power to change the nature of the thing demised, he cannot turn meadow into arable, nor stub a wood to make it pasture (*per CUR.*).—DARCY (LORD) v. ASKWITH (1618), as reported in Hob. 234; 80 E. R. 380.

*Annotations:—Folld.* Simmons v. Norton (1831), 9 L. J. O. S. C. P. 185. *Apld.* Phillips v. Smith (1845), 14 M. & W. 589; West Ham Central Charity Board v. East London Waterworks Co., [1900] 1 Ch. 624. *Reid.* Elwes v. Maw (1802), 3 East, 38; Jones v. Chappell (1875), L. R. 20 Eq. 539. *Mentd.* Manby v. Scott (1661), 1 Keb. 80.

**4931. — Damage must be substantial.]—**DOHERTY v. ALLMAN, No. 4943, *post*.

#### **4932. — & of permanent nature.]—**

By a lease dated Sept. 29, 1830, plf's. predecessors in title granted to deft. co. twelve acres of meadow land forming part of marshy land at West Ham, for ninety-nine years, at a certain rent, for the purpose of constructing a reservoir. The co. did not construct a reservoir but used the land for grazing purposes down to 1890, when they sub-demised it to B. for the rest of the term less the last three days thereof at an increased rent, for the purpose of its being used by him as a rubbish shoot. B. took possession & shot quantities of hard & soft rubbish of all kinds on the land, thereby raising its surface about ten feet. Pltfs. brought an action against the co. & B., alleging that the acts of B. constituted waste & had been done with the authority of the co., & claiming an injunction restraining the bringing or permitting to be brought upon the demised land any rubbish, earth, or material, or otherwise committing waste thereon, & damages. The only value of the lands at the end of the term would be for building factories, to obtain a proper foundation for which it would be necessary to dig down to the original level of the land:—*Held*: there had been such an altera-

tion between the lessor & lessee, ancient meadow, the breaking up of which during the term amounts to a breach of the lessee's covenant not to commit waste for which an action lies.—MURPHY v. DALY (1860), 13 I. C. L. R. 239.—*IR*.

**4930 v. —.]—**CRAIG v. GREER, [1899] 1 L. R. 258.—*IR*.

tion of the thing demised, irrespective of the question whether the added material was offensive or inoffensive, as to constitute waste; it was no answer that the expense of digging down to obtain a proper foundation would be more than compensated for by the increased rent which the reversioners would be able to obtain for the land in its heightened condition; both debts were liable in damages for the past acts of waste; & they must be restrained from committing waste in the future.

The test seems to be whether the act which the lessor says is an act of waste by the lessee is an act which alters the nature of the thing demised. . . . If the permanent character of the property demised is not substantially altered, I conceive that the law is that it is not now waste for the tenant to do things which within the covenants & conditions of his lease he is not precluded from doing (BUCKLEY, J.).—*WEST HAM CENTRAL CHARITY BOARD v. EAST LONDON WATERWORKS CO.*, [1900] 1 Ch. 624; 69 L. J. Ch. 257; 82 L. T. 85; 48 W. R. 284; 44 Sol. Jo. 243.

*Annotation*:—*Reid*, *Sunderland Orphan Asylum v. River Wear Comrs.* (1911), 106 L. T. 288.

**4933. Must be prejudicial to inheritance.]**—The law will not allow that to be waste which is not any ways prejudicial to the inheritance. So when the husband said she shall not commit waste, it was not his intention to restrain her from that which the law allows (RICHARDSON, C.J.).—*BARRET v. BARRET* (circa 1629), *Het.* 34; 124 E. R. 321.

*Annotations*:—*Folld.* *Doe d. Grubb v. Burlington* (1833), 5 B. & Ad. 507. *Refd.* *Simmons v. Norton* (1831), 7 Bing. 640; *Phillips v. Smith* (1845), 14 M. & W. 589; *Jones v. Chappell* (1875), L. R. 20 Eq. 539; *Tucker v. Linger* (1882), 21 Ch. D. 18; *Dashwood v. Magniac*, [1891] 3 Ch. 306; *West Ham Central Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624.

**4934. —.]**—*JONES v. CHAPPELL*, No. 4952, *post*.

**4935. —.]**—Under an agricultural lease, in 1889, of a farm near London, consisting of arable & pasture land, the lessee covenanted to yield up the premises at the end of the term, together with all fixtures & "improvements" which might during the term be fixed to or erected on the demised premises, except such fixtures as should be erected by the lessee, & which he should be at liberty to remove in case the lessor should object to purchase the same by valuation; & also that he would "in all respects cultivate & manage the farm, & every part thereof, in a good, proper, & husbandlike manner, according to the best rules of husbandry practised in the neighbourhood." The lessee converted part of the demised premises into a market garden, erecting glasshouses thereon for the cultivation of hothouse produce for the London market. The lessor brought an action for an injunction to restrain the lessee from converting the farm into a market garden, alleging that his doing so was a breach of covenant & was waste, causing injury to the inheritance. At the trial it was proved that other farms in the neighbourhood had been converted into market gardens, that being found to be the most profitable mode of cultivation:—*Held*: the conversion into a market garden did not constitute a breach of the covenant, & inasmuch as injury had not been thereby caused to the inheritance, was not actionable "waste."

To obtain an injunction against a debt. on the

ground of "waste," *pltf.* must prove that what the debt. is doing is prejudicial to the inheritance; if it improves the value of the land it is not "waste." *Semble*: *Agricultural Holdings Act*, 1883 (c. 61), has abolished part of the old common law doctrine of "waste"; & buildings, such as hothouses, erected by a lessee on his farm, & having the effect of rendering it more profitable, are "improvements" within the meaning of the Act.

A man cannot commit waste, even technically, if he is doing that which he is entitled to do by contract; that is to say, he cannot commit waste as against his landlord if his landlord has entered into a special contract enabling him to do it (KEKEWICH, J.).—*MEUX v. COBLEY*, [1892] 2 Ch. 253; 61 L. J. Ch. 440; 66 L. T. 86; 8 T. L. R. 173. *Annotations*:—*Mentd.* *Re Morse & Dixon* (1917), 87 L. J. K. B. 1; *I. R. Comrs. v. Ransom* (1918), 119 L. T. 369.

— *Improvement.*—*See* Sub-sect. 1, B., *post*.

**4936. — Question for jury.]**—Proviso in a lease, "that if lessee committed waste, to the amount of 10s., lessor might re-enter." Lessee pulled down buildings worth £10, & substituted others of a different nature. In ejectment for a forfeiture:—*Held*: "waste" in the proviso meant such waste as must produce an injury to the reversion; & it should have been left to the jury, in express terms, whether such waste, to the amount of 10s., had been committed.—*DOE d. DARLINGTON (EARL.) v. BOND* (1826), 5 B. & C. 855; 8 Dow. & Ry. K. B. 738; 5 L. J. O. S. K. B. 68; 108 E. R. 318.

*Annotation*:—*Apld.* *Jones v. Chappell* (1875), 44 L. J. Ch. 658.

**4937. — Value of estate diminished—Or burdens increased.]**—If a copyholder pull down a barn, without any intention of rebuilding, the lord cannot recover the place from him, on the ground of a forfeiture, if the jury find that the premises are not damaged.

The question whether the act be injurious is not of necessity decided by the question as to the value of the estate after the act has been done; it may be an act which would increase the value of the estate, yet be injurious to the inheritance, as it may impair the evidence of title. In such a case the act would be waste.

Upon the whole there is no authority for saying that any act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or, secondly, by increasing the burden on it, or thirdly, by impairing the evidence of title (DENMAN, C.J.).—*DOE d. GRUBB v. BURLINGTON (EARL.)* (1833), 5 B. & Ad. 507; 2 Nev. & M. K. B. 534; 3 L. J. K. B. 26; 110 E. R. 878.

*Annotations*:—*Apld.* *Jones v. Chappell* (1875), L. R. 20 Eq. 539. *Folld.* *West Ham Central Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624. *Refd.* *Huntley v. Russell* (1849), 13 Q. B. 572; *Doherty v. Allman* (1878), 3 App. Cas. 709; *Tucker v. Linger* (1882), 21 Ch. D. 18; *Dashwood v. Magniac*, [1891] 3 Ch. 306; *Blackmore v. White* (1898), 68 L. J. Q. B. 180.

**4938. — — —.]**—*HUNTLEY v. RUSSELL*, No. 4940, *post*.

**4939. Destroying evidence of title.]**—(1) A tenant has no right to make any alteration in the demised premises; not even that which may improve their value, if such an alteration will affect the evidence of the landlord's title, either by the alteration not having the character of an act done by a mere tenant, or by its causing a difficulty in afterwards proving the identity of the premises.

**4933 i. Must be prejudicial to inheritance.]**—Acts injurious to the reversion amount to waste.—*McPHERSON v. GILES* (1919), 45 O. L. R. 441; 16 O. W. N. 183.—CAN.

**4933 ii. —.]**—*METCALFE v. VENABLES*, [1931] N. Z. L. R. 576.—N.Z.

**Sect. 2.—What is waste: Sub-sect. 1, A., B. & C. (a) & (b).]**

(2) Case by the owner of a house against his lessee for years for opening a new door, whereby the house was weakened & injured, & pltf. prejudiced in his reversionary estate & interest in the premises. The jury found that the lessee did open the door without leave, but that the house was not in any respect weakened or injured by it. The judge thereupon directed a verdict to be entered for pltf. with nominal damages, subject to a case. On argument:—**Held:** pltf. was not, at all events, entitled to a verdict, but as the reversionary interest of pltf. might be injured, although the house itself was not, & that question had not been submitted to the jury, the ct. ordered a new trial.—**YOUNG v. SPENCER** (1829), 10 B. & C. 145; 5 Man. & Ry. K. B. 47; 8 L. J. O. S. K. B. 106; 109 E. R. 405.

**Annotations:**—As to (1) **Refd.** *Simpson v. Savage* (1856), 1 C. B. N. S. 347. As to (2) **Distd.** *Baxter v. Taylor* (1832), 4 B. & Ad. 72. **Refd.** *Taylor v. Stendall* (1845), 5 L. T. O. S. 214; *Johnstone v. Hall* (1856), 2 K. & J. 414; *Mumford v. Oxford, Worcester & Wolverhampton Rly.* (1856), 1 H. & N. 34.

**4940.** —[The exors. of a rector are not liable to an action on the case in the nature of waste, for pulling down a building on the rectory, & substituting another in a different part, unless the value of the estate be thereby impaired, the burdens upon it increased, or the evidence of title impaired. Not, therefore, if the rector suffers a farm building adjoining the rectory house to go to decay, & in the meantime erects a better building for the same purpose, a mile from the house, but in a situation more convenient for the farming business, as carried on at & from the time of the substitution.—**HUNTLEY v. RUSSELL** (1849), 13 Q. B. 572; *Cripps' Church* Cas. 200; 3 New Mag. Cas. 217; 18 L. J. Q. B. 239; 13 L. T. O. S. 526; 13 J. P. 567; 13 Jur. 837; 116 E. R. 1381.

**Annotations:**—**Mentd.** *Ross v. Adcock* (1868), L. R. 3 C. P. 655; *Ecol. Comrs. v. Wodehouse*, [1895] 1 Ch. 552.

**4941.** — **Ploughing up old meadow.]** — (1) Ploughing old meadow land & converting it to arable is waste; it alters the evidence of the title, & the land cannot be restored to its original state. On the plea of *nul wast*, evidence that such ploughing was for amelioration, was properly rejected.

(2) In an action of waste for cutting timber, deft. cannot give in evidence, even in mitigation of damages, that the timber was cut for the purpose of necessary repairs, but turning out to be unfit for that purpose, was exchanged for other timber which was applied to the repairs.—**SIMMONS v. NORTON** (1831), 7 Bing. 640; 5 Moo. & P. 645; 9 L. J. O. S. C. P. 185; 131 E. R. 247.

**Annotations:**—As to (1) **Distd.** *Huntley v. Russell* (1849), 13 Q. B. 572. **Refd.** *St. Albans v. Skipwith* (1845), 8 Beav. 354; *Green v. Jenkins* (1860), 1 De G. F. & J. 454.

**4942.** — **Act otherwise ameliorative.]**—**DOE d. GRUBB v. BURLINGTON (EARL)**, No. 4937, *ante*.

**4943.** — **Not material under modern conditions.]**—The grant of an injunction to restrain a person from doing a particular thing is an act dependent on the discretion of the ct., & in exercising that discretion a ct. of equity will consider, among other things, whether the doing of the thing sought to be restrained must produce an injury to the party seeking the injunction; whether that injury can be remedied or atoned for, & if capable of being atoned for by damages, whether those damages must be sought in successive suits, or could be obtained once for all.

Two leases were granted of pieces of land with some buildings on them, one granted in 1798 for

999 years, the other granted in 1842 for 988 years. There was no reservation of a power of re-entry for breach of covenant, nor was there any negative covenant obliging the lessee not to change the use of the premises. There was a power of re-entry, for rent in arrear & no sufficient distress on the premises. In each lease there was a covenant by the lessee that he, his exors., etc., will "during the term hereby granted, preserve, uphold, support, maintain, & keep the demised premises, & all improvements made, & to be made thereon, in good & sufficient order, repair & condition; & at the end, or sooner determination of this demise, shall & will so leave & deliver up the same unto" the lessor, his heirs, etc. The premises had been used for corn stores for some years, & afterwards as artillery barracks & dwellings for married soldiers. They had fallen into disrepair & it became necessary to repair them; the lessee thought it would be beneficial to convert the store buildings into dwelling-houses, which would much increase their value, & was proceeding to convert them accordingly, when the lessor filed a bill to restrain him, alleging waste:—**Held:** (1) this was not a case of enforcing a negative covenant where the words of contract were clear & indisputable; (2) the waste alleged was meliorating waste, & under the circumstances, the ct. below had, in the due exercise of its discretion in such matters, properly refused to interfere by injunction.

It seems to me to be that ameliorating waste which so far from doing injury to the inheritance, improves the inheritance. Now, there again the course which the ct. of Chancery ought undoubtedly to adopt would be to leave those who think they can obtain damages at common law to try what damages they can so obtain (**LORD CAIRNS, L.C.**).

The old writ of waste is gone, & we have nothing to do with it now, but an action in the nature of waste still exists in the cts. of common law. It is perfectly clear that in an action of waste you cannot recover nominal damages only, you must get real damages. The jurors must not find for you unless they think there is substantial & real damage. . . . The mischief that would accrue to the tenant from forbidding him to make this alteration would be so very great, & the mischief which could possibly . . . accrue to pltf., the lessor, would be so very small & remote, that I think that upon that ground the ct. was quite right in saying that their discretionary power to restrain should not be exercised. I will only say one word about the alteration of evidence of title. I can perfectly understand that five or six hundred years ago that was an extremely serious matter, that where the evidence of title depended entirely upon the memory of witnesses, to change a meadow into a wood or a wood into a meadow would have been a serious matter as far as regards the evidence of title. . . . But nowadays . . . any damage in regard to evidence of title is quite wild & chimerical, or is at least merely nominal (**LORD BLACKBURN**).—**DOHERTY v. ALLMAN** (1878), 3 App. Cas. 709; 39 L. T. 129; 42 J. P. 788; 26 W. R. 513, H. L.

**Annotations:**—As to (1) **Consd.** *Bickmore v. Dimmer* (1902), 88 L. T. 78. **Appld.** *McEacharn v. Colton*, [1902] A. C. 104; *Osborne v. Bradley*, [1903] 2 Ch. 446. **Distd.** *Rose v. Spicer*, *Rose v. Hyman*, [1911] 2 K. B. 234. **Appld.** *Sharp v. Harrison*, [1922] 1 Ch. 502. **Refd.** *Re McIntosh & Pontypridd Improvements Co., Pontypridd (Mill Street & Rhondda Road) Improvements Act, 1890, & Lands Clauses Act, 1845* (1891), 61 L. J. Q. B. 164; *West Ham Central Charity Board v. East London Water works Co.*, [1900] 1 Ch. 624; *Formby v. Barker*, [1903] 2 Ch. 539; *Killison v. Reacher*, [1908] 2 Ch. 374; *Leng v. Andrews* (1908), 78 L. J. Ch. 80; *Kelly v. Barrett*, [1924] 2 Ch. 379. As to (2) **Consd.** *Tucker v. Linger* (1882), 21 Ch. D. 18; *Meux v. Cobley*, [1892] 2 Ch. 253; *Sunderland Orphan Asylum v. River Wear Comrs.* (1911), 106 L. T.

288. *Refd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306. *Generally, Mentd.* *Metropolitan Electric Supply Co. v. Ginder* (1901), 70 L. J. Ch. 862.

### B. Meliorating Waste.

4944. *General rule—Alteration increasing value of inheritance—Landlord “standing by.”*—*BRYDGES v. KILBURN* (1792), cited in 5 Ves. at p. 689; 31 E. R. 807.

*Annotation:—Apld.* *Jackson v. Cator* (1800), 5 Ves. 688.

4945. ————]—*DOHERTY v. ALLMAN*, No. 4943, *ante*.

4946. ————]—*MEUX v. CORLEY*, No. 4935, *ante*.

4947. *Division of meadow by ditches.*—(1) The division of a great meadow into many parcels by making of ditches is not waste, for the meadow may be the better for it, & it is for the profit & ease of the occupiers of it.

(2) If a termor convert a meadow into a hop garden it is not waste, for it is employed to a greater profit, & it may be a meadow again.—*ANON.* (1587), 2 Leon. 174; 74 E. R. 454.

*Annotation:—As to* (2) *Refd.* *Simmons v. Norton* (1831), 5 Moo. & P. 645.

4948. *Converting meadow into hop garden.*—*ANON.* (1587), No. 4947, *ante*.

4949. *Trees cut during trenching.*—Lessor brought trover against the lessee, for trees cut down; yet because the lessee did it in trenching, & pltf. had thereby greater advantage, though the jury found for deft., yet the ct. would not grant a new trial.—*STARR v. WADE* (1698), 2 Salk. 647; 91 E. R. 548.

4950. *Conversion of buildings.*—*BRYDGES v. KILBURN* (1792), cited in 5 Ves. at p. 689; 31 E. R. 807.

*Annotation:—Refd.* *Jackson v. Cator* (1800), 5 Ves. 688.

4951. ————]—*DOHERTY v. ALLMAN*, No. 4943, *ante*.

4952. *Erection of buildings.*—The lessee of land who erects a building thereon without the consent of his lessor does not commit waste unless it can be shown that such building is an injury to the inheritance.

The erection of buildings upon land which improve the value of the land is not waste (*JESSEL, M.R.*).—*JONES v. CHAPPELL* (1875), L. R. 20 Eq. 539; 44 L. J. Ch. 658.

*Annotations:—Consd.* *Meux v. Cobley*, [1892] 2 Ch. 253. *Refd.* *Tucker v. Linger* (1882), 21 Ch. D. 18; *Dashwood v. Magniac*, [1891] 3 Ch. 306; *West Ham Central Charities Board v. East London Waterworks Co.*, [1900] 1 Ch. 624.

*Mentd.* *Broder v. Saillard* (1876), 2 Ch. D. 692; *Cooper v. Crabtree* (1881), 19 Ch. D. 193; *Byass v. Bettam* (1885), 2 T. L. R. 88; *House Property & Investment Co. v. H. P. Horse Nail Co.* (1885), 29 Ch. D. 190; *Sclifer v. City of London Electric Lighting Co.*, *Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287.

4953. *Farm converted to market garden.*—*MEUX v. COBLEY*, No. 4935, *ante*.

*Improvement destroying evidence of title.*—*See* Nos. 4939–4943, *ante*.

*Destruction of building—New building erected.*—*See* Nos. 4954, 4959, *post*.

### C. In respect of Particular Properties.

#### (a) Agricultural Tenancies.

*Breaking up or mowing meadow or pasture.*—*See* AGRICULTURE, Vol. II., pp. 16, 17, 18, 20, Nos. 79–102, 106, 116.

#### PART XIX. SECT. 2, SUB-SECT. 1.—B.

4950 i. *Conversion of buildings.*—*GRAND CANAL CO. v. McNAMÉE* (1891), 29 L. R. Ir. 131.—*IR.*

i. *Converting bog into pasture land.*—A lessee for lives renewable for ever will be restrained from committing waste by cutting turf, though it appears that the bog cut out was

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being converted into pasture land, & that the ground had been improved by the waste.—*ANON.* (1816), 1 Jo. Ex. Ir. 627, n.—*IR.*

a. ————]—*WATERPARK (LORD) v. AUSTEN* (1822), 1 Jo. Ex. Ir. 627, n.—*IR.*

b. ————]—*WHITE v. WALSH* (1829), 1 Jo. Ex. Ir. 626, n.—*IR.*

*Bad husbandry.*—*See* AGRICULTURE, Vol. II., p. 13, Nos. 55, 56.

*Effect of statutory enactment.*—*See* No. 4935, *ante*.

#### (b) Buildings.

4954. *Pulling down house—New house erected.*—Where a house demised by pltf. was pulled down by deft., an adjoining owner who erected a new house occupying part of the site of the former house:—*Held*: the new house, so far as it occupied the site of the former house, passed to pltf.

The demise which before was made of the house drawn away, shall be now upon the matter a demise, as to this part of it a new message; for if a man make a lease for years of a house, & the termor pull it down, & erect there a new house, or if land be demised, & the lessee build a house upon it, in an action of waste, for waste done in this new house, the writ shall suppose that he did waste in the houses, etc., which were demised to him, & yet in the one case it is not the message which was demised to him, & in the other the house was not demised, but the land only; but he hath no term in the house but by the demise before made.—*HAYES v. ALLEN* (1592), Poph. 13; Cro. Eliz. 234; 79 E. R. 1135; *sub nom.* *HAYS v. ALLEN*, 1 And. 265.

4955. ————]—*Old house in ruinous condition.*—If a lessee pull down a brewhouse, & build dwelling-houses on its site, it is waste. It is waste to pull down & rebuild a house, although it be too bad to be repaired.—*COLE v. FORTH* (1672), 1 Mod. Rep. 94; 86 E. R. 759; *sub nom.* *COLE v. GREEN*, 1 Lev. 309; *sub nom.* *GREENE v. COLE*, 2 Wms. Saund. 228, H. L.

*Annotations:—Refd.* *Doe d. Grubb v. Burlington* (1833), 5 B. & Ad. 507; *Huntley v. Russell* (1849), 13 Q. B. 572; *Jones v. Chappell* (1875), 44 L. J. Ch. 658; *West Ham Central Charities Board v. East London Waterworks Co.*, [1900] 1 Ch. 624. *Mentd.* *R. v. Butler* (1835), 3 Lev. 220; *Phillips v. Bury* (1694), Carth. 319; *Jevon v. Moor* (1699), 12 Mod. Rep. 262; *London (City) v. Wood* (1702), 12 Mod. Rep. 669; *Crosse v. Bilson* (1704), 6 Mod. Rep. 102; *Attersoll v. Stevens* (1808), 1 Taunt. 183; *R. v. Carlile* (1831), 2 B. & Ad. 362; *Guest v. Elwes* (1837), 5 Ad. & El. 118; *Harnett v. Maitland* (1847), 16 M. & W. 257; *Roffey v. Henderson* (1851), 17 Q. B. 574; *Yellowly v. Gower* (1855), 11 Exch. 274; *Brassey v. Maclean* (1875), 39 J. P. 756; *Doherty v. Allman* (1878), 3 App. Cas. 709; *Woodhouse v. Walker* (1889), 5 Q. B. D. 404; *Davies v. Davies* (No. 2) (1888), 57 L. J. Ch. 1093; *Sandeman v. Rushton* (1891), 61 L. J. Ch. 136.

4956. ————]—*HUNTLEY v. RUSSELL*, No. 4940, *ante*.

4957. ————]—*New house of different character.*—*COLE v. FORTH*, No. 4955, *ante*.

4958. ————]—*DOE d. DARLINGTON (EARL) v. BOND*, No. 4936, *ante*.

4959. ————]—*Landlord objecting to new house.*—The ct. will restrain a tenant from pulling down a house & building another which the landlord objects to.—*SMYTH v. CARTER* (1853), 18 Beav. 78; 52 E. R. 31.

*Annotation:—Consd.* *Doherty v. Allman* (1878), 3 App. Cas. 709.

4960. ————]—*House in ruinous condition.*—*EDWARDS & HALINDER'S CASE*, No. 4968, *post*.

4961. ————]—*Houses in good repair—Lessee under covenant to repair.*—*SLATER v. STONE* (1622), Cro. Jac. 645; 2 Roll. Rep. 248; 79 E. R. 556.

#### PART XIX. SECT. 2, SUB-SECT. 1.—C. (b).

a. *Erection of building.*—The erection of a building, even of small size, for a purpose foreign from that contemplated on the demise of the lands, is waste in the contemplation of a ct. of equity.—*HUNT v. HODGES* (1849), 1 Ir. Jur. 33.—*IR.*

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**Sect. 2.—What is waste: Sub-sect. 1, C. (b), (c), (d), (e), (f), (g) & (h); sub-sect. 2.]**

**4962. — Lessee sans waste.]—**(1) Lessee for years sans waste, remainder in fee to a bishop, lessee enjoined from digging the ground for brick.

(2) A., in consideration of marriage settles a house to the use of himself for life, sans waste, remainder to his son, etc. The tenant for life shall not pull down the house. Lessee for years sans waste, cannot pull down a house, or the trees that are a defence or ornament to the house.—LONDON (Bp.) v. WEB (1718), 1 P. Wms. 527; 2 Eq. Cas. Abr. 758; 24 E. R. 501, L. C.

**Annotation:—***As to (2) Reid. Chamberlyne v. Dummer (1792), 3 Bro. C. C. 549.*

**4963. Building new house.]—**HAYES v. ALLEN, No. 4954, *ante*.

**4964. —.]—**An action lies by persons inhabiting a ground floor against the tenant of the garret to keep the roof in repair.

If a lessee for years build a house on the premises leased, it is waste; & if he let it fall, it is a new waste (*per Ctr.*).—ANON. (1702), 11 Mod. Rep. 7; 88 E. R. 850.

**Annotation:—***Reid. Hargroves, Aronson v. Hartop (1905), 74 L. J. K. B. 233.*

— **Improvement of value.]—**See No. 4952, *ante*.

**4965. Conversion of building—Chapel to theatre.]—**HYMAN v. ROSE, No. 4775, *ante*.

— **Improvement of value.]—**See Nos. 4943, 4944, *ante*.

**4966. Opening new doorway.]—**YOUNG v. SPENCER, No. 4939, *ante*.

**4967. Removing windows.]—**In an action on a covenant to keep demised premises in tenantable order & repair, & at the end of the term to deliver them up in such tenantable repair, the breach assigned was, that deft. did not nor would sufficiently repair & keep the said messuages, etc., in tenantable order & repair, nor deliver them up in such tenantable repair at the end of the term, but, on the contrary thereof, suffered & permitted the premises to be & continue, & the same were ruinous & in decay, for want of needful & necessary reparation, etc., & deft., at the end of the term, left them so out of repair:—*Held*: under this breach, the lessor could not recover for voluntary waste, as, by removing windows, etc.—EDGE v. PEMBERTON (1843), 12 M. & W. 187; 1 Dow. & L. 467; 13 L. J. Ex. 48; 2 L. T. O. S. 152; 152 E. R. 1164.

**Annotations:—***Mentd. Times Fire Assee. v. Hawke (1859), 28 L. J. Ex. 317; Bremridge v. Latimer (1864), 12 W. R. 878.*

**4968. Floor giving way—By reason of weight put upon it.]—**If the lessee of a warehouse, the floor of which is to his knowledge defective, overloads it so that it breaks, whereby the property of the lessee of the cellars underneath is damaged, action on the case lies against him. He who takes such a ruinous house ought to mind well what weight he put into it at his peril, so that it be not so much that another shall take any damage by it; but if it had fallen of itself without any weight put upon it, or that it had fallen by the default only of the posts in the cellar which support the floor, with which deft. had nothing to do, there deft. shall be excused; but here it is expressly alleged, that it fell by the weight put upon it, which ought to be answered; as if a man take an estate for life or years in a ruinous house, if he pull it down he shall be charged in waste, but if it fall of itself, he shall be excused in waste; so there is a diversity where default is in the party, & where not, so here, deft. ought to have taken good care, that he did

not put upon such a ruinous floor more than it might well bear, & if it would not bear anything, he ought not to put anything into it, to the prejudice of a third person, & if he does, he shall answer to the party his damages.—EDWARDS & HALINDER'S CASE (1594), 2 Leon. 93; Poph. 46; 74 E. R. 385.

### (c) Ecclesiastical Property.

See ECCLESIASTICAL LAW, Vol. XIX., pp. 510 *et seq.*

### (d) Fixtures.

Fixtures generally, see Part XIV., *ante*.

**4969. General rule.]—**The general rule on this subject . . . is that where a lessee, having annexed anything to the freehold during his term, afterwards takes it away, it is waste (LORD ELLENBOROUGH, C.J.).—ELWES v. MAW (1802), 3 East, 38; 102 E. R. 510.

**Annotations:—***Consd. Wake v. Hall (1883), 8 App. Cas. 195. Reid. Lee v. Haddon (1816), 7 Taunt. 188; Buckland v. Butterfield (1820), 2 Brod. & Bing. 54; Steward v. Lombe (1820), 4 Moore, C. P. 281; Farrant v. Thompson (1822), 2 Dow. & Ry. K. B. 1; Place v. Fagg (1829), 4 Man. & Ry. K. B. 277; Trappes v. Harter (1833), 2 Cr. & M. 153; Re Ogden & Walmsley, Ex p. Lord (1834), 3 Deac. & Ch. 765; Re Gye & Hughes, Ex p. Heynal (1841), 2 Mont. D. & De G. 443; Wiltshire v. Cottrell (1853), 1 E. & B. 674; Bishop v. Elliott (1855), 11 Exch. 113; Whitehead v. Bennett (1858), 27 L. J. Ch. 474; Walmsley v. Milne (1859), 7 C. B. N. S. 115; Ward v. Dudley (1887), 57 L. T. 20; Barff v. Probyn (1895), 64 L. J. Q. B. 557; Norton v. Dashwood (1896), 65 L. J. Ch. 737; Mears v. Callender, [1901] 2 Ch. 388; Re Chesterfield's S. R., [1911] 1 Ch. 237; Mowats v. Hudson (1911), 105 L. T. 400; Re Mann & Harvey (1920), 123 L. T. 242; Pole-Carew v. Western Counties & General Manure Co., [1920] 2 Ch. 97. Mentd. Wynne v. Ingleby (1822), 1 Dow. & Ry. K. B. 247; Darby v. Harris (1841), 10 L. J. Q. B. 294; London & Westminster Loan & Discount Co. v. Drake (1859), 5 Jur. N. S. 1407; Powell v. Boraston (1866), 13 W. R. 465; Powell v. Farmer (1865), 18 C. B. N. S. 168; Cornish v. Stubbs (1870), 39 L. J. C. P. 202; Re De Falbo, Ward v. Taylor (1901), 84 L. T. 273.*

**4970. —.]—**The general rule is, that where a lessee, having annexed a personal chattel to the freehold during his term afterwards takes it away, it is waste (DALLAS, C.J.).—BUCKLAND v. BUTTERFIELD (1820), 2 Brod. & Bing. 54; 4 Moore, C. P. 440; 129 E. R. 878.

**Annotations:—***Reid. Grymes v. Boweren (1830), 6 Bing. 437; Re Ogden & Walmsley, Ex p. Lord (1834), 3 Deac. & Ch. 765; Leach v. Thomas (1835), 7 C. & P. 327; Bishop v. Elliott (1855), 11 Exch. 113; Jenkins v. Gettling (1862), 2 John. & H. 520; Re De Falbo, Ward v. Taylor, [1901] 1 Ch. 523. Mentd. West v. Blakeway (1841), 2 Man. & G. 729; Mears v. Callender, [1901] 2 Ch. 388.*

**4971. Dovecot.]—**Though the ct. has in many instances of express covenant granted an injunction against removing certain articles contrary to the custom of the country, in the case of an implied agreement, to be carried into effect by another remedy than an action of covenant, there would be considerable hazard of impeding a man in the exercise of his right upon that ground. . . . As to the [destruction of] the dovecot a clear act of waste is proved: therefore against waste the injunction must be revived: but I cannot grant it against removing the presses, *eo nomine*, if not fixed to the freehold; in which case it would be waste (LORD ELDON, C.).—KIMPTON v. EVE (1813), 2 Ves. & B. 349; 35 E. R. 352, L. C.

**Annotations:—***Mentd. Durant v. Moore (1830), 9 L. J. O. S. Ch. 12; Re Bishop, Ex p. Langley, Ex p. Smith (1879), 13 Ch. D. 110.*

**4972. Presses.]—**KIMPTON v. EVE, No. 4971, *ante*.

### (e) Mines.

See MINES.

## (f) Soil.

**4973. Removal of virgin soil.]**—If a tenant of land, during his tenancy, remove a dung heap, & at the time of his so doing, digs into & removes virgin soil that is beneath it, the landlord may maintain either trespass *de bonis asportatis* or trover for the removal of the virgin soil.

I am of opinion that, if a tenant, during the tenancy, remove virgin soil, it becomes by operation of law the personal property of the landlord (PARKE, B.).—HIGGON v. MORTIMER (1834), 6 C. & P. 616, N. P.

**4974. Brick earth excavation.]**—LONDON (Bp.) v. WEB, No. 4962, *ante*.

**4975. Sand & gravel excavated for sale—Under building agreement.]**—This was a motion *ex parte* to restrain deft. from committing waste by excavating & taking away sand & gravel from certain land of which he was in possession as licensee under a building agreement. The case on behalf of pltf. was stated to be that deft. was in possession of the land, which was situate at West Ham, under a building agreement which contained the usual provisions, including a provision that deft. should be entitled to a lease upon the buildings being completed. Deft. was entitled to excavate but not to take away sand & gravel otherwise than was necessary for building purposes. In fact, he was taking away & removing sand & gravel for the purpose of selling it. It was also stated that deft. was making large holes in the land, thereby causing lasting damage to the property:—*Held*: as a licensee he had no right to take away the soil.—PEDLEY v. COOPER (1892), 36 Sol. Jo. 729; *subsequent proceedings*, 36 Sol. Jo. 769.

Building agreements generally, *see* Part X., Sect. 2, *ante*.

## (g) Trees and Timber.

*See* AGRICULTURE, Vol. II., pp. 62, 99, 104–110, Nos. 373–376, 801, 850–921.

**What is timber.]**—*See* AGRICULTURE, Vol. II., pp. 61–63, Nos. 348–396.

**Rights of tenant to timber.]**—*See* AGRICULTURE, Vol. II., pp. 75–79, Nos. 541–584.

— **For repairs.]**—*See* Part XVIII., Sect. 7.

## (h) Other Cases.

**4976. Destroying rabbit warren.]**—Action against lessee of manor & warren for waste by destroying cony-borough & cutting down thorns:—*Held*: not waste to destroy cony-boroughs, for waste will not lie for conies, there being no property in them, nor is it waste to stub thorns growing upon the land, but only to cut down thorn trees that have stood sixty or one hundred years.—MOYLE v. MAYLE (1599), Owen, 66; 74 E. R. 905.

*Annotation*:—*Mentd.* Elias v. Griffith (1878), 8 Ch. D. 521.

**4977. Destruction of fish—By stranger.]**—ANON. (1608), 4 Leon. 240; 74 E. R. 846.

**4978. Inclosing & cultivating waste land.]**—An action on the case for an injury to the inheritance lies by the reversioner, pending the term,

against the tenant, for inclosing & cultivating waste land included in the demise, & for continuing the grievance.—QUEEN'S COLLEGE, OXFORD v. HALLETT (1811), 14 East, 489; 104 E. R. 689.

*Annotations*:—*Refd.* Kidgill v. Moor (1850), 9 C. B. 364; West Ham Central Charity Board v. East London Waterworks Co., (1900) 1 Ch. 624.

## SUB-SECT. 2.—PERMISSIVE WASTE.

**4979. Allowing house to fall—Ruinous condition at time of lease.]**—In many cases a man may do a thing to which he is not compellable by law, & yet he shall not be punished for it. As if land is leased for life, upon which there is a house which is ruinous & in decay at the time of the lease, now the lessee is not punishable in waste if it falls, but yet if he cuts down trees growing upon the land, & repairs it with them, it is justifiable. So he may also do, if the lessor covenants to repair it, etc., as it there appears. So if a man leases a house with land upon which there is a wood, etc., without impeachment of waste for the house, yet if the house becomes ruinous, it seems that the lessee may cut timber for the repairing & re-building of it, & he shall not be punished in an action of waste.—ANON. (undated), Plowd. Queries 9; 75 E. R. 868.

**4980. ———.]**—EDWARDS & HALLINDER'S CASE, No. 4968, *ante*.

**4981. ——— After waste committed by building it.]**—ANON. (1702), No. 4964, *ante*.

**4982. Allowing roof to get out of repair.]**—ANON. (1702), No. 4964, *ante*.

**4983. Flood—River breaking banks—Banks out of repair.]**—GRIFFITHS CASE (1564), Moore, K. B. 69; Dal. 70; Keil. 206; 72 E. R. 447.

**4984. ——— Sea wall broken by storm.]**—ANON. (1564), Moore, K. B. 62; Dal. 64; Keil. 206; 72 E. R. 442.

*Annotation*:—*Refd.* Keighley's Case (1610), 10 Co. Rep. 139 a.

**4985. Inevitable accident—Destruction by tempest.]**—In the case of waste, if (1) a house be destroyed by tempest, or (2) by enemies the lessee is excused (*per* CUR.).—PARADINE v. JANE (1647), Aleyn, 26; Sty. 47; 82 E. R. 897.

*Annotations*:—*Generally*, *Refd.* Clark v. Glasgow Assce. (1854), 1 Macq. 668; Redmond v. Dalinton, [1920] 2 K. B. 256.

*Mentd.* Monk v. Cooper (1727), 2 Stra. 763; Brown v. Quilter (1764), Amb. 619; Belfour v. Weston (1786), 1 Term Rep. 310; Bullock v. Dommitt (1796), 6 Term Rep. 650; Hare v. Groves (1796), 3 Anst. 687; Hudley v. Clarke (1799), 8 Term Rep. 259; Touting v. Hubbard (1802), 3 Bos. & P. 291; Heale v. Thompson (1803), 3 Bos. & P. 403; Atkinson v. Ritchie (1809), 10 East, 330; Medeiros v. Hill (1832), 8 Bing. 231; Evans v. Hutton (1842), 12 L. J. C. P. 17; Hart v. Windsor (1844), 12 M. & W. 68; Spence v. Chodwick (1847), 10 Q. B. 517; Denton v. G. N. Ry. (1856), 2 Jur. N. S. 185; Hodgkinson v. Fernie (1857), 3 C. B. N. S. 189; Adams v. Royal Mail Steam Packet Co. (1858), 5 C. B. N. S. 492; Brown v. Royal Insee. Soc. (1859), 28 L. J. Q. B. 275; Hall v. Wright (1859), K. B. & E. 765; Pole v. Cetcovich (1860), 9 C. B. N. S. 430; Brown v. London Corp'n. (1861), 9 C. B. N. S. 726; Lloyd v. Guibert (1865), L. R. 1 Q. B. 115; Coward v. Gregory (1866), 15 L. T. 279; Clifford v. Watts (1870), L. R. 5 C. P. 377; Carstairs v. Taylor (1871),

v. POOR LAW COMRS. (1852), 4 Ir. Jur. 346.—IR.

**h. Accidental fire.]**—An accidental fire, by which the leased premises are burnt, is permissive not voluntary waste.—WOLFE v. MCGUIRE (1896), 28 O. L. 45.—CAN

**k. ———.]**—WHITE v. MCCANN (1851), 1 I. C. L. R. 205; 3 Ir. Jur. 165.—IR.

**l. Allowing gorse to spread.]**—REHANA TEREKUKU v. KIDD (1885), 4 N. Z. L. R. 140.—N.Z.

## PART XIX. SECT. 2, SUB-SECT. 1.—C. (i).

**d. Under building agreement—Sand & gravel excavated for sale.]**—CLELLAND v. RITCHIE (1865), 18 Ir. Jur. 64.—IR.

**e. ———.]**—SHAFTESBURY v. WALLACE, [1897] 1 I. R. 381.—IR.

## PART XIX. SECT. 2, SUB-SECT. 1.—C. (h).

**4976 i. Destroying rabbit warren.]**—To break up a rabbit warren, unless it be a warren by charter or prescription,

is not waste at common law.—LURTING v. CONN (1850), 1 I. Ch. R. 273; 3 Ir. Jur. 99.—IR.

**f. Cutting & selling flax.]**—When land on which flax grows is leased without any reservation a lessee is not guilty of waste if he, at the proper periods & in a proper manner, cuts & sells such flax.—KEWIRI v. EIVERS, [1917] N. Z. L. R. 479.—N.Z.

## PART XIX. SECT. 2, SUB-SECT. 2.

**g. Allowing house to fall.]**—SHEE

**Sect. 2.—What is waste: Sub-sect. 2. Sect. 3: Sub-sects. 1, 2, 3 & 4, A. & B.; sub-sect. 5.]**

**L. R. 6 Exch. 217; The Teutonia (1871), L. R. 3 A. & E. 394; Howell v. Coupland (1874), 22 W. R. 691; Jackson v. Union Marine Ince. (1874), L. R. 10 C. P. 125; Nichols v. Marsland (1876), 46 L. J. Q. B. 174; River Wear Comrs. v. Adamson (1877), 2 App. Cas. 743; Sheffield Water-works Co. v. Cartor, Same v. Brooks (1882), 8 Q. B. D. 632; Jacobs v. Crédit Lyonnais (1884), 12 Q. B. D. 589; Re Shipton, Anderson & Harrison's Arbitration, [1915] 3 K. B. 676; Leiston Gas Co. v. Leiston-cum-Sizewell U. D. C., [1916] 2 K. B. 428; F. A. Tamplin S.S. Co. v. Anglo-Mexican Petroleum Products Co., [1916] 2 A. C. 397; Chinese Mining & Engineering Co. v. Sale, [1917] 2 K. B. 590; Blackburn Bobbin Co. v. Allen, [1918] 1 K. B. 540; Ralli v. Compania Naviera Sota y Aznar, [1920] 2 K. B. 287; Matthey v. Curling, [1922] 2 A. C. 180.**

**4986. ——— King's enemies.] — PARADINE v. JANE, No. 4616, ante.**

**As between owner of particular estate & remainderman.]—See SETTLEMENTS.**

**SECT. 3.—WHO IS LIABLE.**

**SUB-SECT. 1.—TENANT AT WILL.**

**4987. Not liable for waste as such—Voluntary waste—Landlord's remedy in trespass—Cutting trees.]—ANON. (1587), Sav. 84; 123 E. R. 1026.**

**4988. ———.] — WALGRAVE v. SOMERSET (1587), Gouldsb. 72; 4 Leon. 167; 75 E. R. 1002.**

**Annotation:—Refd. Anon. (1587), Sav. 84.**

**4989. ——— Act amounts to determination of tenancy.]—An action on the case does not lie against tenant at will, for permissive waste. But if tenant at will commits voluntary waste, it amounts to a determination of the will, & an action of trespass lies against him.—SHREWSBURY'S (COUNTESS) CASE (1600), 5 Co. Rep. 13 b; 77 E. R. 68; sub nom. SALOP (COUNTESS) v. CROMPTON, Cro. Eliz. 784.**

**Annotations:—Expld. Blackmore v. White, [1899] 1 Q. B. 293. Refd. Pantou v. Isham (1693), 3 Lev. 359; Herno v. Benbow (1813), 4 Taunt. 764; Batthyany v. Walford (1886), 33 Ch. D. 624.**

**4990. ——— Permissive waste.]—ANON. (1587), Sav. 84; 123 E. R. 1026.**

**4991. ———.] — WALGRAVE v. SOMERSET (1587), Gouldsb. 72; 4 Leon. 167; 75 E. R. 1002.**

**Annotation:—Refd. Anon. (1587), Sav. 84.**

**4992. ———.] — SHREWSBURY'S (COUNTESS) CASE, No. 4989, ante.**

**4993. ———.] — PANTON (OR PANTAM) v. ISHAM (1701), 3 Lev. 359; 1 Salk. 19; 83 E. R. 729.**

**4994. ———.]—Semble: case will not lie upon an implied condition by a tenant at will to do tenantable repair or reasonable repair so as to subject him to an action for permissive waste. There must be an express covenant or an assumption to render him liable.—GIBSON v. WELLS (1805), 1 Bos. & P. N. R. 290; 2 Smith, K. B. 677; 127 E. R. 473.**

**Annotations:—Expld. Blackmore v. White, [1899] 1 Q. B. 293. Refd. Powys v. Blagrave (1854), 4 De G. M. & G. 448; Yellowly v. Gower (1855), 11 Exch. 274; Barnes v. Dowling (1881), 44 L. T. 809; Re Cartwright, Avis v. Newman (1889), 41 Ch. D. 532.**

**4995. ———.] — HORSEFALL v. MATHER, No. 4609, ante.**

**4996. ———.]—A declaration in case stated, that deft. held & occupied a messuage, etc., as tenant thereof to pltf., under a demise thereof made by pltf. to deft., by reason of which said tenancy it became & was the duty of deft. to manage & use the said tenements in a tenant**

**like & proper manner, & not to permit or commit waste thereto; yet deft. did not manage & use the said tenements in a tenant like & proper manner, but on the contrary thereof, wrongfully & unjustly suffered & permitted them to be waste, ruinous, etc., for want of tenantable & necessary repairs:—Held: bad on general demurrer, for not showing that deft. was more than a tenant at will, who is not liable to an action or permissive waste. Semble: a tenant for years is liable, under 6 Edw. 1, c. 5, to an action for permissive waste.—HARNETT v. MAITLAND (1847), 16 M. & W. 257; 4 Dow. & L. 545; 16 L. J. Ex. 134; 8 L. T. O. S. 346; 153 E. R. 1184.**

**Annotation:—Refd. Yellowly v. Gower (1855), 11 Exch. 274.**

**SUB-SECT. 2.—TENANT AT SUFFERANCE.**

**4997. Voluntary waste—Action for waste—Or trespass.]—Either case or trespass will lie by a landlord against his tenant at sufferance for despoiling the premises.—WEST v. TREUDE (1630), Cro. Car. 187; 79 E. R. 764.**

**Annotation:—Refd. Hicks v. Downing (Alias Smith v. Baker) (1695), 1 Ld. Raym. 99.**

**SUB-SECT. 3.—TENANT FROM YEAR TO YEAR.**

**4998. Permissive waste—Extent of liability.]—A tenant from year to year is only bound to fair & tenantable repairs, so far as to prevent waste or decay of the premises; not to substantial & lasting repairs, such as new roofing, etc.—FERGUSON v. ——— (1797), 2 Esp. 590.**

**Annotation:—Dtd. Gibson v. Wells (1805), 2 Smith, K. B. 677.**

**4999. ———.] — HORSEFALL v. MATHER, No. 4609, ante.**

**5000. ———.]—A tenant from year to year of a house is only bound to keep it wind & water tight. A tenant, who covenants to repair, is to sustain & uphold the premises; but that is not so with a tenant from year to year.—AUWORTH v. JOHNSON (1832), 5 C. & P. 239, N. P.**

**Annotation:—Refd. Wedd v. Porter, [1916] 2 K. B. 91.**

**5001. ———.]—(1) If an assignee of a lease commit waste, the landlord may sue him in covenant, or in a special action on the case, but not in *assumpsit*.**

**(2) A tenant from year to year is not liable for permissive waste, & is not liable to make good mere wear & tear of the premises.—TORRIANO v. YOUNG (1833), 6 C. & P. 8, N. P.**

**Annotation:—Refd. Martin v. Gilham (1837), 7 Ad. & El. 540.**

**5002. ———.]—A tenant from year to year is not bound to do substantial repairs; he is only bound to keep the premises wind & water tight.—LEACH v. THOMAS (1835), 7 C. & P. 327, N. P.**

**Annotations:—Refd. Wedd v. Porter, [1916] 2 K. B. 91. Mentd. Bishop v. Elliott (1855), 11 Exch. 113.**

**5003. ———.]—An action on the case for permissive waste will not lie against a tenant from year to year.—MARTIN v. GILHAM (1837), 7 Ad. & El. 540; 2 Nev. & P. K. B. 568; 7 L. J. Q. B. 11; 1 Jur. 920; 112 E. R. 574.**

**5004. ———.] — HARNETT v. MAITLAND, No. 4996, ante.**

**5005. ———.] — DIXON v. MOWBRAY & Co., LTD. (1908), 52 Sol. Jo. 616.**

**5006. ———.]—(1) A tenant from year to year of a farm & buildings at a rent, who has not**

**PART XIX. SECT. 3, SUB-SECT. 3.**

**4998 i. Permissive waste—Extent of liability.]—McDONALD v. HAMILTON (1911), 9 E. L. R. 395.—CAN.**

entered into any other express agreement with his landlord, than as to the amount of the rent, is under an obligation implied by law to use & cultivate the land in a husband-like manner, according to the custom of the country, subject to the provisions of the Agricultural Holdings Act, 1908 (c. 64), & to keep the buildings wind & water tight; & the assignee of the reversion can at common law enforce this implied obligation against the tenant.

Where, therefore, a tenant of a farm & buildings under a lease containing express covenants by him continued in occupation after the expiration of the term, the landlord & tenant agreeing that the terms of the old lease should not apply, but not agreeing upon the terms of the new tenancy except that there should be a yearly tenancy at a fixed rent, & the landlord assigned the reversion during the continuance of the tenancy, the assignee of the reversion was held entitled to sue the tenant for breaches of the above-mentioned implied obligations which occurred after the assignment of the reversion.

(2) It is said that there is no lease by deed containing express covenant, & therefore 32 Hen. 8, c. 34, does not assist plff. . . . The law however has always drawn a distinction between express & implied covenants. . . . The reason why the statute extended only to express covenants was that no such provision was necessary with regard to covenants in law or implied covenants (SWINFEN EADY, L.J.).—WEDD v. PORTER, [1916] 2 K. B. 91; 85 L. J. K. B. 1298; 115 L. T. 243, C. A.

*Annotations:*—As to (2) *Reid*. Cole v. Kelly, [1920] 2 K. B. 106. *Generally*, *Mentd.* Blane v. Francis, [1917] 1 K. B. 252; Barnes v. City of London Real Property Co., [1918] 2 Ch. 18.

#### SUB-SECT. 4.—LESSEE FOR YEARS.

##### A. In General.

**5007. Voluntary waste.—Although committed by stranger.]**—ANON. (1370), Y. B. 44, Edw. 3, fo. 27.

*Annotation:*—*Reid*. Attersoll v. Stevens (1808), 1 Taunt. 183.

**5008. ———.]**—ATTERSOLL v. STEVENS, No. 3875, ante.

**5009. ———. Lessee from copyholder.—Though copyholder not liable.]**—The lessee of a copyholder is punishable in waste though the copyholder be not.—DALTON v. GILL (1576), Cary, 63; 21 E. R. 34.

**5010. ———.]**—YELLOWLY v. GOWER, No. 5015, post.

**5011. Permissive waste.]**—PANTAM (OR PANTON) v. ISHAM (1701), 1 Salk. 19; 3 Lev. 359; 91 E. R. 18.

**5012. ———.]**—Copyhold tenant is subject to waste, unless by act of God; & tenant for years, where burnt by fire, though no covenant to repair or rebuild.—ROOK v. WORTH (1750), 1 Ves. Sen. 460; 27 E. R. 1142.

*Annotation:*—*Mentd.* Warwicker v. Bretnall (1882), 23 Ch. D. 188.

**5013. ———.]**—Case for permissive waste does not lie against a tenant by lease, who has not

covenanted to repair.—HERNE v. BEMBOW (1813), 4 Taunt. 764; 128 E. R. 531.

*Annotations:*—*Reid*. Powys v. Blagrove (1854), 4 De G. M. & G. 448; Yellowly v. Gower (1855), 11 Exch. 274; Barnes v. Dowling (1881), 44 L. T. 809; Re Cartwright, Avis v. Newman (1889), 41 Ch. D. 532; Blackmore v. White, [1899] 1 Q. B. 293.

**5014. ———.]**—HARNETT v. MAITLAND, No. 4996, ante.

**5015. ———.]**—We conceive that there is no doubt of the liability of tenants for terms of years, for they are clearly put on the same footing as tenants for life, both as to voluntary & permissive waste (PARKE, B.).—YELLOWLY v. GOWER (1855), 11 Exch. 274; 24 L. J. Ex. 289; 156 E. R. 833.

*Annotation:*—*Consd.* Davies v. Davies (1888), 38 Ch. D. 499.

**5016. ———.]**—A tenant for years is liable for permissive waste, & therefore a lease by a tenant for life under Settled Estates Act, 1877 (c. 18), s. 46, exempting the lessee from liabilities for "fair wear & tear & damage by tempest" is void as "made without impeachment of waste." In granting such a lease the tenant for life has a discretion as to what are proper covenants, & the lease will be void only when there is an outrageous omission of covenants.—DAVIES v. DAVIES (1888), 38 Ch. D. 499; 57 L. J. Ch. 1093; 58 L. T. 514; 36 W. R. 399.

**5017. ———. Avoidance of liability by express covenant to repair.]**—An action on the case for permissive waste is not maintainable against a tenant for years, if he hold premises under an express contract or covenant to repair.—JONES v. HILL (1817), 1 Moore, C. P. 100; 7 Taunt. 392; 129 E. R. 156.

*Annotations:*—*Consd.* Burnett v. Lynch (1826), 5 B. & C. 589; Yellowly v. Gower (1855), 11 Exch. 274. *Reid*. Woodhouse v. Walker (1880), 28 W. R. 765; Re Cartwright, Avis v. Newman (1889), 41 Ch. D. 532.

**Liability when tenancy expired.]**—See No. 5018, post.

##### B. Duration of Liability.

**5018. After expiration of term.]**—Case, in nature of waste, will lie against a tenant for years after the expiration of his term, as well as covenant, for the breach of those contained in his lease.—KINLYSIDE v. THORNTON (1776), 2 Wm. Bl. 1111; 96 E. R. 657.

*Annotations:*—*Consd.* Torriano v. Young (1833), 6 C. & P. 8. *Fold*. Marker v. Kenrick (1853), 13 C. B. 188. *Reid*. Jones v. Hill (1817), 1 Moore, C. P. 100; Burnett v. Lynch (1826), 5 B. & C. 589; Defries v. Milne, [1913] 1 Ch. 98. *Mentd.* Muskett v. Hill (1839), 5 Bing. N. C. 694.

**5019. Tenant holding over.]**—An action on the case in the nature of waste lies at the suit of a landlord against his tenant for acts done by the latter while holding over after the expiration of a notice to quit.—BURCHELL v. HORNSBY (1808), 1 Camp. 360, N. P.

*Annotation:*—*Reid*. Weeton v. Woodcock (1839), 5 M. & W. 587.

#### SUB-SECT. 5.—OTHER PERSONS.

**5020. Tenants in common.—One lessee of another.]**—ANON. (1563), Moore, K. B. 71; 72 E. R. 448.

#### PART XIX. SECT. 3, SUB-SECT. 4.—A.

**5007 i. Voluntary waste.—Although committed by stranger.]**—A lessee is liable for damage caused to the leased property by a third party when he could have prevented such damage.—VON HOLT v. BRUWER, [1918] C. P. D. 163.—S. AF.

**5017 i. Permissive waste.—Avoidance of liability by express covenant to**

*repair.]*—CRAWFORD v. BUGG (1886), 12 O. R. 8.—CAN.

**5017 ii. ———.]**—A tenant for years is liable for permissive waste. Provisions in the lease whereby the covenants to repair & to repair according to notice are qualified by the exceptions in the covenant to leave the premises in good repair, viz., "reasonable wear & tear & damage by

fire or tempest," have not the effect of relieving the tenant from any liability which but for them he would have been subject to for permissive waste. Such exceptions are to be construed as exempting from damage which is the result of accident, not from damage which is the result of negligence.—MORRIS v. CAIRNCROSS (1907), 9 O. W. R. 918; 14 O. L. R. 544.—CAN.

**Sect. 3.—Who is liable: Sub-sect. 5. Sect. 4: Sub-sects. 1 & 2, A. & B.]**

**5021. Executor.]—**ANON. (1531), No. 5043, *post*.  
**5022. —**]—If lessee devises his term & dies, & then his exors. do waste, & afterwards assent to the devise, an action of waste in the *tenuit* lies against the exors.—**SAUNDERS'S CASE** (1599), 5 Co. Rep. 12 a; 77 E. R. 66.

**Annotations:—***Consd. Percy's Case* (1609), 13 Co. Rep. 60; *Astrey v. Ballard* (1676), Freem. K. B. 445. *Refd. Sanders v. Norwood* (1599), Cro. Eliz. 683; *Billingsly v. Hersey* (1612), 2 Bulst. 5; *Dashwood v. Magniac*, [1891] 3 Ch. 306. *Mentd. Doe d. Saye & Sele v. Guy* (1802), 3 East, 120; *R. v. Foleshill* (1835), 2 Ad. & El. 593; *Re West, West v. Roberts*, [1909] 2 Ch. 180.

**5023. — Waste committed by one executor.]—**If one exor. do waste the other shall not be charged.—**DOWNES v. WISEMAN** (1631), Toth. 88; 21 E. R. 132.

**5024. — No connivance.]—**TOWNLEY v. SHURBORNE, No. 5026, *post*.

**5025. — Executor de son tort.]—**If a lessee die intestate during the term, & a stranger enter & take possession, he thereby becomes an exor., *de son tort*; & if he commit waste on the demised premises, he may be sued as exor., *de son tort*, in an action of waste.—**NORWICH CITY v. JOHNSON** (1684), 2 Show. 457; Comb. 7; 3 Lev. 35; 3 Mod. Rep. 90; 89 E. R. 1039.

**— Liability for devastavit generally.]—**See EXECUTORS, Vol. XXIV., pp. 666 *et seq.*

**5026. Trustee—Waste committed by co-trustee—No connivance.]—**Where one of two trustees of a lease or exors. commits waste, the other shall not be charged unless he was a co-actor.—**TOWNLEY v. SHURBORNE** (1633), Toth. 88; O. Bridg. 35; 21 E. R. 132.

**Annotations:—***Dbtd. Scurfield v. Howes* (1790), 3 Bro. C. C. 90. *Consd. Thompson v. Finch* (1856), 22 Beav. 316.

**— Liability of trustees generally.]—**See TRUSTS & TRUSTEES.

**5027. Assignee of lease.]—**TORRIANO v. YOUNG, No. 5001, *ante*.

## SECT. 4.—REMEDIES FOR WASTE.

### SUB-SECT. 1.—INJUNCTION.

**5028. General rule.]—**Pltf. in reversion of a lease has a grant of the woods, he in possession wastes the woods; therefore an injunction.—**PETETSON v. SHELLEY** (1577), Ch. Cas. in Ch. 117; 21 E. R. 72.

**5029. —**]—Injunction to restrain the lessee for years of the temporalities of a bishop, under a lease confirmed by the Dean & Chapter & without impeachment of waste, from felling timber.—**WINCHESTER (BP.) v. WOLGAR** (1620), 3 Swan. 493, n.; 36 E. R. 954.

**5030. —**]—**FARRANT v. LOVEL**, No. 5033, *post*.

**5031. —**]—**KIMPTON v. EVE**, No. 4971, *ante*.

**5032. —**]—Injunction granted to stay waste, & from sowing land with mustard seed, or any other pernicious crop.—**PRATT v. BRETT** (1817), 2 Madd. 62; 56 E. R. 258.

**5033. Against underlessee—At suit of head lessor.]—**The ct. will grant an injunction at the

suit of a ground landlord to stay waste in an underlessee, who holds by lease from the original lessee.—**FARRANT v. LOVEL** (1750), 3 Atk. 723; 26 E. R. 1214; *sub nom.* **FARRANT v. LEE**, Amb. 105, L. C. *Annotation:—**Refd. Harper v. Aplin* (1886), 54 L. T. 383.

**5034. Waste must be irreparable.]—**FLAMANG'S CASE (circa 1783), cited 7 Ves., at p. 308; 32 E. R. 126, L. C.

**Annotations:—***Consd. Mitchell v. Dors* (1801), 6 Ves. 147; *Hanson v. Gardiner* (1802), 7 Ves. 305; *Thomas v. Oakley* (1811), 18 Ves. 184. *Refd. A-G v. Hallett* (1847), 16 M. & W. 569.

**5035. —**]—**JOHNSON v. GOLDSWAIN** (1796), 3 Anst. 749; 145 E. R. 1027.

**5036. Notwithstanding concurrent liability on covenant.]—**A lessee covenants not to dig up a particular part of the demised premises for raising sand, gravel, etc., under the penalty of £100 per acre. He breaks this covenant, & thereupon the lessor files a bill for an injunction; on affidavit of the waste committed, the injunction is granted till answer & further order; after the answer put in, a motion is made to dissolve the injunction, & upon showing cause, deft. consented to appear & plead to an action of debt or trover, & to take short notice of trial; & thereupon the injunction is dissolved. But on an appeal this order was discharged, & an injunction granted to continue till the hearing of the cause.—**LONDON CITY v. PUGH** (1727), 4 Bro. Parl. Cas. 395; 2 E. R. 268, H. L.

**5037. —**]—**LONDON CORPN. v. HEDGER**, No. 4801, *ante*.

**5038. Wilful waste at end of tenancy—On ejectment by landlord.]—**Where a tenant, defending an ejectment brought by his landlord, makes default at the trial, & makes use of the interval to do all the mischief he can by breaches of covenant & wilful waste, an injunction will be granted on motion, or in the vacation on petition; but it was refused, where no ejectment had been brought.—**LATHROPP v. MARSH** (1800), 5 Ves. 259; 31 E. R. 576, L. C.

**5039. — Notice to quit.]—**Injunction to restrain a tenant from year to year, under notice to quit, as in the case of a lessee for a longer term, from doing damage, & from removing the crops, manure, etc., except according to the custom of the country.—**ONSLOW v. —** (1809), 16 Ves. 173; 33 E. R. 949, L. C.

**Annotation:—***Refd. Wedd v. Porter*, [1916] 2 K. B. 91.

**5040. Injury to lessor small compared with benefit to lessee.]—**DOHERTY v. ALLMAN, No. 4943, *ante*.

**Breaking up pasture.]—**See AGRICULTURE, Vol. II., p. 17, Nos. 83–91, p. 18, No. 99.

**Wrongful cutting of trees.]—**See AGRICULTURE, Vol. II., pp. 110–112, Nos. 922–940.

### SUB-SECT. 2.—ACTION FOR DAMAGES IN NATURE OF ACTION FOR WASTE.

#### A. In General.

**5041. Replaces writ of waste.]—**DOHERTY v. ALLMAN, No. 4943, *ante*.

**PART XIX. SECT. 4, SUB-SECT. 1.**  
**5028 i. General rule.]—**The right to restrain waste, involved in the removal by a tenant of a building forming part of the freehold, is clear.—**GRAY v. MACLENNAN** (1886), 3 Man. L. R. 337.—*CAN.*

**5034 i. Waste must be irreparable.]—**DORAN v. CARROLL (1860), 11 I. Ch. R. 379.—*IR.*

**m. Against tenants in common —**

**Partition.]—**A landlord may restrain tenants in common from executing a partition by any act amounting to waste.—**NORTH v. GUINAN** (1829), Beat. 342.—*IR.*

**n. Against lessee for lives renewable for ever.]—**WHITE v. WALSH (1829), 1 Jo. Ex. Ir. 626, n.—*IR.*

**o. —**]—**PURCELL v. NASH** (1836), 1 Jo. Ex. Ir. 625.—*IR.*

**p. —**]—A lessee for lives re-

newable for ever will, unless in special circumstances, be restrained from committing waste.—**COPPINGER v. GUBBINS** (1846), 3 Jo. & Lat. 397.—*IR.*

### PART XIX. SECT. 4, SUB-SECT. 2.—A.

**q. Who can sue—Tenant in common—Conditional upon release by other tenants in common.]—**Deft. went into possession of land as tenant of pltf.

**5042. Action for tort.]—**DEFRIES v. MILNE, No. 5050, *post*.

**5043. When maintainable—Death of tenant—Liability of executor.]—**If a termor commits waste, & makes exors., & dies, the action of waste is gone; for it doth not lie against his exors. but for waste done by themselves, & not for the waste of testator; for it is a common trespass, which is an action personal, & dies with the person.—ANON. (1531), Bro. N. C. 189; 73 E. R. 929.

**5044. — Repairs done before action.]—**An action of waste is not maintainable, where the lessee repairs before action brought; yet, deft. ought to plead the special matter.—WHELPDALE'S CASE (1604), 5 Co. Rep. 119 a; 77 E. R. 239.

**Annotations :—***Mentd.* Winchcombe v. Pigot (1615), 2 Bulst. 246; Lyn v. Wyn (1665), O. Bridg. 122; Chappel v. Vaughan (1669), 1 Sid. 420; Parker v. Welby (1670), 1 Mod. Rep. 57; Boson v. Sandford (1689), 1 Show. 101; Prigg v. Adams (1692), 2 Salk. 674; Thompson v. Leach (1697), 1 Ld. Raym. 313; Wankford v. Wankford (1698), 1 Salk. 299; Collins v. Blantern (1767), 2 Wils. 341; Abbot v. Smith (1774), 2 Wm. Bl. 947; Colton v. Goodridge (1776), 2 Wm. Bl. 1108; Evans v. Lewis (1794), cited 1 Wms. Saund. 291; Richards v. Heather (1817), 1 B. & Ald. 29; Edwards v. Brown (1831), 1 Cr. & J. 307; Hill v. Manchester & Salford Water Works Co. (1833), 5 B. & Ad. 866; Ward v. Lumley (1860), 24 J. P. 150; Latter v. White (1870), L. R. 5 Q. B. 622; David v. Sabin, [1893] 1 Ch. 523.

**5045. — After expiration of term.]—**KINLYSIDE v. THORNTON, No. 5018, *ante*.

**5046. — Collateral liability under covenant.]—**An action on the case will lie for waste by a lessee, although there is an express covenant against it in the lease, the remedies being cumulative.

A., the lessee of a coal mine, cuts through the barriers of the mine. The lessor brings an action on the case for injury done to his reversion. Plea, setting out the lease, & alleging that the grievances complained of consisted of a particular mode of working the mine, provided for by the covenants in the lease. Demurrer:—*Held*: the action would lie, although pltf. might have sued on the covenant.—MARKER v. KENRICK (1853), 13 C. B. 188; 22 L. J. C. P. 129; 20 L. T. O. S. 223; 17 Jur. 44; 138 E. R. 1169.

**Annotation :—***Refd.* Defries v. Milne, [1913] 1 Ch. 98.

**5047. Who can sue—Ultimate remainderman in fee—Waste committed during life of mesne remainderman.]—**ANON. (1559), Moore, K. B. 18; 72 E. R. 410.

**5048. — Assignee of reversion.]—**WEDD v. PORTER, No. 5006, *ante*.

**5049. Who can be sued—Tenants by remainder—Cannot be sued as joint tenants.]—**ANON. (1561), Dal. 30; 123 E. R. 248.

**5050. Action not assignable.]—**A right of action for damages in the nature of waste being in respect of a tort is, on grounds of public policy not capable of assignment.

By a lease dated in 1906 certain business premises were demised to pltf. for a term of forty-one & a half years. The lease contained the usual covenants by the lessee to repair. Pltf. took the lease as trustee for a co., & the co. entered into occupation of the premises. On Mar. 19, 1909 a receiver & manager of the co.'s property was appointed in a debenture holder's action, & on Mar. 25, 1909, the co. went into voluntary liquidation. On May 2, 1911, the co. by its liquidator & the receiver entered into an agreement with deft. for the sale to him of the fixed plant &

machinery of the business. By clause 14 of the agreement it was provided that deft. was to be entitled to occupy the premises for the purpose of removing the plant & machinery until Sept. 29, 1911, upon certain conditions, one of which was that he was not to do anything which, if done by the lessee, would be a breach of the covenants & conditions contained in the lease. It was also provided that deft. was to make good to the satisfaction of the lessor all damages done in removing the tenant's fixtures agreed to be sold. The agreement was approved by the cts. in the debenture holders action & deft. was let into possession of the premises. Whilst in possession deft. committed certain acts which were alleged to constitute waste. Upon his going out of possession on Sept. 29, 1911, pltf. was let into possession, & by a deed dated Nov. 6, 1911, the co.'s interest in the premises was released to pltf., together with the benefit of clause 14 of the agreement of May 2, 1911, & the full power to enforce the obligations under that clause:—*Held*: (1) upon the construction of the assignment of Nov. 6, 1911, it did not purport to assign to pltf. any right of action for tort in respect of waste, but only in respect of breaches of covenant.

I think it is clear that the action for waste, & the action on the case in the nature of waste, are both actions for tort, & there is no question of contract at all in waste in respect of either cause of action (FARWELL, L.J.).

(2) If the assignment had purported to assign any such right, the assignment would have been invalid, inasmuch as such a right is not assignable, according to the established rule which has not been changed.—DEFRIES v. MILNE, [1913] 1 Ch. 98; 82 L. J. Ch. 1; 107 L. T. 593; 57 Sol. Jo. 27, C. A.

**Annotation :—***As to (2) Refd.* County Hotel & Wine Co. v. L. & N. W. Ry., [1913] 2 K. B. 251.

**Waste in respect of timber.]—**See AGRICULTURE, Vol. II., p. 113, Nos. 953–959.

#### B. Damages.

See, generally, DAMAGES, Vol. XVII., pp. 76 *et seq.*

**5051. Nominal damages not recoverable.]—**YORK (DUKE) v. YORK (DUCHESS) (1431), Y. B. 9, Hen. 6, fo. 65, B. pl. 21; 22 Vin. Abr. 458.

**Annotations :—***Mentd.* Piffold's Case (1612), 10 Co. Rep. 115 b; Greene v. Cole (1670), 2 Saund. 252; Elias v. Griffith (1878), 8 Ch. D. 521.

**5052. — Verdict effective as judgment for defendant.]—**In an action of waste on the statute of Gloucester, c. 5, against tenant for years, for converting three closes of meadow into garden ground, if the jury give only one farthing damages for each close, the ct. will give deft. leave to enter up judgment for himself.—HARROW SCHOOL (GOVERNORS) v. ALDERTON (1800), 2 Bos. & P. 86; 126 E. R. 1170.

**Annotations :—***Consd.* Doherty v. Allman (1878), 3 App. Cas. 709. *Refd.* Pindar v. Wadsworth (1802), 2 East, 154; Barry v. Barry (1820), 1 Jac. & W. 851; Doe d. Grubb v. Burlington (1833), 5 B. & Ad. 507; Rochdale Canal Co. v. King (1851), 2 Sim. N. S. 78; Meux v. Copley, [1892] 2 Ch. 253.

**5053. — — — — —.]—**YOUNG v. SPENCER, No. 4939, *ante*.

**5054. — — — — —.]—**DOHERTY v. ALLMAN, No. 4943, *ante*.

for the purpose of carrying on lumbering operations. In an action by pltf. claiming damages for certain acts of trespass, it appeared that pltf. was not sole owner of the land in question, but was one of a number of co-tenants

who had brought action for the same acts of trespass:—*Held*: the recovery of damages by pltf. must be made conditional upon the other tenants in common executing a release to deft. of their claim to damages in respect of

the acts complained of.—MOLONEY v. EMBREE (1921), 54 N. S. R. 318.—CAN.

*r. — — — Rights after partition.*—MOLONEY v. WIRIHANA (1894), 12 N. Z. L. R. 624.—N.Z.

**Sect. 4.—Remedies for waste: Sub-sect. 2, B.; sub-sects. 3 & 4. Part XX. Sect. 1: Sub-sects. 1 & 2.]**

**5055. Mitigation of damages—Cutting timber—Covenant by plaintiff to furnish timber—Timber applied for purpose of covenant.]—RENNELL v. WITHER (1818), Manning's Nisi Prius Digest 2nd. ed. 291.**

**Annotation:—***Reid*. *Simmons v. Norton* (1831), 7 Bing. 640.

**5056. ——— Timber required for repairs—Found unsuitable.]—SIMMONS v. NORTON, No. 4941, ante.**

**5057. Measure of damages—Injury to reversion—Not confined to injury to premises.]—YOUNG v. SPENCER, No. 4939, ante.**

**5058. ———.]—(1) A covenant by a tenant not to commit waste on the demised property is not with regard to the measure of damages for the breach of it the same thing as a covenant to deliver up the property at the end of the term in the same state as that in which the tenant received it. Therefore, in an action by the reversioner against the tenant for waste, the measure of damages is not necessarily the sum which it would cost to restore the property to its condition before the waste; the true measure of damages is the diminution in the value of the reversion, less a discount for immediate payment.**

**(2) There is an implied covenant on the part of the tenant not to commit waste (LORD ESHER, M.R.).—WHITHAM v. KERSHAW (1886), 16 Q. B. D. 613; 54 L. T. 124; 34 W. R. 340; sub nom. WITHAM v. KERSHAW, 2 L. R. 281, C. A.**

**Annotations:—As to (1) *Reid*. *Rust v. Victoria Graving Dock Co. & London & St. Katharine's Dock Co.* (1887), 38 Ch. D. 113; *Joyner v. Weeks*, [1891] 2 Q. B. 31. As to (2) *Dtd. Defries v. Milne*, [1913] 1 Ch. 98. Generally, *Mentd. Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.* (1894), 64 L. J. Ch. 216; *Cruise v. Terrell*, [1922] 1 K. B. 604.**

**5059. ——— Less discount for immediate payment.]—WHITHAM v. KERSHAW, No. 5058, ante.**

**5060. Reference to master—Confirmation of report not necessary.]—It was referred to the master to inquire what reparation ought to be made for damage done to land by improper cultivation & deft. was ordered to pay such reparation:—*Held*: the master's report, by which the amount of money which would be a proper reparation, was ascertained, did not require confirmation; & an order for the payment of the money into ct., obtained without having the report confirmed, was regular.—*EMPRINGHAM v. SHORT* (1840), 11 Sim. 78; 9 L. J. Ch. 406; 50 E. R. 803, L. C.**

**SUB-SECT. 3.—ACTION FOR TRESPASS OR TROVER.**

**5061. Trespass.]—HIGGON v. MORTIMER, No. 4973, ante.**

**—— Voluntary waste by tenant at will.]—See Nos. 4987–4989, ante.**

**—— Voluntary waste by tenant at sufferance.]—See No. 4997, ante.**

**—— Waste in respect of trees.]—See AGRICULTURE, Vol. II., p. 112, Nos. 942–947.**

**5062. Trover.]—If a stranger cut down a timber tree during the continuance of a term, the lessor may maintain trover against him for it. *Qu.*: if he may not, at his election, have trover or waste against the lessee.—*BERRY v. HEARD* (1632), Cro. Car. 242; Palm. 327; W. Jo. 255; 79 E. R. 812.**

**Annotations:—***Reid*. *Gordon v. Harper* (1796), 7 Term Rep. 9; *Attersoll v. Stevens* (1808), 1 Taunt. 183.

**5063. ———.]—HIGGON v. MORTIMER, No. 4973, ante.**

**—— In respect of trees.]—See AGRICULTURE, Vol. II., pp. 112, 113, Nos. 948–952.**

**SUB-SECT. 4.—OTHER REMEDIES.**

**5064. Entry for purpose of inspection.]—A reversioner in fee may enter on a lease for years to inspect waste; & if the lessee prevent the inspection, an action on the case will lie; in which pltf. need not show the waste done.—*HUNT v. DOWMAN* (1618), Cro. Jac. 478; 79 E. R. 407.**

**Annotation:—***Mentd.* *Ashby v. White* (1703), 2 Ld. Raym. 938.

**5065. Ejectment for forfeiture—Licence to commit waste on condition—Performance of condition.]—A copyholder licencing his lessee to commit waste on condition of his doing a subsequent act to diminish the damage thereby occasioned, cannot eject him for a forfeiture incurred by his committing the waste without performing the subsequent act.—*Doe d. WOOD v. MORRIS* (1809), 2 Taunt. 52; 127 E. R. 995.**

**5066. Appointment of receiver.]—Where in an action of ejectment by a landlord against his tenant the landlord applied *ex parte* for a receiver to prevent waste on the ground that the house was falling into disrepair, it was said that an order under R. S. C., Ord. 50, r. 3, for the protection of property cannot be made *ex p.* & the application was refused.—*HABERSHON v. GILL* (1875), Bitt. Prac. Cas. 45; 1 Char. Cham. Cas. 14.**

**Annotation:—***Mentd.* *Pease v. Fletcher* (1875), 1 Ch. D. 273.

**——.]—See, generally, RECEIVERS.**

**Proceedings under Malicious Damage Act, 1861 (c. 97).]—See CRIMINAL LAW, Vol. XV., p. 1033, Nos. 11,640–11,642.**

## Part XX.—Insurance and Damage by Fire.

**SECT. 1.—COVENANT TO INSURE.**

**SUB-SECT. 1.—NATURE OF COVENANT.**

**5067. Covenant running with the land.]—VERNON v. SMITH, No. 5068, post.**

**See, generally, Part XI., Sect. 6, ante.**

**SUB-SECT. 2.—CONSTRUCTION OF COVENANT.**

**See, generally, DEEDS, Vol. XVII., pp. 242 *et seq.***

**5068. Whether covenant running with land.]—A covenant to insure against fire premises situated within the weekly bills of mortality mentioned in Fires Prevention (Metropolis) Act, 1774 (c. 78), is**

**PART XX. SECT. 1, SUB-SECT. 1.**  
**50671. Covenant running with the land.]—Covenant by lessee to insure**

**in the name of the lessor, the insurance money to be expended in the erection of new buildings:—*Held*: a covenant**

**running with the land.—*DOUGLASS v. MURPHY* (1858), 16 U. C. R. 113.—*CAN.***

a covenant that runs with the land.—**VERNON v. SMITH** (1821), 5 B. & Ald. 1; 106 E. R. 1094.

*Annotations*:—**Refd.** *Keppell v. Bailey* (1834), *Coop. temp. Brough*, 298; *Doughty v. Bowman* (1848), 17 L. J. Q. B. 111; *Re Barker, Ex p. Gorely* (1864), 11 L. T. 319; *Coward v. Gregory* (1866), L. R. 2 C. P. 153; *Forster v. Elvert Colliery Co.*, *Quin v. Same*, *Seed v. Same*, *Morgan v. Same*, [1908] 1 K. B. 629.

*See, further*, Part XI., ante.

**5069. "In some sufficient insurance office"**—**Must insure in regular office—Whether void for uncertainty.**—A covenant in the lease of a house, "to insure & keep insured a given sum of money upon the premises during the term in some sufficient insurance office" is not void for uncertainty; but means, that the premises shall be insured against fire in some office where insurances against fire are usually effected. Where there was such covenant in a lease on the part of the tenant, he effected an annual policy on the premises with an insurance co. in the usual printed form, by which it was declared that the policy should be for such longer period as the tenant should regularly pay, & the co. receive the premium, & a space of fifteen days beyond the quarter days was given for payment of the premium, during which time the co. was liable. The year expired on Mar. 25, 1811; but the tenant did not pay the premium for a renewal till Apr. 25, following. The co. then gave a receipt for the premium, stating the insurance to be from Lady Day, 1811, to Lady Day, 1812:—*Held*: the covenant was broken by reason of the non-payment of the premium on or before Apr. 9, & the lease was forfeited upon a clause of re-entry.—**DOE d. PITT v. SHEWIN** (1811), 3 Camp. 134, N. P.

*Annotation*:—**Refd.** *Wilson v. Wilson* (1854), 14 C. B. 616.

**5070. To keep insured during term—Premises must always be insured by some policy.**—**DOE d. FLOWER v. PECK**, No. 5088, *post*.

**5071. Time for insurance—Lease antedated.**—**DOE d. DARLINGTON v. ULPH**, No. 5090, *post*.

**5072. Two leases granted by one instrument—Termination of one lease—Effect on covenant.**—A. granted to B., by one instrument, a lease of O. for five years & a half, & of P. for sixteen years, the rent for both to be £120 during the first five years & a half, & £100 during the residue. B. covenanted "during the said terms" to insure the said premises in the sum of £2,000. There was no provision for any reduction in the amount of the insurance after the expiration of the five & a half years' term in O.:—*Held*: B. was bound to insure for £2,000 during the continuance of the longer term in P., & the covenant did not cease with the expiration of B.'s interest in O.—**HECKMAN v. ISAAC** (1862), 6 L. T. 383.

**5073. Covenant by underlessee to insure—Excessive insurance by lessee by mistake—Right to recover excess from underlessee.**—P., in 1859, covenanted with his lessors to keep the premises demised insured in the Alliance Insurance Office, or such other office as the lessors should appoint; & in Sept., 1855, granted an underlease, in which the underlessees & their assigns covenanted to pay to deft. B., the trustee of P., all sums which B. should pay for insurance of the premises. They also covenanted that they would not do anything to the damage of B. & P.; & the deed contained a proviso for re-entry by B. in default; & there was also a covenant by P. to keep the premises insured in the manner prescribed by the original lease of 1850. The underlease was subsequently assigned to plffs. The premises were insured by P. in the Alliance Insurance Office down to Michaelmas, 1855, when the co. declined to renew, a fire having occurred on the premises. P. subsequently

effected an insurance in another office, but before the policy had expired, the office, on the ground that alterations of a hazardous kind had been made by plffs., gave notice that the policy had been invalidated. P. then insured the premises, from Feb., 1859, to Lady Day, 1860, in the State Insurance Office. The original lessors had commenced an action of ejectment against P. for non-observance of his covenant, when another fire occurred, & the action was compromised. The State Insurance Office refused to renew, except, as alleged by P., on the terms of twenty-five guineas per cent., & he paid the office the sum of £528 for a renewal of the policy. The solr. of plffs. protested against the payment of such a sum & the completion of the policy, & the premises being at the time unoccupied, it appeared that they might have been insured for the sum of £5 5s. & they were subsequently insured by P. himself in the Alliance Office for £5 12s. 9d. An action was then brought by B. against plffs. for the recovery from them of the sum of £528. An injunction was granted to restrain the action, & on the hearing of the cause the injunction was made perpetual.—**LEATHER CLOTH CO. v. BRESSEY** (1862), 3 Giff. 474; 6 L. T. 63; 8 Jur. N. S. 425; 10 W. R. 370; 66 E. R. 496.

**5074. "Loss or damage by fire"**—**Construed in strict primary sense.**—**ENLAYDE, LTD. v. ROBERTS**, No. 5076, *post*.

**5075. Usual policy.**—In a lease granted in 1905, the lessee covenanted that he would insure & keep insured the demised premises against loss & damage by fire in the names of the lessor & lessee in the Imperial Insurance co. or in some other responsible office in London or Westminster to be previously approved of in writing by the lessor. Through the agency of the lessor the premises were insured with the Alliance Assurance co., with which the Imperial Insurance co. had become incorporated, under a policy which excepted loss or damage occasioned by or happening through "invasion, foreign enemy . . . military or uninsured power." This policy was accepted by the lessor as sufficient until July, 1915, when, in consequence of enemy air raids, he required the lessee to insure the premises also against loss or damage by fire occasioned by enemy aircraft in pursuance of his covenant. The lessee refused to remedy this alleged breach, & the lessor commenced this action to recover possession:—*Held*: evidence was admissible to prove that the named co. & other tariff offices in London & Westminster had never insured against aircraft risks, & their policies had always excepted the risks above mentioned; the covenant was to effect such a policy as was the usual policy of the cos. in question at the date of the lease, or such a policy as might from time to time be usual during the currency of the lease; & there had been no breach of that covenant by the lessee.—**UPJOHN v. HITCHENS, UPJOHN v. FORD**, [1918] 2 K. B. 48; 87 L. J. K. B. 1205; 119 L. T. 180; 34 T. L. R. 412; 62 Sol. Jo. 567, C. A.

**5076. Excepted risks—Whether outside covenant.**—In a lease granted by R., in 1913, the lessee covenanted to repay R., the sums expended by R., in insuring the demised property against "loss or damage by fire"; to keep the property in repair "except in case of destruction or damage by fire"; & at the expiration of the lease to give up to the lessor, "damage by fire excepted," the demised property in good repair. R., covenanted at all times during the term to insure & keep insured the demised property "against loss or damage by fire in some insurance office of repute"

**Sect. 1.—Covenant to insure: Sub-sects. 2 & 3, A. (a), (b) & (c).]**

in a named sum, & further that, in the case of destruction of or damage to the demised premises by fire, she would "lay out all moneys received in respect of such insurance in rebuilding or reinstating . . . the premises so destroyed or damaged, & in case such moneys" should "be insufficient for such purpose, she" would "make good such insufficiency out of her own moneys." A policy of insurance against fire was effected in the names of the freeholders, R., & the lessee of R., in an office of repute whose policies, including the one in the present case, exempted the office from liability for "loss or damage by or happening through" certain events, including "invasion, foreign enemy," & "military or usurped power." In 1915 the demised property was destroyed by fire caused by incendiary bombs dropped by enemy aircraft. The ct. was satisfied that, although policies of insurance against fire issued by offices of repute always exempted the offices from liability for fires caused by military operations, their exemption clauses differed considerably in other respects:—*Held*: the words "loss or damage by fire" must be construed in their strict & primary & not in any secondary sense, & the lessor was liable under her covenant for the loss which had occurred.—*ENLAYDE, LTD. v. ROBERTS*. [1917] 1 Ch. 109; 86 L. J. Ch. 149; 115 L. T. 901; 33 T. L. R. 52; 61 Sol. Jo. 86.

*Annotation*:—*Distd.* Upjohn v. Hitchens, Upjohn v. Ford, [1918] 1 K. B. 171.

**5077.** ———.]—*UPJOHN v. HITCHENS*, *UPJOHN v. FORD*, No. 5075, *ante*.

**SUB-SECT. 3.—BREACH OF COVENANT.**

**A. What Amounts to Breach.**

**(a) Stipulations as to Office.**

**5078. Office to be appointed by lessor—No office appointed.]**—The right of entry for a breach of covenant does not pass to the assignee of the lessor when such breach is committed during the continuance of the lessor's estate. Where B. the lessee covenanted to insure in such office as H. the lessor should appoint in the joint names of H. & his assigns, & B. & his assigns, & before assignment H. indicated the office to B. but B. did not insure, & H. afterwards assigned to C. without notice to B.:—*Held*: C., who after the assignment, the premises still remaining uninsured, did not before action brought appoint any insurance office in which B. should insure in their joint names, could not maintain an action against B. for forfeiture for a breach of covenant accruing since the assignment to C.—*CRANE v. BATTEN* (1854), 2 C. L. R. 1696; 23 L. T. O. S. 220; 2 W. R. 550.

**5079.** ———.]—*Qu.*: whether a covenant to insure in such an office as the lessor shall name is broken by non-insurance where the lessor has not been asked to name & has not named any office.—*LILLIE v. LEGH* (1858), 3 De G. & J. 204; 44 R. R. 1247, L. J.

*Annotation*:—*Mentd.* Rankin v. Lay (1860), 2 De G. F. & J. 66.

**(b) Stipulations as to Names.**

**5080. Covenant to insure in joint names—Insurance in name of tenant.]**—Ejectment on a forfeiture for breach of covenant in a lease, wherein the lessee covenanted to insure in the joint names of himself & the lessor, & in two-thirds of the value

of the premises demised. The lessee had insured in his own name only, & as contended, to a less amount than two-thirds of the value of the premises; both parts of the lease remained in the possession of the lessor, & an abstract only had been delivered by him to the lessee, which contained no mention that the insurance was to be in the joint names, though it stated that the insurance was to be in two-thirds of the value of the premises. The lessor of pltf. had previously insured the premises at the same sum as deft.:—*Held*: the conduct of the lessor being such as to induce a reasonable & cautious man to conclude he was doing all that was necessary or required of him, by insuring in his own name & to the amount insured, he could not recover for a forfeiture, though there was no dispensation, or release from the covenant.—*DOE d. KNIGHT v. ROWE* (1826), 2 C. & P. 246; Ry. & M. 343, N. P.

*Annotations*:—*Expld.* West v. Blakeway (1841), 9 Dowl. 846. *Distd.* Doe d. Muston v. Gladwin (1845), 6 Q. B. 953. *Refld.* Walrond v. Hawkins (1875), L. R. 10 C. P. 342.

**5081.** ———.]—However harsh an ejectment may be, no ct. will refuse to give effect to a proviso for re-entry in case of a breach of covenant. A parol licence from the landlord will not justify a breach of covenant; therefore, an ejectment is maintainable by the assignee of the reversion against the lessee for not insuring in the names of the landlord & the tenant, as covenanted in the lease, notwithstanding that he has insured in his own name, & the original landlord had expressed himself quite satisfied with the insurance.

The waiver by acceptance of rent, could not operate beyond Christmas, up to which period that rent was accepted; & this being a continuing covenant, a subsequent breach entitled the lessor of pltf. to re-enter (*PATTESON, J.*).—*DOE d. MUSTON v. GLADWIN* (1845), 6 Q. B. 953; 14 L. J. Q. B. 189; 4 L. T. O. S. 432; 9 Jur. 508; 115 E. R. 350.

*Annotations*:—*Consd.* Havens v. Middleton (1853), 10 Hare, 641. *Apld.* Croft v. Lumley (1855), 5 E. & B. 648. *Distd.* Walrond v. Hawkins (1875), L. R. 10 C. P. 342.

**5082. — One lessor feme sole—Effect of marriage.]**—*Qu.*: where a covenant, with proviso for re-entry upon breach thereof, is entered into by the lessee to insure, in the joint names of the lessors, one of them being a *feme sole*, & the lessee & his assigns, does the marriage of the *feme sole* put an end to such covenant.—*DOE d. ROYLE v. ALISON* (1847), 9 L. T. O. S. 202; *subsequent proceedings*, 9 L. T. O. S. 225.

**5083. — Insurance in name of lessor only.]**—A covenant by the lessee to insure the demised premises in the names of himself & the lessor, although not performed literally, by an insurance in the name of the lessor only, is yet so far substantially performed for the benefit of the lessor, that he could not recover for a breach of the covenant, the stipulation for the insurance in the name of the lessee being for the exclusive benefit of the latter & which he is at liberty to dispense with:—*Held*: the circumstance that the original lessee could not be found, & that no insurance could be effected in his name, was not an objection to the title of an underlessee.—*HAVENS v. MIDDLETON* (1853), 10 Hare, 641; 22 L. J. Ch. 746; 22 L. T. O. S. 62; 17 Jur. 271; 1 W. R. 256; 68 E. R. 1085.

**5084. — Addition of third name.]**—Under covenant to insure premises in the names of A. & B., it is a breach of covenant to insure in the names of A., B., & C.—*NOKES v. GIBBON* (1856), as reported in 26 L. J. Ch. 433; 29 L. T. O. S. 139; 21 J. P. 659; 3 Jur. N. S. 726; *sub nom.* *NOKES*

*v. GIBBON, NOKES v. FISH, NOKES v. BAKER, 5 W. R. 400.*

*Annotation:—Mentd. Hughes v. Met. Ry. (1876), 1 C. P. D. 120.*

**5085. Covenant to insure in lessor's name—Lessee adding his name.]—PENNIAL v. HARBORE, No. 5089, post.**

**5086. — & assigns—No notice before assignment.]—CRANE v. BATTEN, No. 5078, ante.**

(c) *Premises Uninsured or Underinsured.*

**5087. Premises uninsured during part of term.]—DOE d. PITT v. SHEWIN, No. 5069, ante.**

**5088. —.]—**By the terms of a lease, the lessee was to insure & keep insured the premises demised, & deposit the policy with the lessor. There was the usual clause of re-entry or non-performance of the covenants. The lessee never insured, but assigned the premises; & the assignee never insured. The lessor distrained for rent due from the assignee; & afterwards brought ejectment for the forfeiture by the not insuring; laying the day of the demise in his declaration of ejectment a few days after he had so distrained:—*Held*: (1) the lease was conditional, & therefore, whether the covenant to insure ran with the land or not, so as to subject the assignee to an action, the lessor was entitled to re-enter on the forfeiture for condition broken; (2) the covenant to insure & keep insured was a continuing covenant; & although the distress for rent was a waiver of the forfeiture up to the time, the lessor might recover for the forfeiture incurred each day afterwards: & therefore the above ejectment was well brought.—*DOE d. FLOWER v. PECK* (1830), 1 B. & Ad. 428; 9 L. J. O. S. K. B. 60; 109 E. R. 847.

*Annotations:—As to (2) Consd. Doe d. Hemmings v. Durnford (1832), 2 Cr. & J. 687. Refd. Doe d. Muston v. Gladwin (1845), 6 Q. B. 953; Walrond v. Hawkins (1875), L. R. 10 C. P. 342. Generally, Mentd. Ward v. Day (1863), 33 L. J. Q. B. 3.*

**5089. — Delay in effecting insurance.]—**Under a lease with a proviso of forfeiture if the covenants be broken, forfeiture is incurred: (a) if the lessee covenants to insure the buildings from time to time & at all times, & leaves a part uninsured for two months after execution of the lease. Nor is it any answer that the greater part of the premises were already insured at the requisite amount by a policy expiring at the end of the two months, & that on its expiration a new policy was effected covering all the premises, which were then insured at the stipulated amount; (b) if the covenant be to insure against fire in the names of the lessors, A., B. & C., & the lessee adds his own. Nor is it any answer that, by Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83, any person interested in the buildings may require that the insurance co. shall cause the insurance money to be laid out in rebuilding. Especially where the covenant contains an express provision that the insurance money shall be so laid out, & that the lessee shall supply what is deficient. If a lessee, having incurred these forfeitures, though the lessor has taken no step to enforce them, contracts to sell his term, the purchaser, on becoming acquainted with them, may refuse to complete his contract, & may reclaim his deposit.—*PENNIAL v. HARBORE* (1848), 11 Q. B. 368; 17 L. J. Q. B. 94; 10 L. T. O. S. 305; 12 Jur. 159; 116 E. R. 514.

*Annotations:—Distd. Havens v. Middleton (1853), 10 Hare, 641. Follid. Wilson v. Wilson (1854), 14 C. B. 616.*

**5090. —.]—**A lease for years, to commence at Michaelmas, 1845, was, by a decree for a specific performance at the instance of the lessee, executed on Jan. 12, 1847, bearing date Sept. 29, 1845. The lease contained a covenant to insure the demised premises & keep them insured during the term, & a power of re-entry on breach. The landlord brought ejectment, & proved that the premises were not insured until Feb. 18, 1847. Deft. gave no evidence to account for the delay:—*Held*: assuming that the covenant might be construed as the covenant to insure within a reasonable time only after the execution of the deed, the *onus* of showing the delay from Jan. 12 to Feb. 18 was reasonable lay on deft.; & no evidence being given to explain the delay, it was right that the judge should direct a verdict for pltf.—*DOE d. DARLINGTON v. ULPH* (1849), 13 Q. B. 204; 18 L. J. Q. B. 106; 12 L. T. O. S. 424; 13 Jur. 276; 116 E. R. 1241.

*Annotation:—Follid. Wilson v. Wilson (1854), 14 C. B. 616.*

**5091. —.]—**A purchaser of a leasehold may object to the vendor's title on the ground that he has incurred a forfeiture by omitting for the space of a month to pay the annual premium of insurance pursuant to his covenant; although it does not appear that the lessor has taken advantage of the forfeiture. Upon a sale of a leasehold, the purchaser agreed to pay a deposit of £50 & the residue on completion. Instead of actually paying the £50 he gave the vendor £5 & an I.O.U. for £45:—*Held*: the vendor, failing to make a good title, was not entitled to recover the £45 upon an account stated; & the defence was admissible under never indebted.—*WILSON v. WILSON* (1854), 14 C. B. 616; 2 C. L. R. 818; 23 L. J. C. P. 137; 23 L. T. O. S. 158; 18 Jur. 581; 2 W. R. 421; 139 E. R. 253.

*Annotation:—Mentd. Camillo Bank S.S. Co. v. Alexandria Engineering Works (1921), 38 T. L. R. 134.*

**5092. —.]—**Pltf. was lessee of copyhold houses for a term of twenty-one years, with a covenant for perpetual renewal from time to time upon payment of the rent reserved & performance of the covenants contained in the original lease, namely, to keep the houses in repair & insured, with a proviso for re-entry on breach of any of the covenants. The lessee expended £8,000 upon the premises, & upon the expiration of the lease the landlord refused to renew, upon the ground that the covenants had been broken. It was admitted that pltf. had neglected to keep the houses insured for a few days, & that one of them was & had been for some time in a ruinous state. The landlord brought an action of ejectment, & pltf. filed his bill to restrain such action:—*Semle*: the failure to keep the premises insured was such a breach of covenant as to entitle the landlord to re-enter.—*JOB v. BANISTER* (1856), 26 L. J. Ch. 125; 28 L. T. O. S. 242; 21 J. P. 86; 3 Jur. N. S. 23; 5 W. R. 177, L. C.

*Annotations:—Refd. Finch v. Underwood (1875), 33 L. T. 634; Bastin v. Bidwell (1881), 18 Ch. D. 238.*

**5093. —.]—**The vendors of an interest in a leasehold house, subject to a covenant to insure it against fire, contracted for the sale of the house to a purchaser within a given time. The contract was not completed by the specified time. There was no defence on the part of the purchaser, but the vendors did not keep up the insurance after the time at which the contract should have been completed:—*Held*: the purchaser ought to be

**PART XX. SECT. 1, SUB-SECT. 3.—**  
**A. (c)**

*t. Premises Underinsured.]—*Where there is a covenant to insure for

a specified amount, & the lessee insures for a smaller amount, the lessor is entitled to be exonerated by the lessee from all risk to the extent of the amount specified in the covenant,

no matter what the cost or trouble to the lessee may be.—*LAWSON v. DOUGLAS* (1886), 7 N. Z. L. R. 55.—N.Z.

**Sect. 1.—Covenant to insure: Sub-sect. 3, A. (c), B. & C. (a) i., ii., & iii., & (b).]**

discharged from his contract.—**PALMER v. GOREN** (1856), 25 L. J. Ch. 841; 4 W. R. 688.

**5094.** —.]—Leasehold property was sold by auction on June 8, 1858, with a condition for completion on July 20 following. The title was accepted by the purchaser on July 16, but owing to disputes as to the value of the fixtures the meeting for completion did not take place till Aug. 26. The purchaser then discovered that the vendors had renewed the insurance, which expired on June 24, for one month only, so that the property became uninsured on July 24, & thereupon became forfeited to the lessors. On Sept. 7 the purchaser absolutely repudiated the contract. The vendors subsequently renewed the insurance, & obtained a waiver of the forfeiture from the lessors, & the purchaser refusing to complete, they filed a bill for specific performance:—**Held**: although the vendors were not bound to renew the insurance, yet having done so in so unusual a manner, the ct. would not decree specific performance, & the bill was dismissed, but without costs.—**DOWSON v. SOLOMON** (1859), 1 Drew. & Sm. 1; 29 L. J. Ch. 129; 1 L. T. 246; 6 Jur. N. S. 33; 8 W. R. 123.

**Annotation**:—**Apld.** **Newman v. Maxwell** (1899), 80 L. T. 681.

**5095.** — **Policy indorsed to personal representative—Indorsement after time limit.**—(1) Covenant in a lease to insure & keep insured a specified sum of money upon the premises. The lessee effected such an insurance, the policy containing a memorandum that in case of the death of the assured, the policy might be continued to his personal representative provided an indorsement to that effect was made upon it within three months after his death. The lessee died, & an indorsement continuing the policy to his personal representative was made after the expiration of three months from the time of his decease:—**Held**: under these circumstances there was no breach of the covenant to keep the premises insured.

(2) Letting lodgings is not a breach of a covenant in a lease not to underlet any part of the premises without the licence of the lessor.—**DOE d. PITT v. LAMING** (1814), 4 Camp. 73, N. P.

**Annotations**:—As to (1) **Distd.** **Wilson v. Wilson** (1854), 14 C. B. 616. As to (2) **Distd.** **Greenlade v. Tapscott** (1834), 1 Cr. M. & R. 56. **Refd.** **Phillips v. Henson** (1877), 3 C. P. D. 26. **Generally, Mentd.** *Re Universal Non-Fire Inscc., Forbes' Claim* (1875), L. R. 19 Eq. 485.

**B. Evidence of Breach.**

**5096. Onus of proof.**—In ejectment by landlord against tenant, on an alleged forfeiture by breach of a covenant to insure in some office in or near London, the omission to insure must be proved by pltf. It is not sufficient proof of such omission that deft., being asked to show a policy, or receipt for premium, refused (after which pltf. accepted rent, & made no further inquiry till the action was commenced), & that pltf. gave notice to produce such policy or receipt at the trial, which was not done on demand.—**DOE d. BRIDGER v. WHITEHEAD** (1838), 8 Ad. & El. 571; 3 Nev. & P. K. B. 557; 1 Will. Woll. & H. 521; 7 L. J. Q. B. 250; 2 Jur. 493; 112 E. R. 955.

**Annotation**:—**Apld.** **Toleman v. Portbury** (1870), L. R. 5 Q. B. 288.

*See, generally, EVIDENCE, Vol. XXII., pp. 35 et seq.*

**5097. Refusal to produce policy.**—**DOE d. BRIDGER v. WHITEHEAD**, No. 5096, *ante*.

**5098.** — **Whether production compelled.**—In ejectment for not insuring, it is sufficient, in

order to show that the lessee's premises are not insured, to call a clerk of the insurance office who enters the policies & premiums, & has searched the books; but, it being necessary to show that neither the lessee nor his assignee had insured:—**Held**: not sufficient that the clerk had searched under the name of the lessee alone; & although deft.'s attorney could be asked if there was a policy & if it were in ct., he could not be called upon to produce it, nor on his refusal be asked to prove a copy.—**CHAPLIN v. REID** (1858), 1 F. & F. 315, N. P.

**5099.** — **After admission of breach—Evidence of continuing breach.**—In ejectment, against a tenant for forfeiture by non-insurance, brought on Dec. 24, 1858, it was proved that on two occasions, the first a year & a half before action brought, & the second in Aug. 1858, deft. had admitted that he was uninsured. On the latter occasion he stated that he wanted the money for other purposes. Notice was given to deft. to produce the policy at the trial, which he failed to do. On Dec. 23, 1858, pltf. received some rent from the undertenants of the premises, "on account of rent due at Michaelmas":—**Held**: (1) there was evidence from which a jury might presume a continuing breach of the covenant to insure on Dec. 24, at the time of action brought; (2) that the landlord afterwards received rent from an undertenant was no waiver of the breach of covenant to insure.—**PRICE v. WORWOOD** (1859), 4 H. & N. 512; 28 L. J. Ex. 329; 33 L. T. O. S. 149; 5 Jur. N. S. 472; 7 W. R. 508; 157 E. R. 941.

**Annotation**:—As to (1) **Refd.** **Toleman v. Portbury** (1870), 22 L. T. 33.

**5100. Proof of lapse of former policy.**—In ejectment to recover premises for a breach of covenant in not insuring it is *prima facie* evidence to support pltf.'s case to show that the assignee of the term had ceased to insure the premises at an office where he had formerly insured them.—**DOE d. IVE v. SCOTT** (1840), Arn. & H. 76.

**5101.** — **Renewal after long interval.**—**DOE d. BATEMAN v. DARRY**, No. 5100, *post*.

**5102. Search by clerk of insurance company—No insurance in name of lessee—No search in name of assignee.**—**CHAPLIN v. REID**, No. 5098, *ante*.

**5103. Evidence in rebuttal—Undisturbed possession.**—Where the original lessee covenants to keep the premises insured, & afterwards a sub-lease is granted by his exor., without any covenant to insure; undisturbed possession under this sub-lease for twenty years, will entitle a ct. to presume, that no breach of covenant took place during the life of the original lessee.—**MONTRESOR v. WILLIAMS** (1823), 1 L. J. O. S. Ch. 151.

**C. Remedies for Breach.**

(a) *Forfeiture.*

i. *Who may Claim.*

**5104. Assignee of lessor—Breach before assignment—No direction as to insurance office by assignee.**—**CRANE v. BATTEN**, No. 5078, *ante*.

ii. *Waiver.*

Waiver & acquiescence, generally, *see* **EQUITY**, Vol. XX., pp. 522, 523; **ESTOPPEL**, Vol. XXI., pp. 333 *et seq.*

**5105. What amounts to—Covenant to insure in joint names—Non-communication of term of covenant to lessee.**—**DOE d. KNIGHT v. ROWE**, No. 5080, *ante*.

**5106.** — **Tenant believing premises insured by landlord.**—A lessee covenanted to insure & the premises were insured for a week:—**Held**: in an

ejectment for a forfeiture for a breach of this covenant that the lessor could not recover if he, by his conduct, had led the lessee to believe that the premises were properly insured by himself.—*DOE d. PITTMAN v. SUTTON* (1841), 9 C. & P. 706, N. P. *Annotations*:—*Distd.* Doe d. Muston v. Gladwin (1845), 6 Q. B. 953. *Refd.* Walrond v. Hawkins (1875), L. R. 10 C. P. 342. *Mentd.* Winthrop v. Murray (1850), 19 L. J. Ch. 547.

**5107.** — Policy produced to & approved by lessor.]—*DOE d. MUSTON v. GLADWIN*, No. 5081, *ante*.

**5108.** — Distress for rent.]—*DOE d. FLOWER v. PECK*, No. 5088, *ante*.

**5109.** — Acceptance of rent—Landlord ignorant of breach.]—(1) A breach of covenant to insure was cured by the acceptance of rent, & by an agreement between the parties settling all claims & demands, though signed by the landlord in ignorance of the omission to insure.

(2) The mere circumstance of a policy of insurance in a particular office being suffered to lapse, & renewed, after a long interval, is not conclusive of the non-insurance.—*DOE d. BATEMAN v. DARBY* (1844), 2 L. T. O. S. 355.

As to necessity for knowledge, *see* *ESTOPPEL*, Vol. XXI., pp. 335–337, Nos. 1270–1285.

**5110.** — — —.]—*DOE d. MUSTON v. GLADWIN*, No. 5081, *ante*.

**5111.** — — —.]—*From undertenant*.]—*PRICE v. WORWOOD*, No. 5099, *ante*.

**5112.** — Premium paid by landlord—Repayment by tenant.]—Where a tenant under a lease containing a covenant to insure, had, in consequence of his agent's embezzlement, failed to pay a premium, & so the premises were left for a time uninsured, but the landlord had, on discovering this, afterwards paid the premium, & allowed the tenant to repay him:—*Held*: this was such a waiver of a forfeiture under the covenant as to bring the tenant within the exception in Law of Property Amendment Act, 1859 (c. 35), s. 6, & preclude him from obtaining relief under C. L. P. Act, 1860 (c. 126), s. 2.—*MILLS v. GRIFFITHS* (1876), 45 L. J. Q. B. 771.

**5113.** Extent of waiver—Past breaches only—Continuing breach.]—*DOE d. FLOWER v. PECK*, No. 5088, *ante*.

**5114.** — — —.]—*DOE d. MUSTON v. GLADWIN*, No. 5081, *ante*.

Waiver of forfeiture, generally, *see* Part XXIV., Sect. 1, sub-sect. 5, *post*.

### iii. Relief.

*See* Law of Property Act, 1925 (c. 20), s. 146.

**5115.** Jurisdiction to grant—Breach after Law of Property Amendment Act, 1859 (c. 35).]—The ct. has power, under above Act, s. 4, to grant relief in respect of a forfeiture of a lease, dated prior to that Act, for breach of the covenant to insure against damage by fire, where such breach has occurred subsequent to the passing of that Act.—*PAGE v. BENNETT* (1860), 2 Giff. 117; 29 L. J. Ch. 398; 2 L. T. 36; 24 J. P. 405; 6 Jur. N. S. 419; 8 W. R. 339; 66 E. R. 50.

*Annotation*:—*Consd.* West v. Gwynne, [1911] 2 Ch. 1.

*See, now*, Law of Property Act, 1925 (c. 20), s. 146 (2).

**5116.** When granted.]—*ROLFE v. HARRIS* (1811), 2 Price, 200, n.; 146 E. R. 71.

*Annotations*:—*Distd.* Reynolds v. Pitt (1812), 19 Ves. 134. *Consd.* Bracebridge v. Buckley (1816), 2 Price, 200.

**5117.** — — —.]—*REYNOLDS v. PITT* (1812), 19 Ves. 134; 2 Price, 212, n.; 34 E. R. 468, L. C.

*Annotations*:—*Apld.* Green v. Bridges (1830), 4 Sim. 96. *Consd.* Gregory v. Wilson (1852), 9 Hare, 683. *Distd.* Bamford v. Creasy (1862), 3 Giff. 675. *Refd.* Bracebridge v. Buckley (1816), 2 Price, 200; *Re* Edridge, *Ex p.* Vaughan (1823), Turn. & R. 434; Elliott v. Turner (1843), 13 Sim. 477. *Mentd.* Payne v. Banner (1846), 15 L. J. Ch. 227; *Re* Dixon, Heynes v. Dixon, [1900] 2 Ch. 561.

**5118.** — — —.]—The ct. will not relieve a tenant against the breach of a covenant to insure.—*GREEN v. BRIDGES* (1830), 4 Sim. 96; 58 E. R. 37.

*Annotation*:—*Refd.* Doe d. Muston v. Gladwin (1845), 6 Q. B. 953.

**5119.** — Fraud or misrepresentation of lessor.]—In a case of fraud or misleading, the ct. will interfere by injunction to restrain the lessor from proceeding in an action of ejectment against the lessee who has not strictly complied with the terms of a covenant to insure against fire.—*MEEK v. CARTER* (1858), 32 L. T. O. S. 64; 22 J. P. 575; 4 Jur. N. S. 992; 6 W. R. 852.

**5120.** — Breach repaired before action.]—On consideration of pltf. erecting certain houses upon a piece of land, deft. agreed to grant him a lease of the land & houses to be erected thereon, & pltf. covenanted to insure the houses in the joint names of pltf. & deft. in the Law Fire Office. Pltf. built the houses, & on Sept. 23 insured them in the Phoenix Fire Office, & in his own name only. Deft. discovered this fact a few days afterwards, but made no objection to pltf. In Jan. following the solr. of deft. wrote to pltf. claiming a forfeiture; & on Feb. 2 pltf. insured the houses in the Law Fire Office in the joint names of himself & deft. On Mar. 10, deft. brought ejectment for breach of covenant. Upon bill by pltf. for injunction & specific performance of the agreement, a decree was made in the terms of the prayer of the bill, & deft. was ordered to pay the costs of the suit.—*ROGERS v. TUDOR* (1860), 2 L. T. 303; 24 J. P. 708; 6 Jur. N. S. 692.

**5121.** — Breach not wilful.]—A landlord brought an action of ejectment against a tenant, assigning breaches of covenant to pay rent & taxes, & to keep insured & in good repair. Judgment was recovered by default, & the landlord entered into possession.

Upon the evidence the ct. was satisfied that there had been no wilful breach, if any, of the covenants. At the hearing deft. said, that, if his costs at law & equity, rent, & expenses for repairs, were paid, he did not oppose the relief.

Under the special circumstances of the case, the ct. granted relief, upon terms.—*BAMFORD v. CREASY* (1862), 3 Giff. 675; 7 L. T. 187; 27 J. P. 55; 8 Jur. N. S. 1147; 10 W. R. 856; 66 E. R. 579.

Relief against forfeiture, generally.]—*See* Part XXIV., Sect. 1, *post*.

### (b) Damages.

**5122.** Measure of damages—Assignor insuring after breach by assignee—Whether amounts expended in insuring.]—Pltf., a lessee under covenant to insure against fire in his own name & that of the lessor jointly, assigned to deft., who covenanted to keep the covenants in the lease. Deft. having neglected to keep up a fire policy, which had been effected, pltf. effected a fresh one, but in his own name only. No fire happened. Pltf. brought covenant against deft. for neglecting to insure.

PART XX. SECT. 1, SUB-SECT. 3.—C. (b).

a. Measure of damages—Value of premises lost by neglect to insure.]—In

an action on a covenant by lessee to insure the premises in the name of the lessor:—*Held*: the measure of damages was the value of the premises

lost to pltf. by deft.'s neglect to insure, such value not exceeding the sum in which deft. was to have insured by his covenant.—*DOUGLASS v.*

*Sect. 1.—Covenant to insure: Sub-sect. 3, C. (b); sub-sect. 4. Sect. 2: Sub-sect. 1, A. & B.]*

Deft. pleaded payment of a farthing into ct.:—*Held*: though pltf. had no claim to be indemnified specifically for the sum expended by him in effecting the fresh policy, the jury were at liberty to award more than nominal damages for the risk to which he had been exposed by deft.'s default.—*HEY v. WYCHE* (1842), 2 Gal. & Dav. 569; 12 L. J. Q. B. 83; 6 Jur. 559.

*Annotation*:—*Reid. Browne v. Price* (1858), 4 C. B. N. S. 598.

5123. — *Whether limited to nominal damages—No fire occurring.*—*HEY v. WYCHE*, No. 5122, ante.

5124. *Liability of lessee—Where lessee & sub-lessee guilty of breaches.*—A. being lessee of a messuage under the corpn. of London, demised it, in 1829, to B., C., & D., for twenty-one years, the lessees covenanting to repair, & to insure "in the sum of £2,500 at the least, in The Protector Fire Insurance Office, or in such other respectable insurance office in London or Westminster, as B., C., & D., the lessees, their exors., etc., should think fit"; with a proviso for re-entry for breach of any of the covenants. In 1835, C., by indenture, granted an underlease to E. & F., for the residue of the term, wanting one day; the underlease containing the like covenants to repair, & to insure "in the sum of £2,500 at the least, in The Protector Fire Insurance Office, or in such other respectable fire insurance office in London or Westminster as E. & F., their exors., etc., should think fit"; & also a proviso for re-entry for breach of any of the covenants. The messuage being out of repair, & uninsured, the exors. of A., in 1843, brought ejectment, & recovered possession:—*Held*: C. was not entitled to recover against E. & F. the value of his reversionary interest, the loss thereof not being the result of their breaches of covenant, but of the breaches of covenants by C., to which covenants they were no parties.

Suppose the premises insured, & burnt down under circumstances that would give the insurance office a defence as against the sub-lessees; if the insurance were effected by pltf., the office would be liable; otherwise, if effected by defts. The performance of defts.' covenants would, under such circumstances, afford no indemnity to pltf. (*MAULE, J.*).—*LOGAN v. HALL* (1847), 4 C. B. 598; 16 L. J. C. P. 252; 9 L. T. O. S. 224; 11 Jur. 504; 136 E. R. 642.

*Annotations*:—*Mentd. Hooper v. Lane* (1857), 6 H. L. Cas. 443; *Duckworth v. Ewart* (1863), 2 H. & C. 129; *Cotton v. Bennett* (1884), 26 Ch. D. 161; *Pontifex v. Foord* (1884), 12 Q. B. D. 152; *Clare v. Dobson*, [1911] 1 K. B. 35.

#### SUB-SECT. 4.—PAYMENT OR APPLICATION OF INSURANCE MONEY.

*Application in reinstatement.*—*See INSURANCE*, Vol. XXIX., p. 309.

— *Effect of covenant to repair.*—*See Sect. 2, sub-sects. 1 & 2, post.*

5125. *Right to policy money—Exercise of option to purchase by tenant—Insurance by lessor &*

*MURPHY* (1858), 16 U. C. R. 113.—*CAN.*

b. — *Re DRISCOLL, DRISCOLL v. DRISCOLL*, [1918] 1 I. R. 152.—*IR.*

#### PART XX. SECT. 1, SUB-SECT. 4.

c. *Right to policy money—Insurance solely for benefit of landlord.*—*HAMILTON'S (DUKE) TRUSTEES v. FLEMING* (1870), 9 Macph. (Ct. of Sess.) 329; 43 Sc. Jur. 155.—*SCOT.*

d. — *CLARK v. HUME*

(1902), 5 F. (Ct. of Sess.) 252; 40 Sc. L. R. 229; 10 S. L. T. 509.—*SCOT.*

#### PART XX. SECT. 2, SUB-SECT. 1.—A.

5128i. *General rule—Loss due to negligence.*—A tenant from year to year is not liable to his landlord in damages for destruction of demised buildings by fire owing to the negligence of the tenant or his servant, at any rate in the absence of gross negligence.—*PAUL v. CURRAH & PHILLIP*,

*lessee.*—A lessee with an option to purchase, in pursuance of a covenant in his lease, insured the demised premises in their full value. The premises were also insured in another office by the lessor without the lessee's knowledge. The premises were burnt down, & the sum payable in respect of the damage done was apportioned between the two offices. Shortly after the fire the lessee notified to the lessor his intention to exercise his option to purchase, & suggested that the moneys payable on both policies should be received by the lessor as part of the purchase money. The lessor, without noticing the lessee's proposal, appropriated the money received on his own policy for his own benefit, & threatened the lessee with ejectment if he did not employ the money payable on the other policy in reinstating the premises:—*Held*: the lessee, having elected to purchase, the lessor must be ordered specifically to perform his covenant to convey, & he must take the moneys received in respect of both policies as part payment of the purchase money.—*REYNARD v. ARNOLD* (1875), 10 Ch. App. 386; 23 W. R. 804, C. A.

*Annotation*:—*Distd. Edwards v. West* (1878), 7 Ch. D. 858.

5126. — *Insurance by landlord.*—Under the terms of a lease the landlord covenanted to insure, & the tenant had the option to purchase for a fixed sum. Before the time for exercising the option, the buildings demised were burnt, & the landlord received the insurance money. The tenant then exercised his option to purchase, & claimed the insurance money as part of his purchase:—*Held*: under the circumstances, the tenant had no claim to the insurance money.—*EDWARDS v. WEST* (1878), 7 Ch. D. 858; 47 L. J. Ch. 463; 38 L. T. 481; 26 W. R. 507.

*Annotations*:—*Reid. Adams & Kensington Vestry* (1884), 27 Ch. D. 394. *Mentd. Re Isaacs, Isaacs v. Reginald*, [1891] 3 Ch. 506; *Re Dyson, Challinor v. Sykes*, [1910] 1 Ch. 750.

*See, generally, INSURANCE*, Vol. XXIX., pp. 309 *et seq.*

### SECT. 2.—DAMAGE BY FIRE.

#### SUB-SECT. 1.—LIABILITY OF TENANT.

##### A. In General.

*See Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 86.*

5127. *General rule—Apart from covenant.*—As between landlord & tenant for years, though no covenant to repair or rebuild, he is subject to waste in general, & if the house is burned by fire, he must rebuild (*LORD HARDWICKE, C.*).—*ROOK v. WORTH* (1750), 1 Ves. Sen. 460; 27 E. R. 1142, L. C.

*Annotation*:—*Mentd. Warwicker v. Bretnall* (1882), 23 Ch. D. 188.

5128. — *Loss due to negligence.*—An action on the case will lie by a lessee for years against his underlessee, for so negligently keeping his fire that the premises were burned down.—*CUDLIP v. RUNDLI* (1691), 1 Show. 310; 4 Mod. Rep. 9; 3 Salk. 156; Holt, K. B. 410; Comb. 177; Carth. 202; 89 E. R. 593.

*Annotation*:—*Mentd. Bristow v. Wright* (1781), 2 Doug. K. B. 665.

[1919] 2 W. W. R. 359; 12 Sask. L. R. 276.—*CAN.*

5128ii. — *—*—*—*—A tenant at will is liable for destruction of the premises by fire caused by his negligent act amounting to voluntary waste.—*KORATT v. MELDONIS*, [1920] 3 W. W. R. 800; 55 D. L. R. 153; 13 Sask. L. R. 470.—*CAN.*

5128iii. — *—*—*—*—*DALY v. CHISHOLM & Co., LTD.* (1916), C. P. D. 562.—*S. AF.*

**5129.** ———.]—(1) A termor may bring an action against his undertenant for negligently keeping his fire, *per quod* the house was burnt.

(2) In such action pltf. must show in his declaration that he had a residuary interest when the house was burnt. But he need not show that it still continues.

(3) The assignor of a term cannot maintain such action against his assignee.

(4) If a termor for years makes a lease for a time exceeding his interest it shall operate as an assignment.—**HICKS v. DOWNING** (*alias* SMITH *v.* BAKER) (1696), 1 *Ld. Raym.* 99; 1 *Salk.* 13; 12 *Mod. Rep.* 100; 91 *E. R.* 962; *sub nom.* **WHEELER v. BAKER**, 3 *Salk.* 10.

*Annotations:—As to* (4) **Consd.** *Beardmore v. Wilson* (1868), 38 *L. J. C. P.* 91. **Refd.** *Wollaston v. Hakewill* (1841), 3 *Man. & G.* 297.

**5130. Liability of underlessee—To immediate termor.]—CUDLIP v. RUNDLI**, No. 5128, *ante*.

**5131.** ———.]—If lessee reversioner at time of fire.]—**HICKS v. DOWNING** (*alias* SMITH *v.* BAKER), No. 5129, *ante*.

**5132. Liability under agreement for lease—Premises burnt before entry.]—To an action on an agreement to take, *qu.* : if it is a good defence, that the house was burnt before the party could take possession.—**PHILLIPSON v. LEIGH** (1795), 1 *Esp.* 398, *N. P.***

**Liability for fire—Under Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 86.]—See NEGLIGENCE.**

#### *B. Under Covenant to Repair.*

**5133. General rule—Cause of fire immaterial.]—COMPTON v. ALLEN** (1649), *Sty.* 162; 82 *E. R.* 612.

**5134.** ———.]—A lessee is liable on a covenant to repair, although the house be burned down.—**POOLE v. ARCHER** (1684), 2 *Show.* 401; *Skin.* 210; 89 *E. R.* 1007.

**5135.** ———.]—**Accidental fire.]—Covenant to repair binds though house burnt.—CHESTERFIELD (EARL) v. BOLTON (DUKE)** (1739), 2 *Com.* 627; 92 *E. R.* 1241.

*Annotation:—Refd.* *Bullock v. Dommitt* (1796), 6 *Term Rep.* 650.

**5136.** ———.]—Tenant covenanting to keep & leave the premises in repair must rebuild in case of fire.—**PYM v. BLACKBURN** (1796), 3 *Ves.* 34; 30 *E. R.* 878.

**5137. To whom liability extends—Assignee.]—A lessee of a house, who covenants generally to repair, is bound to rebuild it, if it be burned by an accidental fire.—**BULLOCK v. DOMMITT** (1796), 6 *Term Rep.* 650; 2 *Chit.* 608; 101 *E. R.* 752.**

*Annotations:—Refd.* *Tempany v. Burnand* (1814), 4 *Camp.* 20; *Jacob v. Down*, [1900] 2 *Ch.* 156. *Mentd.* *Atkinson v. Ritchie* (1809), 10 *East.* 530.

**5138.** ———.]—Testator directed his trustees to allow A. to occupy a mill, etc., so long as he should think proper so to do, "he nevertheless keeping" the premises "in good & tenantable

repair, & paying" a rent of £100. A. accepted the gift, but the premises were afterwards totally destroyed by accidental fire:—**Held:** A. was bound to reinstate them, & was liable for the rent in the meanwhile, & he could not escape from the liability to rebuild, by declining any longer to retain them.—**GREGG v. COATES, HODGSON v. COATES** (1856), 23 *Beav.* 33; 2 *Jur. N. S.* 964; 4 *W. R.* 735; 53 *E. R.* 13.

*Annotations:—Refd.* *Woodhouse v. Walker* (1880), 5 *Q. B. D.* 404; *Re Williams, Andrew v. Williams* (1885), 54 *L. T.* 105; *Bathany v. Walford* (1886), 33 *Ch. D.* 624; *Re Bradbrook, Lock v. Willis* (1887), 56 *L. T.* 106.

**5139. Termination of liability—Whether by expiry of term.]—During the currency of a lease of a house & land, the military authorities, acting under the powers conferred by Defence of the Realm Regulations, took possession of the demised premises & continued in occupation thereof until after the expiration of the term. The lease contained covenants, in the usual form, by the lessee, to repair, to deliver up in repair, to insure, & in the event of the demised buildings being destroyed or damaged by fire at any time during the term forthwith to expend the insurance money in rebuilding. On Feb. 12, 1919, the house was destroyed by fire. On Mar. 25, 1919, the term expired by effluxion of time. In an action commenced after that date the lessor claimed from the lessee payment of the last quarter's rent & damages for breach of the above-mentioned covenants:—**Held:** the lessee had not been evicted by title paramount & was liable for the rent; & the temporary occupation by the military authorities did not excuse him from performance of the repairing covenants.**

Where leasehold premises are damaged or destroyed by fire near the end of the term the obligation of the covenantor under the ordinary lessee's covenant to reinstate, in the absence of any special provision fixing the time of performance, does not come to an end at the end of the term, but he is allowed a reasonable time for reinstatement.—**MATTHEY v. CURLING**, [1922] 2 *A. C.* 180; 91 *L. J. K. B.* 593; 127 *L. T.* 247; 38 *T. L. R.* 475; 66 *Sol. Jo.* 386, *H. L.*

**5140.** ———.]—**Indefinite occupation under will—Liability not escaped by surrender.]—GREGG v. COATES, HODGSON v. COATES**, No. 5138, *ante*.

**5141. Extent of liability—Whether limited to sum insured—Covenant to insure in specific sum.]—If a lease contains a covenant by the tenant to keep the premises in repair, & a covenant to insure them for a specific sum against fire: on their being burnt down his liability on the former covenant is not limited to the amount of the sum to be insured under the latter.—**DIGBY v. ATKINSON** (1815), 4 *Camp.* 275.**

*Annotations:—Refd.* *Johnson v. St. Peter, Hereford* (1836), 4 *Ad. & El.* 520; *Jones v. Shears* (1836), 4 *Ad. & El.* 832; *Thomas v. Packer* (1857), 1 *H. & N.* 669; *Wedd v. Porter*, [1916] 2 *K. B.* 91; *Re Leeds & Batley Breweries & Bradbury's Lease, Bradbury v. Grimble*, [1920] 2 *Ch.* 548.

#### **PART XX. SECT. 2, SUB-SECT. 1.—B.**

**5135i. General rule—Accidental fire.]—The landlord found liable to repair the damage done to a farmhouse by accidental fire; the tenants being bound by the tack to keep their houses in tenantable & habitable repair; & both parties admitting that they wished the house to be rebuilt.—**SWINTON v. M'DOUGAL** (1810), 15 *Fac. Coll.* 487.—**SCOT.****

**5135ii.** ———.]—Where a conveyance by feu-contract contains a covenant that the purchaser shall keep the premises in repair, if the premises are accidentally burnt down, he is bound to rebuild them.—**CLARK v. GLASGOW ASSURANCE CO.** (1854),

1 *Macq.* 668.—**SCOT.**

**5136i.** ———.]—**MORROGH v. ALLEYNE** (1873), 7 *I. R. Eq.* 487.—**IR.**

**5136ii.** ———.]—**ANDERSON v. JAMES** (1908), 28 *N. Z. L. R.* 34.—**N.Z.**

**5136iii.** ———.]—**SEARL v. SOUTH BRITISH INSURANCE CO. LTD.**, [1916] *N. Z. L. R.* 137.—**N.Z.**

**5136iv.** ———.]—**DUNEDIN CITY CORPN. v. SEARL**, [1916] *N. Z. L. R.* 146.—**N.Z.**

**5136v.** ———.]—Though an exception of fire in his covenant to repair will relieve the lessee from the obligation to repair, where the damage has been occasioned by fire, yet such an exception does not cast the onus of repairing

upon the lessor during the continuance of the term.—**BROOM v. PRESTON & STABB** (1825), 1 *Nfld. L. R.* 427.—**NFLD.**

**5136vi.** ———.]—**Held:** a stipulation in a lease by which the tenant bound himself to keep the subjects in repair did not bind him to repair damage by fire.—**DUFF v. FLEMING** (1870), 8 *Macph. (Ct. of Sess.)* 769; 42 *Sc. Jur.* 423.—**SCOT.**

**5137i. To whom liability extends—Assignee.]—DELAMATTER v. BROWN BROTHERS CO.** (1904), 5 *O. W. R.* 423; 9 *O. L. R.* 351.—**CAN.**

**5137ii.** ———.]—**CORKEN v. ANTRIM COUNTY COUNCIL** (1907), 41 *I. L. T.* 131.—**IR.**

*Sect. 2.—Damage by fire: Sub-sect. 1, B. & C.; sub-sect. 2. Part XXI. Sect. 1: Sub-sect. 1.]*

5142. — **Cost of restoring to condition on demise—Old buildings—Covenant to “maintain in as good a state as when repaired.”**—Pltf. being assignee of a lease which contained a covenant to repair, underlet the premises to deft., upon the terms, that he should “maintain them in as good a state as they would be when repaired by him.” Shortly after deft. took possession, the premises, which were old & dilapidated were destroyed by fire. The jury found that the cost of rebuilding them would be £1,635, but that they would be more valuable by £800:—*Held*: deft. was only bound to put the premises in the same state they would have been if he had repaired them before the fire, & consequently he was liable to pay as damages £1,035 only.—*YATES v. DUNSTER* (1855), 11 Exch. 15; 24 L. J. Ex. 226; 19 J. P. 597; 156 E. R. 726.

*Annotation:—Reid. Morgan v. Hardy* (1886), 17 Q. B. D. 770.

5143. **Whether doctrine of frustration applies—Occupation of premises by Government—Fire during Government occupation.**—*MATTHEY v. CURLING*, No. 5139, *ante*.

—*See, generally, CONTRACT, Vol. XII., p. 399, Nos. 3229–3231.*

**Exception of casualties by fire—Effect on covenant for rent.**—*See Part XV., Sect. 6, sub-sect. 5, B., ante.*

—**Effect on landlord’s liability.**—*See No. 5148, post.*

**Destruction of demised premises.**—*See Part XVII., Sect. 6, sub-sect. 5, ante.*

#### C. Effect on Rent.

**Whether suspended.**—*See Part XV., Sect. 6, sub-sect. 5, B., ante.*

#### SUB-SECT. 2.—LIABILITY OF LANDLORD.

5144. **Under covenant for quiet enjoyment.**—Lessee of a house & wharf covenants to repair, accidents by fire excepted; the house is burnt

down & the lessor, having insured, received the insurance money but neglected to rebuild & brought an action at law for the rent. Bill for an injunction:—*Held*: proper till the house is rebuilt.—*BROWN v. QUILTER* (1764), Amb. 619; 2 Eden, 219; 27 E. R. 402, L. C.

*Annotations:—Consd. Hare v. Groves* (1796), 3 Anst. 687. *Reid. Phillipson v. Leigh* (1795), 1 Esp. 398; *Lofft v. Dennis* (1859), 1 E. & E. 474.

5145. **Under covenant to rebuild—Extent of liability—Whether liable to rebuild tenant’s additions.**—If a lessor covenant in a lease with his lessee, that he will, in case the premises demised shall be burnt down, “rebuild & replace” the same in the same state as they were in before the fire, he is only bound to restore the premises to the state in which they were when he let them, & not to rebuild any additional parts which may have been erected by his tenant.—*LOADER v. KEMP* (1826), 2 C. & P. 375, N. P.

5146. **Under covenant to repair.**—A tenant has no equity to compel his landlord to expend money received from an insurance office, on the demised premises being burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt.—*LEEDS v. CHEETHAM* (1827), 1 Sim. 146; 5 L. J. O. S. Ch. 105; 57 E. R. 533.

*Annotations:—Apld. Lofft v. Dennis* (1859), 1 E. & E. 474. *Mentd. Lees v. Whiteley* (1866), 35 L. J. Ch. 412.

5147. **For accidental fire.**—Where a farmhouse was burnt by accident:—*Held*: the landlord was not bound to rebuild.—*BAYNE v. WALKER* (1815), 3 Dow, 233; 3 E. R. 1049, H. L.

5148. **Loss by fire excepted from lessor’s covenant.**—To an action of covenant for rent by a landlord, deft. cannot set off any uncertain damages that he may be entitled to recover against the landlord on any of the covenants in the lease. The lessee covenanted to repair, etc., “casualties by fire & tempest excepted”: *qu.*: if the landlord be bound to repair in either of the excepted cases.—*WEIGALL v. WATERS* (1795), 6 Term Rep. 488; 101 E. R. 663; *previous proceedings, sub nom. WATERS v. WEIGALL*, 2 Anst. 575.

*Annotations:—Reid. Hare v. Groves* (1796), 3 Anst. 687. *Mentd. Hammond v. Toulmin* (1798), 7 Term Rep. 612.

## Part XXI.—Assignment and Devolution of Leases.

### SECT. 1.—RIGHT TO ASSIGN OR UNDERLET.

#### SUB-SECT. 1.—IN GENERAL.

5149. **General rule.**—A lessee may assign his term, if no actual ouster has taken place.—*BRUERTON v. RAINSFORD* (1583), Cro. Eliz. 15; 78 E. R. 281.

5150. — *See* 5149. — A lessee for years of the Crown may assign his term, though he is ousted of his possession by a stranger.—*WYNGATE v. MARKE* (1592), Cro. Eliz. 275; 78 E. R. 529.

#### PART XX. SECT. 2, SUB-SECT. 2.

*a. Under covenant to rebuild.*—*PROUDFOOT v. TROTTER* (1854), 12 U. C. R. 226.—CAN.

1. **Under covenant to pay for buildings.**—The lessor covenanted with the lessee that he would at the expiration of the term pay him, his heirs or assigns, a valuation for his building on the land demised:—*Held*: the covenant was neither wholly spent in the event of destruction by fire of the building then in existence, nor necessarily limited to the then value of the

existing building.—*Re Haisley* (1879), 44 U. C. R. 345.—CAN.

#### PART XXI SECT. 1, SUB-SECT. 1.

5149 i. **General rule.**—The right to assign or sub-let is as well established an incident of a tenancy at a rent for a determinate period when the contract of letting is silent on the subject, as it is of an estate for life or of inheritance had.—*VENKATASAMY NAICK v. MUT-HUVILIA RAGUNADA RANI KATHAMA NATCHIAR* (alias KULANDAPURI NATCHIAR) (1869), 5 Mad. 227.—IND.

5149 ii. — *See* 5149 i. — *Doja Chand Shah*

5151. — *See* 5149 i. — Generally speaking, the grant of an estate carries with it all legal incidents, & therefore the grantee has a right to sell & convey it, unless he be controlled by the terms of his grant (Lord Kenyon, C.J.).—*DOE d. MITCHINSON v. CARTER* (1798), 8 Term Rep. 57; 101 E. R. 1264.

*Annotations:—Apprvd. Keeves v. Dean, Nunn v. Pellegrini*, [1924] 1 K. B. 685. *Reid. Doe d. Norfolk v. Hawke* (1802), 2 East, 481; *Doe d. Goodbehare v. Bevan* (1815), 3 M. & S. 353; *Crosbie v. Tooke* (1833), 1 My. & K. 431; *Croft v. Lumley* (1858), 6 H. L. Cas. 672; *Baily v. De Crespigny* (1869), 10 B. & S. 1; *Re Farrow’s Bank*, [1921]

*v. ANUND CHUNDER SEN MOZUMDAR* (1887), 1 L. R. 14 Calc. 382.—IND.

5149 iii. — *See* 5149 i. — *Semble*: A clause in a lease granting the premises to “the lessee, his heirs, successors & assigns,” & providing that the rent should be paid by “the lessee, his successors, or assigns” renders the lease freely assignable by the lessee.—*VAN DER HOVEN v. TRANSVAAL CONSOLIDATED COAL MINES, LTD.* (1904), T. H. 120.—S. AF.

*g. What may be assigned—Lease of Crown lands.*—*HENSLEY v. RECHKE* (1914), 18 C. L. R. 452.—AUS.

2 Ch. 164. *Mentd. Weatherall v. Geering* (1806), 12 Ves. 504; *Doe d. Lockwood v. Clarke* (1807), 8 East, 185; *R. v. Robinson* (1811), Wight. 386; *Wilkinson v. Wilkinson* (1819), 3 Swan. 515; *Davis v. Eytton* (1830), 9 L. J. O. S. C. P. 44; *Sharpe v. Thomas* (1830), 6 Bing. 416; *Flight v. Salter* (1831), 1 B. & Ad. 673; *Saltmarsh v. Hewett* (1834), 1 Ad. & El. 812; *Jeffries v. Alexander* (1860), 8 H. L. Cas. 594; *Avison v. Holmes*, Penny v. Avison (1861), 1 John. & H. 530.

5152. —.]—The occupation of a cottage for forty days by the leave of the former tenant, who then went out, under an agreement with him to pay the same rent to the landlord which he had before done, but without any authority from the landlord, the cottage together with other premises occupied at the same time being £10 a year & upwards, was held to give the occupier a settlement.

Nothing appeared of the former tenant's term having expired, & the law gave him authority to assign his interest (LORD KENYON, C.J.).—*R. v. ALDBOROUGH (INHABITANTS)* (1801), 1 East, 597; 102 E. R. 231.

*Annotation*.—*Reid. R. v. St. Michael in Coventry* (1812), 15 East, 587.

5153. —.]—Covenant in a lease not to let, set, or demise, the premises, or any part, for all or any part of the term without consent restrains assignment.—*GREENAWAY v. ADAMS* (1806), 12 Ves. 395; 33 E. R. 149.

*Annotations*.—*Reid. Grove v. Portal*, [1902] 1 Ch. 727. *Mentd. Todd v. Gee* (1810), 17 Ves. 273; *Williams v. Hignett* (1828), 6 L. J. O. S. Ch. 125; *Jenkins v. Parkinson* (1833), *Coop. temp. Brough*, 179; *Sainsbury v. Jones* (1839), 5 My. & Cr. 1; *Onions v. Cohen* (1865), 2 Hem. & M. 354; *Aberaman Ironworks v. Wickens* (1868), L. 11. 5 Eq. 485.

5154. —.]—Under an agreement for a lease the lessor is not, without express stipulation, entitled to a covenant, restraining alienation without licence, as a proper & usual covenant.

If the landlord has a covenant against both assigning & under-letting, the tenant might by an agreement, neither assigning, nor under-letting, put another person in possession of the premises; & parting with the possession in that manner would not be a breach of those covenants. Is a further covenant, therefore, not to part with the possession of the premises, to be given, as a usual covenant? That would not have restrained the tenant from parting with a part of the premises: these covenants having been always construed by cts. of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation. The ct. will have to consider, whether all these covenants are also included under the terms "usual & proper covenants," in the construction of an equitable agreement; where the law would regard the instrument with that jealousy (LORD ELDON, C.).—*CHURCH v. BROWN* (1808), 15 Ves. 258; 33 E. R. 752, L. C.

*Annotations*.—*Consd. Buckland v. Papillon* (1866), L. R. 1 Eq. 477; *Hodgkinson v. Crowe* (1875), 10 Ch. App. 622; *Hampshire v. Wickens* (1878), 7 Ch. D. 555; *Re Lander & Bagley's Contract*, [1892] 3 Ch. 41; *Grove v. Portal*, [1902] 1 Ch. 727; *Jackson v. Simons*, [1923] 1 Ch. 373; *Keeves v. Dean*, *Nunn v. Pellegrini*, [1924] 1 K. B. 685. *Apld. Russell v. Beecham*, [1924] 1 K. B. 525. *Reid. Browne v. Raban* (1809), 15 Ves. 528; *Blakesley v. Wheldon* (1841), 1 Hare, 176; *Wall v. City of London Real Property Co.* (1874), 30 L. T. 53; *McKay v. McNally* (1879), 41 L. T. 230; *David v. Sabin*, [1893] 1 Ch. 523; *West Ham Central Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624; *Abrahams v. Mac Fisherlee*, [1925] 2 K. B. 18. *Mentd. Bartlett v. Greene* (1874), 30 L. T. 553.

5155. What may be assigned—Tenancy not in possession.]—*Held*: if S. makes a lease to B. to commence two years after, after the two years have expired, B. before any entry may grant his term, although the lessor continues in possession.—*WHEELER v. THOROGOOD* (1589), Cro. Eliz. 127; 78 E. R. 384.

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5156. — Tenancy in futuro.]—A. & B. are lessees of land for eighty-one years, if C. so long live, the term to commence in futuro, & from & after the death of C., for thirty-one years, from thenceforth. A & B. enter before the commencement of the term of eighty-one years, which is a disseisin, & suspends the right of assigning the *interesse termini*: but being put out of possession by their lessor before the thirty-one years had begun, their disseisin is purged, & that future interest is not disturbed, so that their assignment of it by indenture is good.—*HEMMING v. BRABASON* (1661), O. Bridg. 1; 124 E. R. 435; *sub nom. HENNINGS v. BRABASON*, 1 Lev. 45; 1 Keb. 154.

*Annotation*.—*Consd. Doe d. Rawlings v. Walker* (1825), 7 Dow. & Ry. K. B. 487.

5157. — Agreement for lease.]—Appl., owner of chalk quarries, made a contract with the Imperial Portland Cement co., by which it was agreed that he would for fifty years supply to the co. & that the co. should take & buy from him at least 750 tons of chalk per week at a certain price, & so much more, if any, as the co. should require for the whole of their manufacture of Portland cement upon their land near the quarries. The Imperial co. afterwards assigned the contract & sold its undertaking, land, works, & business to the Associated co., & went into voluntary liquidation, its affairs being wound up & its assets distributed:—*Held*: (1) upon the true construction of the contract it must be read as if it had been expressed to be made with the Imperial co., its successors & assigns, owners & occupiers of the works; (2) the Associated co. was entitled to the benefit of the contract, & could enforce it by action without joining the Imperial co. as plffs.

An agreement for a lease, & even an option to require a lease or a renewal of a lease, is assignable in equity even although there is no mention of exors., administrators or assigns (LORD LINDLEY, J.).—*TOLHURST v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS* (1900), LTD., *TOLHURST v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS* (1900), LTD., & *IMPERIAL PORTLAND CEMENT CO., LTD.*, [1903] A. C. 414; 72 L. J. K. B. 834; 89 L. T. 196; 52 W. R. 143; 19 T. L. R. 677, H. L.

*Annotations*.—*As to* (2) *Reid. Dawson v. G. N. & City Ry.*, [1905] 1 K. B. 260; *Kemp v. Baerselman*, [1906] 2 K. B. 604; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251; *Whiteley v. Hill*, [1918] 2 K. B. 808; *Ellis v. Torrington*, [1920] 1 K. B. 399. *Generally, Mentd. Fitzroy v. Cave* (1905), 93 L. T. 499; *Hubbard v. Weldon* (1909), 25 T. L. R. 356; *Bennett v. White*, [1910] 2 K. B. 643; *Cooper v. Micklfield Coal & Lime Co.*, *Cooper v. Rayner* (1912), 107 L. T. 457; *Fratelli Sorrentino v. Burger*, [1915] 1 K. B. 307.

5158. — Option to renew.]—*TOLHURST v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS* (1900), LTD., *TOLHURST v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS* (1900), LTD., & *IMPERIAL PORTLAND CEMENT CO., LTD.*, No. 5157, *ante*.

5159. Who may assign—Tenant out of possession.]—An assignment of leasehold premises by a person not in possession of the premises at the time of the assignment, is void both at common law & by 32 Hen. 8, c. 9.—*DOE d. WILLIAMS v. EVANS* (1845), 1 C. B. 717; 14 L. J. C. P. 237; 5 L. T. O. S. 175; 9 Jur. 712; 135 E. R. 724.

*Annotations*.—*Reid. Jenkins v. Jones* (1882), 9 Q. B. D. 128; *Kennedy v. Lyell* (1885), 15 Q. B. D. 491.

5160. — Tenancy in futuro.]—*HEMMING v. BRABASON*, No. 5156, *ante*.

5161. — Tenant from year to year.]—*ALLCOCK v. MOORHOUSE*, No. 5465, *post*.

5162. Reservations on assignment.]—*BILLINGSLEY (LADY) v. HERSEY* (1612), 2 Bulst. 5; 80 E. R. 912.

B. B.

**Sect. 1.—Right to assign or underlet: Sub-sects. 1 & 2, A. & B. (a) t.]**

**5163. —.]—**A lease by a lessee for life with an exception of trees, is good; but if a lessee for years assign his term with such an exception, it is void.—*BACON v. GYRLING* (1612), Cro. Jac. 296; 79 E. R. 254.

**Capacity of tenant at will to grant lease.]—See Part III., Sect. 1, sub-sect. 18, ante.**

#### SUB-SECT. 2.—RESTRICTION ON RIGHT— COVENANTS AGAINST ASSIGNMENT.

##### A. In General.

**5164. What operates as restraint.]—GREENAWAY v. ADAMS, No. 5153, ante.**

**5165. Whether repugnant—Agreement to grant lease to lessee, "his executors, administrators & assigns."]**—Proviso against assignment without licence in a lease to the lessee, his exors., administrators, & assigns, not repugnant: the construction being such assigns as he may lawfully have: viz. by licence; or by law, as assignees in bkpcy. Though bkpcy. supersedes an agreement not to assign without licence, that has been held only in favour of general creditors; & where there is no actual lease, but it rests in agreement to grant a lease, an individual cannot have a specific performance in opposition to such provision; & it is very disputable, whether the general assignees could obtain it; even if there was no such provision.—*WEATHERALL v. GIERING* (1800), 12 Ves. 504; 33 E. R. 191.

**Annotations:—**Consd. *Crosbie v. Troke* (1833), 1 My. & K. 431; *Buckland v. Papillon* (1866), L. R. 1 Eq. 477. *Refd. Powell v. Lloyd* (1828), 2 Y. & J. 372; *Bowser v. Colby* (1841), 1 Hare, 109.

**5166. How construed—Viewed with jealousy.]—CHURCH v. BROWN, No. 5154, ante.**

**5167. —.]—GENTLE v. FAULKNER, No. 5194, post.**

**5168. Not "usual covenant."]**—*CHURCH v. BROWN, No. 5154, ante.*

*See, generally, Part XI., Sect. 2, sub-sect. 2, ante.*

**5169. Whether a covenant running with the land.]—**(1) A covenant, in an indenture of lease, by which the lessees, for themselves, their heirs, exors., administrators, & assigns, covenanted that they, their exors., administrators, & assigns, would not assign, underlet, or otherwise part with the possession of the demised premises without first obtaining the consent in writing of the lessor, is a covenant which touches & concerns the land, & therefore runs with the land, & the lessor can sue an assignee of the lessee for the breach of it.

(2) The measure of damages in an action for a breach of the covenant is such a sum as will, as far as money can, put plff. in the same position as if he had still deft.'s liability, instead of the liability of another of inferior pecuniary ability, for breaches both past & future.—*WILLIAMS v. EARLE* (1868), L. R. 3 Q. B. 739; 9 B. & S. 740; 37 L. J. Q. B. 231; 19 L. T. 238; 33 J. P. 86; 16 W. R. 1041.

**Annotations:—**As to (1) *Apld. Re Stephenson, Poole v. Stephenson*, [1915] 1 Ch. 802. *Refd. West v. Dobb* (1869), L. R. 4 Q. B. 634; *Horsey Estate v. Steiger*, [1899] 2 Q. B. 79. As to (2) *Folld. Langton v. Henson* (1905), 92 L. T. 805. *Refd. Lepia v. Rogers*, [1893] 1 Q. B. 31; *Douglas v. Deroy* (1895), 39 Sol. Jo. 484; *Cohen v. Popular Restaurants*, [1917] 1 K. B. 480. *Generally, Mendt. Hardy v. Fothergill* (1888), 13 App. Cas. 351; *Byrne v. Brown, Diplock, Third Party* (1889), 5 T. L. R. 205.

**5170. —.]—**A covenant by a lessee not to assign without the lessor's consent runs with the

land, & applies to a reassignment to the original lessee. An injunction will lie on a threat to commit a breach of it.—*McEACHARN v. COLTON*, [1902] A. C. 104; 71 L. J. P. C. 20; 85 L. T. 594, P. C.

**5171. —.]—GOLDSTEIN v. SANDERS, No. 5282, post.**

**5172. — Expression of contrary intention—Sufficiency.]—**By a lease made in 1899 H. & P., therein called "the lessors," demised to X. & Y., therein called "the lessees," certain lands for a term of over seventy years, & the lessees covenanted with the lessors (*inter alia*) as follows: that "the lessees will not at any time during the said term assign or sub-let the said demised premises or any part thereof" or use the same in certain prohibited ways. An interpretation clause provided that "the expression 'the lessors,' used herein, shall, where the context so admits, include, besides the said H. & P., their respective exors., administrators, & assigns, & the expression, 'lessees,' used in these presents, shall, where the context so admits, include, besides the said X. & Y., their respective exors. & administrators." In 1899 X. & Y., with the licence of their lessors, assigned the demised property to the S. co., which in 1915 wished to assign it to another co.:—*Held*: (1) although "assigns" were not mentioned in the covenant, it was binding on the S. co., & that co. could not assign the demised property without the consent of the lessors; (2) the fact that in the definition in the lease the word "lessees," as contrasted with the word "lessors" was not stated to include assigns did not show a sufficient indication of intention that the covenant should be personal only & not run with the land.—*Re STEPHENSON (ROBERT) & Co., LTD., POOLE v. THE CO.*, [1915] 1 Ch. 802; 84 L. J. Ch. 563; 113 L. T. 230; 31 T. L. R. 331; 59 Sol. Jo. 429.

*See, generally, Part XI., Sect. 6, ante.*

**5173. What restriction comprises.]—ANON. (1551), Moore, K. B. 11; 72 E. R. 405.**

**5174. Whether creating condition.]—**These words in a lease "that it shall not be lawful for the lessee to aliene without licence of the lessor" make a condition, but the restraint continues only during the lives of the lessee & lessor.—*ANON. (1549)*, 1 Dyer, 65 b; 73 E. R. 139.

**Annotations:—***Refd. Sayer v. Hardy* (circa 1600), Gouldsb. 179. *Mentd. Portington's Case* (1613), 10 Co. Rep. 35 a.

**5175. —.]—KNIGHT v. MORY, No. 5345, post.**

**5176. — Estate of lessee defeasible.]—**(1) It is a very plain case, that this covenant & grant here on the part of the lessee, that he will not alien but to his wife for her life, & after, etc.: that this is a condition or defeasance, & by this he hath a conditional & a defeasible estate (*COKE, C.J.*).

(2) As to the second point, the condition being that he will not aliene to any one but to his wife, etc., upon pain of forfeiture: by the first alienation this party to whom the same is made, hath now an absolute estate in him, & to his estate no condition can be annexed by the words of the first covenant (*COKE, C.J.*).—*FOX v. WHITCHOCKE* (1616), 2 Bulst. 290; 80 E. R. 1129; *sub nom. WHITCHCOT v. FOX*, Cro. Jac. 398; 1 Roll. Rep. 389.

**Annotations:—**As to (1) *Consd. Re Stephenson, Poole v. Stephenson*, [1915] 1 Ch. 802. As to (2) *Refd. Bally v. Wells* (1769), Willm. 341. *Generally, Mentd. Tovey v. Pitcher* (1691), Carth. 177; *Rockingham v. Oxenden* (1711), 2 Salk. 578; *Dowell v. Dew* (1842), 1 Y. & C. Ch. Cas. 345.

**5177. — What words will suffice.]—**By a memorandum of agreement, in consideration of the rent, & conditions thereafter mentioned, A.

was to have, hold, & occupy, as on lease, certain premises therein specified, at a certain rent per acre. It was stipulated, that no buildings should be included or leased by virtue of the agreement; & it was further agreed & stipulated, that A. should take, at the rent aforesaid, certain other parcels, as the same might fall in; & lastly, it was stipulated & conditioned that A. should not assign, transfer, or underlet, any part of the said lands & premises otherwise than to his wife, child, or children:—*Held*: by the last clause a condition was created, for the breach of which the lessor might maintain an ejectment.—*DOE d. HENNIKER v. WATT* (1828), 8 B. & C. 308; 1 Man. & Ry. K. B. 694; 6 L. J. O. S. K. B. 185; 108 E. R. 1057.

**5178.** ———.]—The following words in an agreement for letting do not create a condition, "The said A. (the tenant) hereby agrees that he will not underlet the said premises without the consent in writing of the landlord."—*SHAW v. COFFIN* (1863), 14 C. B. N. S. 372; 2 New Rep. 29; 143 E. R. 490.

*Annotation*:—*Fold. Crawley v. Price* (1875), L. R. 10 Q. B. 302.

**5179.** ———.]—By an agreement in writing, but not under seal, *pltf.* agreed to let & *deft.* to hire on lease for twenty-one years a house, etc., on the following terms: The rent to be £55 *per annum*; the lease to commence from Mar. 25 next, & to contain an extract of the covenants in the original lease which *pltf.* is bound under; that the proposed lease shall not be sold, parted with, or any portion of the property underlet without the consent in writing of *pltf.* In the original lease were six covenants by the lessee, with a proviso for re-entry on the breach of any of them; but there was no covenant not to underlet without the consent of the landlord. *Deft.* entered & paid rent, & underlet the premises without the consent of *pltf.*, who thereupon brought ejectment, & was nonsuited:—*Held*: the nonsuit was right; *deft.* held as tenant from year to year on such of the terms of the agreement as were applicable to that tenancy, & the agreement incorporated the six covenants in the original lease, & the proviso for re-entry on the breach of any one of those covenants; but the agreement could not be read as applying the proviso for re-entry to the new clause as to not underletting; & on mere words of agreement a condition could not be created.—*CRAWLEY v. PRICE* (1875), L. R. 10 Q. B. 302; 33 L. T. 203; 23 W. R. 874.

**5180.** Whether creating collateral covenant—Landlord entering on part of land—Covenant remains binding.]—*COLLINS v. SILLYE* (1851), Sty. 265; 82 E. R. 698.

*Annotations*:—*Consd. Williams v. Earle* (1868), 37 L. J. Q. B. 231. *Refd. Bally v. Wells* (1769), Wilm. 341.

**5181.** On agreement for lease—Lease assigned without licence—Whether specific performance of lease decreed.]—*WEATHERALL v. GEERING*, No. 5165, *ante*.

**5182.** Effect of assignment with licence.]—*DUMFORS CASE*, No. 5393, *post*.

**5183.** ———.]—*FOX v. WHITCHOCKE*, No. 5176 *ante*.

**5184.** ———.]—Proviso in a lease for re-entry upon assignment by the lessee, his exors., administrators, or assigns, without licence, ceases by assignment with licence, though to a particular

individual.—*BRUMMELL v. MACPHERSON* (1807), 14 Ves. 173; 33 E. R. 487, L. C.

*See, also*, No. 5417, *post*.

*See, now*, Law of Property Act, 1925 (c. 20), ss. 143, 148.

Effect of licence to assign part of lease, *see* Subsect. 2, B. (a) iii., *post*.

**5185.** Effect of assignment without licence—Whether interest passes.]—*Deft.* demised a farm for a term of fourteen years; the lease contained a covenant by the lessees not to assign without licence, with a proviso for re-entry, & a covenant by the lessor at the expiration of the tenancy to pay for certain things at a valuation. At the expiration of the term, the lessees continued tenants from year to year on the terms of the original lease. They afterwards, by deed, assigned their interest in the premises, with their right to be paid for the things at a valuation, to *pltf.* *Pltf.* entered into the occupation of the premises, but never paid rent; nor did *deft.* ever recognise him as his tenant. *Deft.* gave the lessees the proper six months' notice to quit, & *pltf.* gave *deft.* a similar notice:—*Held*: *pltf.* could not maintain an action against *deft.* for the amount of the things at a valuation; (*MELLOR & LUSH, JJs.*) on the ground that no new tenancy had been created between *pltf.* & *deft.*, & that the bare assignment of the parol tenancy did not pass to the assignee a right of action upon the special stipulation; (*SHEE, J.*) on the ground that as the lessees had no power to assign without licence, they could not transfer any interest in the premises to *pltf.*—*ELLIOTT v. JOHNSON* (1866), L. R. 2 Q. B. 120; 8 B. & S. 38; 36 L. J. Q. B. 44; 31 J. P. 212; 15 W. R. 253.

———.]—*See, generally*, Sect. 1, sub-sect. 2, I., *post*.

## B. What Amounts to Breach.

### (a) Of Covenant against Assignment.

#### i. In General.

**5186.** Assignment for benefit of creditors—Void as act of bankruptcy.]—A lease contained a proviso for re-entry of the lessor, & that the lease should be void on the lessee's assigning without the licence of the lessor. The lessee in Jan. 1825, executed a deed which purported to convey all his real & personal property to trustees, for the benefit of his creditors. In Apr. 1825, a commission of bkpt. issued against the lessee, & he was duly declared bkpt.:—*Held*: the deed of Jan. 1825, was an act of bkptcy. & void, it did not operate as a valid assignment of the tenant's interest in the lease, & therefore, there was no forfeiture.—*DOE d. LLOYD v. POWELL* (1826), 5 B. & C. 308; 8 Dow. & Ry. K. B. 35; 108 E. R. 115; *sub nom.* *DOE v. LLOYD*, 4 L. J. O. S. K. B. 159.

*Annotations*:—*Refd. Re Riggs, Ex p. Lovell*, [1901] 2 K. B. 16; *Stein v. Pope*, [1902] 1 K. B. 595. *Mentd. Re O'Sullivan, Ex p. Baller* (1892), 61 L. J. Q. B. 228.

**5187.** Assignment without written consent of lessor—Assignee entering into possession at instance of lessor.]—*Pltf.* demised premises, in 1860, to T. & P., for fourteen years. The lease contained a covenant by the lessees not to underlet, assign, or otherwise part with possession of the premises without the written consent of the lessor; with a clause of re-entry if the lessees should fail in the observance or performance of their covenants. In a letter of Mar. 25, 1865, addressed to W., *pltf.*

## PART XXI. SECT. 1, SUB-SECT. 2.—B. (a) 1.

b. Attempted assignment—Agreement merely formal.]—*GROSSMAN v. MODERN THEATRES, LTD.* (1919), 45 O. L. R. 664; 16 O. W. N. 442.—*CAN.*

**Sect. 1.—Right to assign or underlet: Sub-sect. 2, B. (a) i. & ii.]**

wrote: "I consent for you to take the premises that T. & P. have been renting of me on the same conditions, & in accordance with their lease. This will be sufficient authority to T. & P. to transfer the lease to you on paying £75 rent, due this day. It will be necessary for you to write me accepting these terms." W. accepted the terms & entered into possession; but no formal assignment was executed to him by T. & P. W. paid rent to pltf. till Jan. 1867, when pltf., in answer to an application on behalf of W., wrote: "I have no objection to consent to the trustees, C. & H., acting for W. in respect of the premises to vest the same in their hands, similar to the transfer I allowed W. from T. & P."; & accordingly W. executed, on Feb. 27, 1867, a formal assignment, *inter alia*, of all his interest in the premises to C. & H. They entered on the same day; & in Nov. 1867, they parted with the possession to deft., without the assent of pltf. Pltf. brought ejectment on a forfeiture for a breach of the covenant not to assign, etc., without pltf.'s written consent:—*Held*: there had been no breach of the covenant. *Qu.*: whether the clause of re-entry applied only to the breach of affirmative covenants, or whether it extended to negative covenants also.—*West v. DOBB* (1870), L. R. 5 Q. B. 460; 10 B. & S. 987; 39 L. J. Q. B. 190; 23 L. T. 76; 18 W. R. 1167, Ex. Ch.

*Annotations*:—*Consd. Harman v. Ainslie*, [1904] 1 K. B. 698. *Reid, Hyde v. Warden* (1877), 3 Ex. D. 72; *Tinms v. Baker* (1883), 49 L. T. 106; *Horsey Estate v. Steiger*, [1898] 2 Q. B. 259.

**5188. — By liquidator of company.—Not to responsible person.]**—A co. were assignees of a lease containing a covenant by the lessee not to assign the demised premises without the lessor's previous licence & consent in writing not to be unreasonably withheld in case of a respectable & responsible person being offered as tenant. The co. went into voluntary liquidation, in which the liquidator without the licence or consent of the lessor assigned the lease without offering a responsible person as tenant:—*Held*: (1) this constituted a breach of the covenant not to assign; (2) the lessor electing to avoid the lease could assess once for all the amount which he had lost by having an insolvent tenant instead of the co., & could prove for that amount in the liquidation, & was not bound to wait & prove for each quarter's rent as it fell due.—*COHEN v. POPULAR RESTAURANTS, LTD.*, [1917] 1 K. B. 480; 86 L. J. K. B. 617; 116 L. T. 477; 33 T. L. R. 107.

*Annotation*:—*Reid, Re Farrow's Bank*, [1921] 2 Ch. 164.

**5189. Assignment of lessee's fixture.]**—The lessee of certain premises erected a greenhouse thereon, which, though a fixture, by agreement with the lessor (def't.), he was to be entitled to remove. He subsequently mortgaged, among

other things, the greenhouse in question, & the mtgee. immediately entered in accordance with the powers given him by the bill of sale. The greenhouse was put up to auction a month after the entry, but not sold. Ten days after the auction the keys of the premises were given up to def't. by the auctioneer, who had been in possession for the mtgee., & def't. took possession; on the same day the mtgee. had notice of the surrender. The lessee made no attempt or claim to recover the premises after the entry under the bill of sale. Between three & four weeks after possession had been given up to def't. the mtgee. sold the greenhouse to pltf., who claimed to be entitled to enter & remove it:—*Held*: the mtge. of the greenhouse did not create a forfeiture under a covenant in the lease against any alienation of the premises without leave of the lessor, but the facts showed a surrender by operation of law; & the greenhouse, not having been removed by the mtgee. within a reasonable time after notice of the surrender, had become the property of def't., & could not be removed.—*MOSS v. JAMES* (1878), 38 L. T. 595, C. A.

**5190. Joint possession.—On formation of partnership.]**—Where a lease contained a proviso for re-entry in case the tenant should demise, lease, grant or let the demised premises, or any part or parcel thereof, or convey, etc., to any person whomsoever, for all or any part of the term, without the licence of the lessor in writing; & def't., without such licence, agreed with a person to enter into partnership with him, & that he should have the use of the back chamber & some other parts of the premises exclusively, & of the rest jointly with def't., & accordingly let him into possession:—*Held*: the lessor was entitled to re-enter.—*ROE d. DINGLEY v. SALES* (1813), 1 M. & S. 297; 105 E. R. 111.

*Annotations*:—*Reid, Mashiter v. Smith* (1887), 3 T. L. R. 673; *Horsey Estate v. Steiger*, [1899] 2 Q. B. 79.

—*See, also*, No. 5226, *post*.

**5191. Agreement for sale.—Prospective purchasers let into possession.]**—(1) A lease contained a covenant by the lessees for themselves & their assigns not to assign or underlet the premises without the consent of the lessors, which was not to be unreasonably withheld. Assignees of the lease entered into an agreement for the sale thereof by which it was provided that at a certain period, though the purchase might not then be completed, the purchasers should be let into possession of the premises, & should from that date pay the rents & outgoings in respect of the same. The purchasers even let into possession under that agreement, the purchase remaining uncompleted:—*Held*: so letting them into possession was not a breach of the covenant against assignment or underletting without the consent of the lessors.

(2) I think, looking to the wide words of the

**5191i. Agreement for sale.—Prospective purchasers let into possession.]**—*LAPIN v. COHEN* (1923), 23 S. R. N. S. W. 507; 40 N. S. W. W. N. 114.—*AUS.*

**k. Assignment for payment of arrears of rent.]**—S. & his partners were tenants of D. under a lease which provided that any assignment by the lessees for the general benefit of their creditors should forfeit the term. The lessees, at a time when two quarters' rent were overdue & in arrear, made such an assignment to C., who thereupon took possession of the premises & shortly afterwards paid D. the two quarters' arrears of rent:—*Held*: the act of the lessees in making the assignment was an act whereby their tenancy was determined.—*DOBSON v. SOUTHERAN* (1888), 15 O. R. 15.—*CAN.*

**l. First assignment with consent.—Second without.—Consent in first not waiver of covenant.]**—Lease in 1819, with covenant against assignment, & to pay an increased head rent in case of breach. In 1824 lessee assigned with consent. In 1845 another assignment without consent:—*Held*: the first assent was not a general waiver of the covenant, & the lessor was entitled to the penal rent.—*STEWART v. HASSARD* (1849), 1 Ir. Jur. 291.—*IR.*

**m. Assignment by way of mortgage.—Lessor's waiver of breach.—Subsequent assignment by mortgagee after foreclosure.]**—*BACON v. CAMPBELL* (1877), 40 U. C. R. 517.—*CAN.*

**n. Assignment by lessee with consent.—Reassignment to lessee without**

**consent.]**—The words "any person or persons" in the covenant not to assign or sub-let without leave include the original lessee, & where an assignment by him has been made with consent, a reassignment to him without a fresh consent is a breach of the covenant.—*MUNRO v. WALLER* (1896), 28 O. R. 29.—*CAN.*

**o. Assignment of interest in lease.—To partner.—For purposes of partnership concern.]**—*HERSCHORN v. ST. MARY'S YOUNG MEN'S SOCIETY* (1915), 49 N. S. R. 260.—*CAN.*

**p. Agreement ostensibly for management of business.—Substantive though not formal underlease.]**—Action by lessors for possession on account of breach of a covenant against assigning

interpretation sect. 2 of the [Conveyancing] Act of 1881 referring to bkpcy., that liquidation is within the meaning of bkpcy. as interpreted by sub-sect. 6 of sect. 14 of the Act of 1881. It follows that, if the [Conveyancing] Act of 1892 has not effected a difference, *pltf. co.* was not bound, as to this ground of forfeiture, to give notice at all. Has, then, the Act of 1892 made any difference? I think it has. I think the effect of sect. 2, sub-sect. 2, of that Act, which is very difficult of construction, is to take the case of forfeiture for bkpcy. or liquidation out of the cases in which notice is not necessary for one year from the bkpcy. or liquidation (LORD RUSSELL, C.J.).—*HORSEY ESTATE, LTD. v. STEIGER*, [1899] 2 Q. B. 79; 68 L. J. Q. B. 743; 80 L. T. 857; 47 W. R. 644; 15 T. L. R. 307, C. A.

*Annotations*:—*As to* (2) *Consd. Gentle v. Faulkner* (1899), 68 L. J. Q. B. 848; *Pannell v. City of London Brewery Co.*, [1900] 1 Ch. 496; *Re Riggs, Ex p. Lovell*, [1901] 2 K. B. 16. *Apprvd. Fryer v. Ewart*, [1902] A. C. 187. *Consd. Civil Service Co-op. Soc. v. McGrigor's Trustee*, [1923] 2 Ch. 347. *Refd. Jacob v. Down*, [1900] 2 Ch. 156; *Fox v. Jolly*, [1916] 1 A. C. 1; *Davenport v. Smith* (1921), 91 L. J. Ch. 225. *Generally, Refd. Woodall v. Clifton*, [1905] 2 Ch. 257.

**5192. Licence—To refreshment contractor.**—The lessee of a theatre granted a refreshment contractor "the free & exclusive licence & right to the use of all the refreshment bars, smoking-rooms, wine cellars, & offices" in the theatre, together with the free right of access thereto, & also the sole & exclusive right of advertising therein, for a term of years at a fixed rent. The grant contained a power to determine the terms of non-payment of rent, & a covenant for quiet enjoyment:—*Held*: the effect of the document was to grant a licence under which the refreshment contractor took no estate or interest in the property, & therefore it did not amount to a breach of a covenant in the lease not to assign without the consent of the lessor.—*EDWARDES v. BARRINGTON* (1901), 85 L. T. 650; 50 W. R. 358; 18 T. L. R. 169, H. L.; *affg.*, *S. C. sub nom. DALY v. EDWARDES*, 83 L. T. 548, C. A.

*Annotations*:—*Appld. Warr v. L. C. C.*, [1904] 1 K. B. 713. *Refd. Bevan v. Webb*, [1905] 1 Ch. 620; *Joel v. International Circus & Christmas Fair* (1920), 124 L. T. 459; *Jackson v. Simons*, [1923] 1 Ch. 373.

*Compare No. 5241, post.*

**Disposition on death of lessee.**—*See Sub-sect. 2, B., post.*

**Assignment by operation of law.**—*See Sub-sect. 2, F., post.*

## ii. Equitable Assignment.

**5193. General rule—No breach by equitable assignment.**—Equitable assignments not sufficient to avoid the lease at law are not a ground for refusing relief.—*BOWSER v. COLBY* (1841), 1 Hare, 109; 11 L. J. Ch. 132; 5 Jur. 1178; 66 E. R. 969.

*Annotations*:—*Refd. Howard v. Fanshawe*, [1895] 2 Ch. 581; *Dendy v. Evans*, [1910] 1 K. B. 263.

or sub-letting any interest in the demised premises. Defts. had carried on a restaurant business in the premises in question & entered into an agreement with a third party ostensibly for the management of the business for them upon the basis that they should receive \$1,500 & the third party all profits above that sum. The arrangement was to be for one year, & the \$1,500 payable on certain fixed days:—*Held*: the agreement complained of was in substance an assignment of an interest in the property & the interest of defts. had come to an end on account of the termination of the condition upon which it depended.—*CURRY v. PENNOCK* (1913), 24 O. W. R. 357; 4

O. W. N. 1065; 10 D. L. R. 548.—CAN.

**q. Temporary renting of premises—During absence of lessee.**—Proviso for re-entry if the lessee "do or shall at any time or times during the continuance of the said term, let, set, or assign over these presents or hereby granted, or otherwise part with his interest therein or thereto to any person or persons whatsoever," without the lessor's consent in writing. The lessee, on leaving the country for a time, rented the premises to one J., who was to go out when required:—*Held*: no forfeiture.—*LEYS v. FISKEIN* (1855), 12 U. C. R. 604.—CAN.

**5194.** — — — — —]—By a lease the lessee covenanted not to assign or underlet the demised premises without the consent of the lessor, & there was a proviso for re-entry on breach of any of the covenants, or if the lessee should (*inter alia*) execute an assignment for the benefit of his creditors. The lessee executed an assignment of all his real & personal property, except that of a leasehold tenure, to a trustee for the benefit of his creditors, & he declared that he would stand possessed of all his leasehold property upon trust for the trustee & to assign & dispose of the same in such manner as the trustee should direct for the purposes of the deed. The trustee entered into possession of the demised premises, but no legal assignment of them was executed. The lessor served upon the trustee a notice alleging as ground of forfeiture the execution by the lessee of the assignment. In an action against the lessee to recover possession of the premises:—*Held*: (1) as there had been no legal assignment of the premises, there had been no breach of the covenant against assignment; (2) the condition against assignment for the benefit of creditors was not a condition against disposing of the land leased within Conveyancing Act, 1881 (c. 41), s. 14 (6) (i), & therefore service of notice on the lessee under s. 14 (1), was necessary before the lessor could enforce his right of re-entry; & service of the notice on the trustee under the deed was not a sufficient compliance with the provisions of s. 14 (1), & s. 67 (2), of the Act.

A condition against the disposing of the land leased within the meaning of s. 14 (6) (i) of the Act, means a condition which on its face is against the disposing of the land leased.—*GENTLE v. FAULKNER*, [1900] 2 Q. B. 267; 69 L. J. Q. B. 777; 82 L. T. 708; 16 T. L. R. 397; 44 Sol. Jo. 483, C. A.

*Annotations*:—*As to* (1) *Refd. Matthews v. Usher* (1900), 69 L. J. Q. B. 856; *Re Masters & G. W. Ry.* (1901), 70 L. J. K. B. 516.

**5195. Application of rule—Deposit of lease as security.**—*Re BAGLEHOLE & REDGRAVE, Ex p. BAGLEHOLE* (1813), 1 Rose, 432, L. C.

**5196.** — — — — — No "parting with legal interest."—Covenant "not to let, set, assign, transfer, set over, or otherwise part with, the premises demised, or the lease," of a coffee house, is not broken by proof of a deposit of the lease with the brewers of the lessee, as a security for beer supplied to the house.

The lessee has only deposited the lease as a security, which it was competent for him to do. There is no "parting with the legal interest" within the meaning of the covenant (BAYLEY, J.).—*DOE d. PITT v. HOGG* (1824), 4 Dow. & Ry. K. B. 226; 2 L. J. O. S. K. B. 121.

*Annotations*:—*Consd. Greenslade v. Tapscott* (1834), 1 Cr. M. & R. 55. *Follid. Ex p. Drake* (1841), 1 Mont. D. & G. 539. *Refd. McKay v. McNally* (1879), 41 L. T. 230; *Horsey Estate v. Steiger*, [1898] 2 Q. B. 259; *Gentle v. Faulkner* (1899), 68 L. J. Q. B. 848; *Russell v. Beecham*, [1924] 1 K. B. 525.

## PART XXI. SECT. 1, SUB-SECT. 2.—B. (a) ii.

**5195 i. Application of rule—Deposit of lease as security.**—The lessee, during the existence of the lease, made an equitable deposit of the lease with a sales-master, accompanied by a memorandum to the effect that the deposit should hold the lease "by way of equitable mtge." as security for a sum of money due to him by the lessee:—*Held*: this equitable deposit was not a breach of the covenant by the lessee not to "mtge., sell, assign, or otherwise part with" the lease or premises.—*McKAY v. McNALLY* (1879), 41 L. T. 230.—IR.

**Sect. 1.—Right to assign or underlet: Sub-sect. 2, B.**  
**(a) *ii.*, *iii.*, *iv.* & *v.***

**5197.** ———.]—*Semble*: a proviso to make void a lease, on assignment by the lessee, does not apply to a mere deposit of it, by way of equitable mtge.

The assignees cannot complain of being taken by surprise; for the petition already states that there was a deposit of the lease itself, which would create an equitable lien on the colliery, as well as on the fixtures; & this would be the case, if there was no written memorandum accompanying the deposit; & no objection in this case arises, as to the fixtures being in the order & disposition of bkpt. at the time of the bkpcy.; for petitioner took possession of them under the contract. It had been contended that the lease cannot be sold, as there is a proviso in it to prevent any assignment by the lessee. But it has been decided that such a proviso does not apply to the assignees of a bkpt., who are in by operation of law, & not by the act of the party (ERSKINE, C.J.).

A proviso to make void a lease, on assignment by the lessee, does not apply to a case of mere deposit, any more than to an assignment by operation of law (SIR G. ROSE).—*Re HAND, Ex p. COCKS* (1836), 2 Deac. 14, Ct. of R.

**5198.** ———.]—A lease, deposited by way of equitable mtge., contained a covenant on the part of the lessee not to assign, without licence.—*Held*: this was no objection to the usual order.—*Ex p. DRAKE* (1841), 1 Mont. D. & De G. 530, Ct. of R.

**5199.** ——— **Declaration of trust only.**—GENTLE v. FAULKNER, No. 5194, *ante*.

### *iii. Assignment of Part of Premises.*

**5200. Assignment must be substantial.**—To constitute a breach of a covenant not to assign there must be a substantial parting with a substantial portion of the demised premises.—*MASHITER v. SMITH* (1887), 3 T. L. R. 673.

**5201. Assignment of residue.—After assignment of part by licence.**—Lease on condition not to alienate the premises, or any part, without the assent of the lessor; he licences the alienation of part, still he may re-enter if the lessee alienate the whole.—*ANON.* (1574), 3 Dyer, 334 b; 73 E. R. 756.

*Annotation*.—*Dbtd. Dumpor's Case* (1603), 4 Co. Rep. 119 b.

**5202.** ———.]—*DUMPOR'S CASE*, No. 5393, *post*.

*See, now*, Law of Property Act, 1925 (c. 20), ss. 143, 148.

**5203. After partition of premises leased—Assignment of divided part.**—A lease was made for two years, upon condition, that they, nor either of them, shall alienate any part of the land without assent of the lessor. They make portion & one alienates his part. This is a forfeiture of the whole.—*GOSTWICK'S CASE* (1589), Cro. Eliz. 163; 78 E. R. 421.

**5204. Licence to fish.**—By an indenture of lease deft. demised to pltf. the exclusive right of fishing in a certain portion of the river "together with full liberty of ingress, egress, & regress for the said lessee & his authorized friends at all times" during the term thereby granted "to fish with

rods & lines in a proper & sportsmanlike manner" . . . "& the fish which they shall then & there take to have & retain to his & their own use." The lessee covenanted that he would not during the term "underlet, assign, transfer, or set over or otherwise by any act or deed procure, the said premises to be assigned, transferred, or set over unto any person or persons whomsoever" without the consent in writing of the lessor, his heirs or assigns.—*Held*: inasmuch as the covenant did not expressly apply to "any part" of the premises, the lessee was not precluded from granting a licence to another person to fish in the river during the residue of the term granted by the lease.—*GROVE v. PORTAL*, [1902] 1 Ch. 727; 71 L. J. Ch. 299; 86 L. T. 350; 18 T. L. R. 319; 46 Sol. Jo. 296.

*Annotations*.—*Refd. Jackson v. Simons*, [1923] 1 Ch. 373; *Abrahams v. MacFisheries*, [1925] 2 K. B. 18.

**Underlease of part.**—*See* No. 5190, *ante*, Nos. 5237–5240, *post*.

### *iv. Underlease.*

**5205. Covenant not to assign.**—Where a lease had been granted with a covenant for renewal, & also the deputation of a keepership, with a memorandum to renew concurrently with the lease; & upon the renewal, a few days before the expiration of the term, the renewed deputation had been by mistake made for the residue of the old, instead of for the new term.—*Held*: the mistake ought to be rectified; & though there was a covenant in the lease not to assign, yet as that covenant would not at law have prevented an underletting, the same relief was given to an undertenant as the original lessee would have been entitled to.—*JALABERT v. CHANDOS (DUKE)* (1759), 1 Eden, 372; 28 E. R. 729.

**5206.** ———.]—Underleases are not within provisos concerning assignments.—*KINNERSLEY v. ORPE* (1779), 1 Doug. K. B. 56; 99 E. R. 40.

*Annotations*.—*Mentd. Hunt v. Andrews* (1820), 3 B. & Ald. 341; *Doe d. Lewis v. Bingham* (1821), 4 B. & Ald. 672; *Rowe v. Brenton* (1828), 3 Man. & Ry. K. B. 133; *Doe d. Williams v. Lloyd* (1840), 1 Man. & G. 671; *Morgan v. Savin* (1887), 16 L. T. 457.

**5207.** ———.]—*CHURCH v. BROWN*, No. 5154, *ante*.

**5208.** ———.]—A lessee, with a covenant not to assign, may be compelled by a purchaser with notice of such covenant to grant him an underlease, instead of an assignment of the lease.—*GOODWIN v. FIELDING* (1853), 4 De G. M. & G. 90; 21 L. T. O. S. 147; 1 W. R. 343; 43 E. R. 441, L. JJ.

**5209.** ———.]—*CRUSOE d. BLENCOWE v. BUGBY*, No. 5384, *post*.

**5210.** ——— **For whole or part of term.**—A proviso in a lease not to assign or otherwise part with the premises for the whole or any part of the term, is broken by an underlease as well as an assignment.—*DOE d. HOLLAND v. WORSLEY* (1807), 1 Camp. 20, N. P.

**5211. Covenant not to assign whole or part of premises—Underlease of part.**—Pltfs. granted a lease of a house to deft. for twenty-one years, deft. covenanting (a) to keep the premises in good & substantial repair & condition; (b) not to make any alteration in the external appearance of the buildings; (c) not to do or suffer to be done any act or thing which might be or grow to the annoyance, damage or disturbance of the lessors or the

### **PART XXI. SECT. 1, SUB-SECT. 2.—** **B. (a) *iv.***

**5205 i. Covenant not to assign.**—A sublease is not a breach of a covenant in a lease not to assign.—*GRIFFITHS v. CANONICA* (1896), 5 B. C. R. 67.

### **—CAN.**

**r. Permitting overholding by sub-tenant.—After expiration of sub-tenancy.**—A covenant by a lessee not to assign or part with the possession of the premises or any estate or interest

therein without consent of the lessor, is broken by allowing a sub-tenant to overhold after the expiration of a sub-tenancy consented to by the lessor.—*HUME v. DODGSHUM* (1833), 9 V. L. R. 83.—**AUS.**

neighbourhood; (d) not to carry on upon any part of the premises any other business than that of a tailor; & (e) not to assign or part with the possession of the premises or any part thereof. Pltfs. held the house under a lease for ninety years from the vicar of the parish, which contained similar covenants. The house adjoined the churchyard, & deft. let the wall of the house which faced the principal entrance to the church to a bill-posting co., who covered the wall with advertisements. The effect of this was to injure the wall, & there was evidence that it was an annoyance to the vicar of the church & members of the congregation. Pltfs. claimed an injunction to restrain deft. from allowing the wall to be used as a bill-posting station:—*Held*: there had been a breach of covenants (a), (b), & (c), & perhaps of covenants (d) & (e), & pltf. was entitled to an injunction.—*HEARD v. STUART* (1907), 24 T. L. R. 104.

5212. —[.]—A lease for thirty years from Mar. 1899, contained a covenant by the lessee that he would not "assign or part with this lease or the premises hereby demised or any part thereof" without the licence & consent in writing of the lessor or his trustees. The lease also contained a proviso for re-entry by the trustees for breach of his covenants by the lessee. An assignee of the lease with the consent of the lessor made by sub-demise a mtgee. by which the mtgor. was debarred from exercising the powers of leasing conferred on mtgors. by Conveyancing Act, 1881 (c. 41), s. 18 (1), & the mtgor. attorned & became tenant at will to the mtgee. The mtgor. then, without the consent of the lessor of the thirty years' lease or of his trustees, in Nov. 1921, by an agreement in writing sub-let part of the demised premises for three years from Michaelmas, 1921. The trustees of the lessor of the thirty years' lease, without serving any notice under sect. 14 of the Act, brought an action against the mtgor. to recover the demised premises on the ground that giving the tenant possession under the agreement of Nov. 1921, was a breach of the covenant in the lease not to assign or part with the lease or the premises thereby demised or any part thereof:—*Held*: the action was not maintainable; (*BANKES & ATKIN, L.JJ.*) on the ground that on the true construction of the covenant "assign" & "part with" mean part with the whole interest in the premises or in any part thereof & do not include a sub-letting of part of the premises; or that at the most the expression "part with" is ambiguous & may exclude parting with part of the lessee's interest in part of the premises, & that a lessor insisting on a forfeiture for breach of covenant must express the covenant in unambiguous terms; (*SCRUTTON, L.J.*) on the ground that a covenant against parting with possession of part of the premises is a different covenant from a covenant against parting with possession of the premises; & that the former covenant was not within the exception in sub-sect. 8 of sect. 14 of the Act, & therefore a notice under sub-sect. 1 was necessary before pltfs. could enforce a right of entry for a breach of it.—*RUSSELL v. BEECHAM*, [1924] 1 K. B. 525; 93 L. J. K. B. 441; 130 L. T. 570; 40 T. L. R. 66; 68 Sol. Jo. 301, C. A.

*Annotations*:—*N.F. Abrahams v. MacFisherles*, [1925] 2 K. B. 18; *Carrington Manufacturing Co. v. Saldin* (1925), 133 L. T. 432.

#### 5213. Provision for re-entry on premises vesting

#### PART XXI. SECT. 1, SUB-SECT. 2.— B. (a) v.

5214. *Assignment to surviving partner.*—Where partners were lessees

of a term for years, & have covenanted not to assign or sub-let without the consent in writing of the lessor, an assignment by one

in any other person — Underlease from year to year.]—A lease of a public-house for twenty-seven years contained a proviso for re-entry "if the lessees or their assigns should do or suffer any other act, matter, or thing whereby or by reason or means whereof the demised premises, or any part thereof should either directly, or by operation of law, or otherwise howsoever indirectly become or be rendered liable to become vested either for the whole or any part of the term thereby created, in any person other than the lessees." The lessees sub-let to a tenant from year to year:—*Held*: the lessees had done an act whereby the demised premises became vested for part of the term in the sub-tenant, within the proviso, & a forfeiture had been incurred.—*DYMOCK v. SHOWELL'S BREWERY CO., LTD.* (1898), 79 L. T. 329; 15 T. L. R. 12, C. A.

#### v. Assignment on Dissolution of Partnership.

*See, generally, PARTNERSHIP.*

5214. *Assignment to surviving partner.*—A. & B., partners in a trade, were assignees of a lease which contained a covenant by the lessee, for himself & his assigns, that he would not, neither should his exors., administrators, or assigns, assign the demised premises without the consent in writing of the lessor. On the dissolution of the partnership, A. assigned all his interest in the premises to B.:—*Held*: a breach of the covenant.—*VARLEY v. COPPARD* (1872), L. R. 7 C. P. 505; 26 L. T. 882; 36 J. P. 694; 20 W. R. 972.

*Annotations*:—*Consd. Bristol Corpn. v. Westcott* (1879), 12 Ch. D. 461. *Fold. Langton v. Henson* (1905), 92 L. T. 805. *Apld. Abrahams v. MacFisherles*, [1925] 2 K. B. 18. *Refd. Horsey Estate v. Stelger*, [1899] 2 Q. B. 79.

5215. —[.]—L. leased certain premises to D. for twenty-one years. The lease contained a covenant by D. for himself, his heirs, administrators, & assigns, that he would not, neither should his exors., administrators, or assigns assign the demised premises without the consent in writing of the lessor. D. assigned the premises with the consent of L. to V. Subsequently V. assigned them, with the consent of L., to W. II. & J. H., who were partners. W. H. & J. H. dissolved partnership, & J. H. assigned to W. H. all his undivided share & interest of & in the premises contained in the lease. L. had no notice of this assignment, nor was his consent given:—*Held*: the assignment was a breach of the covenant.—*LANGTON v. HENSON* (1905), 92 L. T. 805.

5216. *Surviving partner in possession—No assignment.*—A lease was granted to two partners, B. & H., as joint tenants. The lessees covenanted that they, their exors., administrators, or assigns, or any or either of them, would not, during the term, assign, underlet, or part with the possession of the demised property to any person or persons without the written consent of the lessor; & there was a proviso for re-entry on the breach of any of the covenants. The partners dissolved partnership, & agreed that the partnership property should be made over to B., & that the leasehold property should be assigned to him with the consent of the lessor, if such consent could be obtained, & recited, as the fact was, that A. had given up sole possession of the leaseholds to B. Consent was not obtained, & no assignment of the leasehold was executed, but B., from the time of the dissolution, remained in sole possession:—*Held*: there had

the lease to his co-partner without such consent is a breach of such covenant.—*LOVELLES v. FITZGERALD* (1909), 42 S. C. R. 254.—*CAN.*

*Sect. 1.—Right to assign or underlet: Sub-sect. 2, B. (a) v., (b) & (c).]*

been no breach of the covenant, & the proviso for re-entry had not come into operation.—**BRISTOL CORPN. v. WESTCOTT** (1879), 12 Ch. D. 461; 41 L. T. 117; 27 W. R. 841, C. A.

*Annotations:—*Consd. *Horsely Estate v. Steiger*, [1898] 2 Q. B. 259; *Gentle v. Faulkner* (1899), 68 L. J. Q. B. 848. *Distd. Langton v. Henson* (1905), 92 L. T. 805.

**Assignment on formation of partnership.**—*See* No. 5190, *ante*.

*(b) Of Covenant not to Part with Possession.*

**5217. Assignment of part of premises.**—**CHURCH v. BROWN**, No. 5154, *ante*.

**5218. Underlease of part of premises.**—**HEARD v. STUART**, No. 5211, *ante*.

**5219. —.**—**RUSSELL v. BEECHAM**, No. 5212, *ante*.

**5220. — Separate transactions—Resulting in underlease of whole.**—**CHATTERTON v. TERRELL**, No. 5239, *post*.

**5221. —.**—**ROBERTS v. ENLAYDE, LTD.**, No. 5240, *post*.

**5222. Agreement to grant underlease of part—Proposed underlessee let into possession.**—A lease of two adjoining messuages & shops contained a covenant by the lessees that they would not assign, transfer, underlet, or part with the possession of the said premises or any part thereof other than an underletting for residential purposes only without the consent of the lessor not unreasonably withheld. The lessees agreed with a co. of wine merchants to grant them an underlease of one of the messuages & shops subject to the consent of the lessor, a draft underlease being prepared, & allowed them to occupy the premises, & there to execute repairs & to instal & carry on their business. The lessor refused consent to the underlease:—*Held*: the lessees had committed a breach of the covenant not to part with possession of any part of the premises.—**ABRAHAM v. MAC FISHERIES, LTD.**, [1925] 2 K. B. 18; 94 L. J. K. B. 562; 133 L. T. 89.

*Annotation:—*Fold. *Carrington Manufacturing Co. v. Saldin* (1925), 133 L. T. 432.

**5223. Equitable mortgage.**—**DOE d. PITT v. HOGG**, No. 5196, *ante*.

**5224. Purchaser of lease let into possession—With consent of lessor—No assignment executed.**—**WEST v. DOBB**, No. 5187, *ante*.

**5225. Assignment on dissolution of partnership.**—**BRISTOL CORPN. v. WESTCOTT**, No. 5216, *ante*.

**5226. Joint possession with others.**—**PEEBLES v. CROSTHWAITE** (1897), 13 T. L. R. 198, C. A.

*Annotations:—*Distd. *Gentle v. Faulkner* (1899), 68 L. J. Q. B. 848; *Richards v. Davies*, [1921] 1 Ch. 90. *Appl. Jackson v. Simons*, [1923] 1 Ch. 373. *Distd. Abrahams v. Macfisheries*, [1925] 2 K. B. 18. *Reid. Mostyn v. Manger* (1901), 17 T. L. R. 199.

**5227. Consent to underlease by occupier.**—Where a lessee, who has covenanted for himself & his assigns that he will not sub-let or part with possession of the premises without the consent of the lessor, sub-lets them, the lessor cannot, if the sub-lessee further sub-lets without his consent, complain of such further sub-letting as a breach of covenant by the lessee. A sub-lessee is not for that purpose an assign.

C. let premises to W., who covenanted for himself & his assigns that he would not sub-let or part with possession without the consent of C. W. sub-let the premises to B., who similarly covenanted not to sub-let or part with possession without the consent of W. B. sub-let to F. with the consent of W. but without the consent of C.:

—*Held*: the fact of W. consenting to the sub-lease to F., & thereby allowing F. to take possession of the premises, did not amount to a parting with the possession by W. or his assign so as to constitute a breach of his covenant not to part with the possession without C.'s consent.—**MACKUSICK v. CARMICHAEL**, [1917] 2 K. B. 581; 87 L. J. K. B. 65; 117 L. T. 372; 33 T. L. R. 497.

**5228. Licence to use premises—Legal possession retained by lessee.**—A lessee who has covenanted not to part with possession of the demised premises does not commit a breach of the covenant by merely permitting another person to have the use of the premises, so long as the lessee retains the legal possession himself.

A lessee had covenanted with his lessor that he would not assign or underlet or part with possession of the demised premises or any part thereof. He assigned his business, that of a motor garage proprietor, to a co., of which he was the managing director & in which he held a controlling interest. He carried on the business of the co. on the premises which were stated to be its registered address & on which the name of the co. was exposed. He kept the key of the premises in his possession. The co. agreed to indemnify him in respect of rates & taxes. The co. appeared in the valuation list for the parish as the occupier of the premises for the purpose of the poor rate. Subsequently a second co. was formed, of which the lessee was the managing director, & which took over the business, assets, & liabilities of the first co. In negotiating for this transfer the lessee stipulated that he should remain in possession as actual tenant of the demised premises:—*Held*: no interest in the demised premises had passed to the cos. or either of them, & there had been no breach of the lessee's covenant not to part with possession of the premises or any part thereof.—**CHAPLIN v. SMITH**, [1926] 1 K. B. 198; 95 L. J. K. B. 449; 134 L. T. 393, C. A.

**Mortgage by sub-demise.**—*See* No. 5233, *post*.

*(c) Of Covenant against Underletting.*

**Covenant against assignment—Whether restriction on sub-letting.**—*See* Sub-sect. 2, B. (a) ii., *ante*.

**Covenant against parting with possession—Whether restriction on sub-letting.**—*See* Sect. 2, sub-sect. 2, B. (b), *ante*.

**5229. Power to sub-let up to one year—Sub-lease for year from future date.**—C. let the Opera-House, Haymarket, to L., who entered into certain covenants, on breach of which a right of re-entry was reserved:—*Held*: letting some stalls in Dec. to hold for one year from Mar. following was not a breach of the covenant not to let these for a longer period than one year.—**CROFT v. LUMLEY** (1858), 6 H. L. Cas. 672; 27 L. J. Q. B. 321; 31 L. T. O. S. 382; 22 J. P. 639; 4 Jur. N. S. 903; 6 W. R. 523; 10 E. R. 1459, II. L.; *affg.* (1856), 5 E. & B. 682, Ex. Ch.

*Annotations:—*Mentd. *Hill v. Cowdery* (1856), 1 H. & N. 380; *Mumford v. Oxford, Worcester & Wolverhampton Ry.* (1856), 1 H. & N. 34; *Dendy v. Nicholl* (1858), 4 C. B. N. S. 376; *Price v. Worwood* (1859), 4 H. & N. 512; *Jeffries v. Alexander* (1860), 8 H. L. Cas. 594; *Avison v. Holmes*, *Penny v. Avison* (1861), 1 John. & H. 530; *Benham v. Keane* (1861), 1 John. & H. 685; *Ward v. Day* (1864), 5 B. & S. 359; *Clough v. L. & N. W. Ry.* (1871), L. R. 7 Exch. 26; *Toleman v. Portbury* (1871), L. R. 6 Q. B. 245; *Morrison v. Universal Marine Insce.* (1873), L. R. 8 Exch. 197; *Davenport v. R.* (1877), 3 App. Cas. 115; *Lancashire Waggon Co. v. Nuttall* (1879), 40 L. T. 291; *James v. Young* (1884), 27 Ch. D. 652; *Ackroyd v. Smithies* (1885), 54 L. T. 130; *Keith, Prowse v. National Telephone Co.*, [1894] 2 Ch. 147; *Re Cotgrave, Mynors v. Cotgrave*, [1903] 2 Ch. 705; *Harman v. Ainalde*, [1904] 1 K. B. 698; *Wulfsberg v. Weardale S.S.* (1916),

85 L. J. K. B. 1717; *Davies v. Bristow*, Penrhos College v. Butler, [1920] 3 K. B. 428; *Hartell v. Blackler*, [1920] 2 K. B. 161; *The Kin Tye Loong v. Seth* (1920), 89 L. J. P. O. 113; *R. v. Paulson*, [1921] 1 A. C. 271; *Abram S.S. Co. v. Westville Shipping Co.*, [1923] A. C. 773.

**5230. Advertisement for sub-tenant.]**—Under a right of re-entry upon underletting an advertisement does not work a forfeiture; but was made the ground for imposing terms.—*GOURLAY v. SOMERSET (DUKE)* (1812), 1 Ves. & B. 68; 35 E. R. 27, L. C.; *subsequent proceedings* (1815), 19 Ves. 429.

*Annotations*.—*Mentd.* *Hare v. Burges* (1857), 5 W. R. 585; *Finch v. Underwood* (1875), 33 L. T. 634; *Hart v. Hart* (1881), 18 Ch. D. 870.

**5231. Lease from year to year.]**—Letting the premises from year to year is a breach of a covenant not to "underlease."—*TIMMS v. BAKER* (1883), 49 L. T. 106.

*Annotation*.—*Mentd.* *Härman v. Ainslie* (1904), 52 W. R. 615.

**5232. Agreement for sale—Purchaser let into possession before completion.]**—*HORSEY ESTATE, LTD. v. STEIGER*, No. 5191, *ante*.

**5233. Mortgage by sub-demise.]**—The lessee of premises created a yearly tenancy under which *pltf.* became tenant & occupier of the premises. On the same day the lessee mortgaged the premises by way of subdemise without obtaining the permission of the lessor. The lease contained a covenant not to assign, underlet, or part with the possession of the premises without the consent in writing of the lessor, & a clause providing for re-entry upon breach of any of the covenants. The lessee, who had been adjudicated *bkpt.*, failing to pay the interest, the *mtgees.* appointed a receiver, to whom *pltf.* paid a quarter's rent due at the following Midsummer. Before the next quarterly rent became due the lessor issued a writ to recover possession of the premises; but the writ, which was served on *pltf.*, as occupier, & others, did not contain a statement of the ground of forfeiture. *Pltf.* after appearance in that action, but before delivery of statement of claim specifying the cause of forfeiture, paid the rent falling due at Michaelmas to the receiver. He refused to pay the rent falling due at Christmas, & the receiver, under the powers given by Conveyancing Act, 1881 (c. 41), distrained. In an action by *pltf.* against the receiver for a wrongful distress:—*Held*: the sub-demise to the *mtgees.*, without the consent of the lessor, constituted a breach of the covenant as to assignment.—*SERJEANT v. NASH, FIELD & Co.*, [1903] 2 K. B. 304; 72 L. J. K. B. 630; 89 L. T. 112; 19 T. L. R. 510, C. A.

*Annotation*.—*Mentd.* *Works Comrs. v. Hull*, [1922] 1 K. B. 205.

**5234. Sale or letting of grass-keep on farm.]**—Where the tenant of a farm covenants not to underlet or permit any other person to use or occupy any part of the demised premises without the written consent of the landlord, the sale or letting by the tenant, without such consent, in the last year of his tenancy of the grass-keep—*i.e.* growing herbage—of his pasture lands for a definite period, is a breach of the covenant, although such sale or letting is in accordance with the usual practice of an outgoing tenant in that part of the country. *Semble*: agistment—*i.e.* the taking in by the tenant of the sheep or

cattle of another to be depastured on the farm at so much per head per week—would not be a breach of the covenant.—*RICHARDS v. DAVIES*, [1921] 1 Ch. 90; 89 L. J. Ch. 601; 124 L. T. 238; 65 Sol. Jo. 44.

**5235. Sub-lease of part of premises—Covenant not to underlet "any part"—Exclusive use of part.]**—*ROE d. DINGLEY v. SALES*, No. 5190, *ante*.

**5236. — — — Letting lodgings.]**—*DOE d. PITT v. LAMING*, No. 5095, *ante*.

**5237. — — —]**—The only point I have to decide is the true construction of the covenant "not to underlet the said premises without the like consent." In my opinion such a covenant does not prohibit the letting of part of the premises, nor indeed the parting with possession of the whole or part of the premises. But it is sufficient for my judgment to say it does not prohibit letting part of the premises. On the evidence I am not satisfied that the whole of the premises ever were let out in parts at any one time. Under the circumstances it is unnecessary for me to decide whether the landlord knew that the premises were so let out & so waived the breach, although I have a shrewd suspicion that he knew the position at all times. It is sufficient to rest my judgment on the above-stated grounds (*SUTTON, J.*).—*WILSON v. ROSENTHAL*, (1906), 22 T. L. R. 233.

*Annotation*.—*Folld.* *Cottell v. Baker* (1920), 64 Sol. Jo. 276.

**5238. — — —]**—A covenant not to underlet premises without the landlord's consent does not include an underletting of part of the premises.—*COTTELL v. BAKER* (1920), 36 T. L. R. 208; 64 Sol. Jo. 276.

**5239. — — — Separate transactions—Resulting in sub-lease of whole.]**—By an agreement dated Mar. 11, 1919, *pltf.* let a house to *deft.* for five years at a rent of £135, *deft.* covenanting not to assign, underlet or part with the possession of the demised premises without the consent of *pltf.*, such consent not to be unreasonably withheld. On Feb. 14, 1920, *deft.*, with the consent of *pltf.*, underlet the top floor of the house for three years at a rent of £90. On Feb. 28, 1920, *deft.*, without the knowledge or consent of *pltf.*, underlet the remainder of the premises on a yearly tenancy, with the option to the under-lessee to continue the tenancy for the residue of the original term, at a rent of £180. In an action for a declaration that the covenant had been broken *pltf.* claimed possession & mesne profits:—*Held*: although the underletting had been effected by two separate transactions, *deft.* had in fact underlet the whole of the premises without the consent of the landlord to the underletting of the whole; therefore the covenant had been broken so as to involve a forfeiture of the lease.—*CHATTERTON v. TERRELL*, [1923] A. C. 578; 92 L. J. Ch. 605; 129 L. T. 769; 39 T. L. R. 589, H. L.; *affg.*, S. C. *sub nom.* *TERRELL v. CHATTERTON*, [1922] 2 Ch. 647, C. A.

*Annotations*.—*Distd.* *Roberts v. Enlayde*, [1924] 1 K. B. 335. *Mentd.* *Elliott v. Boynton*, [1924] 1 Ch. 236.

**5240. — — —]**—A lessee covenanted with his lessor that he would not "underlet or otherwise part with the possession of the premises" without the lessor's consent, the covenant containing a proviso that it should "not apply to any underletting of the said premises or any part thereof for a term not exceeding three years."

**PART XXI. SECT. 1, SUB-SECT. 2.—B. (a).**

**52371. Sub-lease of part of premises.]**—*Semble*: where there is a covenant against sub-letting "the premises hereby leased," the sub-letting of a part is no breach thereof.—*GILLISON*

*v. THOMAS'S ESTATE*, [1920] E. D. L. 116.—S. AF.

*t.* — *Premises not ready for occupation by lessee.]*—*VON SERBINOFF v. MCCARTHY* (1913), 26 W. L. R. 54; 5 W. W. R. 659; 15 D. L. R. 180.—CAN.

*a.* *Covenant not to sub-let—Until loan repaid.]*—A tenant covenanted not to sub-let during the term of his lease while any money borrowed from the landlord which was to be repaid by instalments, remained unpaid. All instalments due having been paid

**Sect. 1.—Right to assign or underlet: Sub-sect. 2, B. (c) & (d), C. (a), (b) & (c), & D. (a) i.]**

The lessee, without the lessor's consent, underlet a portion of the premises to T. on a weekly tenancy, & subsequently underlet the residue of the premises to W. for a term of twenty-one years without the lessor's consent:—*Held*: the two underlettings did not amount to a breach of the covenant, for the underletting to W. was not a breach, not being an underletting of the whole of the premises, nor was the underletting to T. a breach, being for a term of less than three years & therefore excepted from the covenant by the proviso; & the fact that the two underlettings together constituted an underletting of the whole premises made no difference in this respect.—*ROBERTS v. ENLAYDE, Ltd.*, [1924] 1 K. B. 335; 93 L. J. K. B. 593; 130 L. T. 790; 68 Sol. Jo. 441, C. A.

**5241. Licence.—To use part of premises.]—**A licence to use part of demised premises does not constitute an underletting, in that it does not confer any estate or interest in land. Conveyancing & Law of Property Act, 1881 (c. 41), s. 14 (6), does not include a lessee's covenant against sharing the possession of the demised premises, & a lessor cannot, therefore, enforce his right of re-entry in respect of the breach of such a covenant without serving on the lessee the notice prescribed by the sub-sect.—*JACKSON v. SIMONS*, [1923] 1 Ch. 373; 92 L. J. Ch. 161; 128 L. T. 572; 39 T. L. R. 147; 67 Sol. Jo. 262.

*Annotation:—Consd. Russell v. Beecham*, [1924] 1 K. B. 525.

*Compare No. 5192, ante.*

**Assignment of part of premises.]—See Sub-sect. 2, B. (a) iii., ante.**

**5242. Effect of covenant.—Where premises acquired under statutory powers—Metropolitan Water Board.]—**By virtue of the provisions of the Metropolitan Water Act, 1902 (c. 41), the undertaking & property of the Grand Junction Waterworks co., comprising (*inter alia*) leasehold premises demised to the co. by a lease of Mar. 14, 1881, were transferred to & became vested in pltf. board. The lease contained a covenant on the part of the co., its successors & assigns, not to sell, assign, or underlet the demised premises without the previous written consent of the lessors, & also a power for the lessors to re-enter on breach of any of the covenants in the lease. Pltf. board did not require the premises in question, & proposed to underlet them to an intended tenant for the residue of their term less three days. Defts., in whom the leasehold reversion was vested, refused their consent. In an action by pltf. board for a declaration that, notwithstanding the covenant, they were entitled, in exercise of their powers under Metropolitan Water Act, 1902 (c. 41), & the provisions of Public Health Act, 1875 (c. 55), incorporated therein, & the Metropolitan Water Board (Various Powers) Act, 1907 (c. clxxiv), to sell, assign, or underlet the premises without the previous consent in writing of defts.:—*Held*: what pltf. board possessed was not an absolute term of years, but only a lease liable to be determined in the event (*inter alia*) of an assignment or underletting without the previous written consent of defts.; the pltf. board's statutory powers only enabled it to dispose of such estate & interest as it might have, & did not deprive defts. of their

right to re-enter for breach of the covenant against assigning or underletting without the necessary consent; &, consequently, the action failed.—*METROPOLITAN WATER BOARD v. SOLOMON*, [1908] 2 Ch. 214; 77 L. J. Ch. 517; 98 L. T. 712; 72 J. P. 259; 24 T. L. R. 490; 52 Sol. Jo. 443; 6 L. G. R. 594.

**5243. Evidence of breach.—What amounts to—Stranger in possession.]—**Where there is a right of entry given for an assigning or underletting, if a person is found in the premises, appearing as the tenant, it is *prima facie* evidence of an underletting sufficient to call upon deft. to show in what character such person was in possession, as tenant or as servant to the lessee.—*DOE d. HINDLY v. RICKARBY* (1803), 5 Esp. 4, N. P.

**5244. ———.]—**In ejectment on a clause of re-entry in case the tenant should assign, set over, or otherwise let the demised premises, it is not sufficient to prove deft., a stranger in possession of the demised premises, & his declaration that they were demised to him by another stranger. Such evidence would not be sufficient, even if the tenant had covenanted not to part with the possession.—*DOE v. PAYNE* (1815), 1 Stark. 86, N. P.

**Dispositions on death of lessee.]—See Sub-sect. 2, E., post.**

**(d) Of Covenant against Assignment or Underletting without Licence.**

*See Sect. 1, sub-sect. 2, D., post.*

### C. Remedies for Breach.

#### (a) Re-Entry for Forfeiture.

■ Relief from forfeiture generally, *see* Law of Property Act, 1925 (c. 20), s. 146.

**5245. When forfeiture incurred.—Innocent breach of condition.]—**Clause in a lease for three lives, to prevent the lessee, or his exors., etc., from letting above seven years without licence of lessor. The third life being in possession under his father's will, & being his exor., leased for fourteen years:—*Held*: no forfeiture; for he had no notice of the condition.—*NORTHCOTE v. DUKE* (1765), Amb. 511; 2 Eden, 319; 27 E. R. 330, L. C.

*Annotations:—Mentd. Davis v. West* (1806), 12 Ves. 475; *Sanders v. Pope* (1806), 12 Ves. 282; *Bracebridge v. Buckley* (1816), 2 Price, 200; *Reynolds v. Pitt* (1872), 19 Ves. 134; *Howard v. Fanshawe* (1893), 64 L. J. Ch. 666.

**5246. ——— Assignment without consent—Consent justifiably refused.]—FULLER'S THEATRE & VAUDEVILLE CO. v. ROFE**, No. 5266, *post*.

**What amounts to re-entry.]—See Part XXIV., Sect. 1, sub-sect. 4, B. (b), post.**

**5247. Necessity for statutory notice to lessee—Under Conveyancing & Law of Property Act, 1881 (c. 41), s. 14—Liquidation of company.]—HORSEY ESTATE, LTD. v. STEIGER**, No. 5191, *ante*.

**5248. ——— Equitable assignment.]—GENTLE v. FAULKNER**, No. 5194, *ante*.

**5249. ——— Licence to use part of premises.]—JACKSON v. SIMONS**, No. 5241, *ante*.

**5250. ——— Covenant not to part with possession of part of premises.]—RUSSELL v. BEECHAM**, No. 5212, *ante*.

*See, now*, Law of Property Act, 1925 (c. 20), s. 146 (8).

—*See, generally*, Part XXIV., Sect. 1, sub-sect. 4, D. (a) i., *post*.

the tenant sub-let before the whole amount was paid off:—*Held*: the tenant had committed a breach of covenant.—*JONES v. JONES* (1911), 11 S. R. N. S. W. 70; 28 N. S. W. W. N. 12.—*AUS.*

**b. Assignment without consent.]—**An assignment of a lease without consent is not a breach of a covenant not to sub-let without consent.—*COOK & GRAY v. GARPEL* (1900), 19 N. Z. L. R. 286.—*N.Z.*

### PART XXI. SECT. 1, SUB-SECT. 2.—C. (a).

**5246 i. When forfeiture incurred—Assignment without consent—Consent justifiably refused.]—ROYAL TRUST CO. v. BELL (1909), 12 W. L. R. 546.—*CAN.***

**Waiver of forfeiture—What amounts to.]—See Part XXIV., Sect. 1, sub-sect. 5, A., *post*.**

**5251. — Onus of proof.—On lessee.]—A right to re-enter under a lease is not waived by the lessor unless, knowing the facts on which the right arises, he does something unequivocal which recognises the continuance of the lease. The question whether there has been a waiver in such a case is one of law & the *onus* is on the lessee to adduce some evidence of the lessor's knowledge, & proof of an act showing recognition of the tenancy does not throw the *onus* of proving want of knowledge on the lessor.**

Property held under a lease which contained a covenant against underletting without the consent of the lessor, & a clause of forfeiture in case of any breach of covenant, was mortgaged by sub-demise to the trustees of a co.'s debenture stock deed. The deed comprised a number of other properties. The trustees made no inquiry as to whether the lessor's consent was necessary to the sub-demise:—*Held*: the trustees had been guilty of negligence & the ct. was precluded from giving them, under Conveyancing & Law of Property Act, 1892 (c. 13), s. 4, relief against the forfeiture.—**MATTHEWS v. SMALLWOOD**, [1910] 1 Ch. 777; 79 L. J. Ch. 322; 102 L. T. 228.

*Annotations*:—**Apld.** Davenport v. Smith, [1921] 2 Ch. 270. **Apprvd.** Fuller's Theatre & Vaudeville Co. v. Rofe, [1923] A. C. 435. *Refd.* Hurd v. Whaley, [1918] 1 K. B. 448; Atkin v. Rose, [1923] 1 Ch. 522; Samuel v. Dumas, [1924] A. C. 431.

**5252. — — — — —.]—FULLER'S THEATRE & VAUDEVILLE CO. v. ROFE**, No. 5266, *post*.

**5253. — — — — —.]—Whether shifted.]—MATTHEWS v. SMALLWOOD**, No. 5251, *ante*.

**5254. — — — — —.]—FULLER'S THEATRE & VAUDEVILLE CO. v. ROFE**, No. 5266, *post*.

*See, generally*, EVIDENCE, Vol. XXII., pp. 35 *et seq.*

**Production of documents exposing party to forfeiture.]—See DISCOVERY**, Vol. XVIII., p. 165, No. 1187.

#### (b) Damages.

**5255. Whether too remote—Loss by fire—Assignment to turpentine distiller.]—A lease contained a covenant that the lessee should not assign or sub-let the premises, or any part of them, without the consent in writing of the lessor, his exors., administrators, or assigns; but that such consent should not be unreasonably or capriciously withheld to a responsible assignee or sub-tenant. The lessee, without applying for the consent of the lessor, sub-let the premises to a person who intended, as he knew, to use**

them, & who did, in fact, use them as a turpentine distillery. The premises having been burnt down by a fire arising from the use of the premises for the business for which they were taken, an action was brought by the lessor for breach of covenant:—*Held*: the loss caused by the fire was the natural result of the breach of covenant, & was, therefore, recoverable as damages in the action.—**LEPLA v. ROGERS**, [1893] 1 Q. B. 31; 68 L. T. 584; 57 J. P. 55; 9 T. L. R. 23; 37 Sol. Jo. 11; 5 R. 57.

*Annotation*:—*Refd.* Mackusick v. Carmichael, [1917] 2 K. B. 581.

*See, generally*, DAMAGES, Vol. XVII., pp. 95 *et seq.*

**5256. Assessment—Right to claim once & for all—Proof on insolvency of assignor.]—COHEN v. POPULAR RESTAURANTS, LTD.**, No. 5188, *ante*.

*See, generally*, DAMAGES, Vol. XVII., pp. 156 *et seq.*

**5257. Measure of damages—Compensation to landlord.]—WILLIAMS v. EARLE**, No. 5169, *ante*.

*See, generally*, DAMAGES, Vol. XVII., pp. 130 *et seq.*

#### (c) Injunction.

**5258. When granted—Consequential damage irreparable.]—In a doubtful case between landlord & tenant, if pltf., the lessor, seeking relief with respect to a breach, by his lessee of a covenant against assignment of the premises without the proper consent, does not show irreparable damage as a consequence of the breach, this ct. will not interfere in pltf.'s behalf by way of injunction.—**DYKE v. TAYLOR** (1861), 3 De G. F. & J. 467; 30 L. J. Ch. 281; 3 L. T. 717; 25 J. P. 515; 7 Jur. N. S. 83; 9 W. R. 403; 45 E. R. 959, L. JJ. *See, generally*, INJUNCTION, Vol. XXVIII., pp. 355 *et seq.***

#### D. Assignment subject to Landlord's Consent.

##### (a) Construction of Restriction.

###### i. In General.

**5259. Consent not to be unreasonably withheld—Whether covenant by lessor to give consent.]—A lessee covenanted with the lessor not to assign the demised premises without the consent in writing of the lessor, "such consent not being arbitrarily withheld;" & it was provided by the lease that if the lessee should assign the premises without the consent in writing of the lessor, "but such consent is not to be arbitrarily withheld," the lessor might re-enter:—*Held*: there was no covenant by the lessor, either express or implied, not to refuse his consent arbitrarily, but that an**

#### PART XXI. SECT. 1, SUB-SECT. 2.—C. (b).

**5257i. Measure of damages—Compensation to landlord.]—Upon breach of a covenant in a lease not to assign without leave, the lessors are entitled to recover as damages such sum of money as will put them in the same position as if the covenant had not been broken & they had retained the liability of deft. instead of an inferior liability, but in estimating the value of deft.'s liability, allowance must be made for the vicissitudes of business & the uncertainty of life & health.—**MUNRO v. WALLER** (No. 2) (1897), 28 O. R. 574.—**CAN.****

**e. — Rent payable in advance.]—Where, a few days prior to the accruing due of a quarter's rent payable in advance, the lessee assigned without the lessor's leave, in breach of a covenant contained in the lease, the lessor was entitled to recover, as damages for such breach, the rent so**

payable in advance without any deduction for rents realised during the said quarter under new leases created by the lessor, who finding the property vacant, had taken possession.—**PATCHING v. SMITH** (1896), 28 O. L. 201.—**CAN.**

**d. — Nominal—Where no actual damage proved.]—GURUSHANTAPPA v. MALLAVA** (1921), 1 L. R. 45 Bom. 1197.—**IND.**

**e. Right to.]—Where a lease contained a stipulation against sub-letting without the lessor's consent & the lessee violated this stipulation:—*Held*: the stipulation was a reasonable one, & the lessor might either bring an action for damages for its breach, or a suit for an injunction to restrain such sub-letting by the lessee.—**MOHANA v. SHEKH SADODIN** (1870), 7 Bom. A. C. 69.—**IND.****

**f. — Question of fact.]—The question whether a breach of a covenant not to sub-let without consent is one**

which can be compensated in damages must depend upon the particular circumstances of each case.—**HAMMOND v. MANGHAM** (1898), 17 N. Z. L. R. 21.—**N.Z.**

#### PART XXI. SECT. 1, SUB-SECT. 2.—C. (c).

**g. General rule.]—Where a tenant sub-lets, or threatens, or insists on his right to sub-let in breach of a covenant against sub-letting contained in his tenancy agreement, the ct. will grant to a landlord an injunction restraining him from so doing, notwithstanding that such sub-letting would be void.—**WHELAN v. MCKINLEY** (1921), 56 I. L. T. 21.—**IR.****

#### PART XXI. SECT. 1, SUB-SECT. 2.—D. (a) i.

**5259i. Consent not to be unreasonably withheld—Whether covenant by lessor to give consent.]—Where a lease contained a covenant that the lessee would**

**Sect. 1.—Right to assign or underlet: Sub-sect. 2, D.**  
**(a) i., ii. & iii.]**

arbitrary refusal would leave the lessee at liberty to assign without the lessor's consent. *Semble*: an "arbitrary" refusal is equivalent to an "unfair & unreasonable" refusal; & a refusal "upon advice," though the grounds of refusal be not specified, is not "arbitrary."

Two questions arise in this case, the first being whether certain words introduced in the clause prohibiting assignment & whereby pltf. covenants not to assign without licence in writing amount to an absolute covenant on the part of the lessor not to withhold his consent arbitrarily, I am of opinion that they do not constitute a covenant on which the lessee can sue, but are words the only effect of which is to qualify the generality of the phrase into which they are introduced (*KELLY, C.B.*).—*TRELOAR v. BIGGE* (1874), 1 L. R. 9 Exch. 151; 43 L. J. Ex. 95; 22 W. R. 843.

**Annotations:—***Folld. Sear v. House Property & Investment Soc.* (1880), 16 Ch. D. 387. *Distd. Lepia v. Rogers*, [1893] 1 Q. B. 31. *Exp'd. Eastern Telegraph Co. v. Dent*, [1899] 1 Q. B. 835. *Cons'd. Goodwin v. Saturley* (1900), 16 T. L. R. 437; *Andrew v. Bridgman*, [1908] 1 K. B. 196; *Lewis v. Allenby* (1909), *Ltd. v. Pegge*, [1914] 1 Ch. 782; *Mills v. Cannon Brewery Co.*, [1920] 2 Ch. 38; *Fuller's Theatre & Vaudeville Co. v. Rofe*, [1923] A. C. 435; *Re Gibbs & Houlder's Lease*, *Houlder v. Gibbs*, [1925] Ch. 575. *Reid. Hyde v. Warden* (1877), 3 Ex. D. 72; *Bishop v. Taylor* (1891), 60 L. J. Q. B. 556; *Douglas v. Derooy* (1895), 39 Sol. Jo. 484; *Bates v. Donaldson*, [1896] 2 Q. B. 241; *Jenkins v. Price*, [1907] 2 Ch. 229. *Ment'd. Charrington v. Wooder* [1914] A. C. 71; *Westacott v. Hahn*, [1918] 1 K. B. 495.

**5260. ————Qualification of lessee's covenant.]—SEAR v. HOUSE PROPERTY & INVESTMENT SOCIETY, No. 5320, post.**

**5261. ————]—DOUGLAS v. DEROY** (1895), 39 Sol. Jo. 484.

**5262. ————]—Deft. became tenant to pltf. of a house, & he covenanted not to assign the premises without the consent of pltf., such consent not to be unreasonably withheld to a responsible tenant. Pltf. refused his consent to an assignment. Pltf. having sued for rent, deft. counterclaimed for a declaration that the proposed assignee was a responsible person, or alternatively for damages for breach of covenant by pltf. in refusing the consent:—Held: there was no covenant by pltf. to give his consent in the case of a responsible assignee, such words being merely a qualification of deft.'s covenant.—GOODWIN v. SATURLEY (1900), 16 T. L. R. 437.**

**5263. ————]—By two underleases deft. demised to pltf. certain business premises, & pltf. covenanted in each lease in identical terms that they would not assign the demised premises without the previous consent of the lessor, but the lessor covenanted with pltf. not unreasonably to withhold such consent in the case of a respect-**

not assign or sublet without the consent of the lessor, consent not to be arbitrarily withheld by the lessor:—*Held*: the effect of the covenant was, not to impose an obligation on the lessor to give his consent, but to enable the lessee to assign without consent in case the lessor unreasonably withheld it.—*McCALLUM, HILL & Co. v. IMPERIAL BANK* (1914), 39 W. L. R. 343; 7 W. W. R. 981.—*CAN.*

**h. ————"Arbitrary" refusal.]—A person does not arbitrarily refuse consent to an assignment of a lease where he honestly believes that the proposed assignee is not fit to undertake the duties & obligations of a lessee on account of age & physical health, & bases his refusal upon such belief.—*Re CONNOR* (1910), 30 N. Z. L. R. 437.—*N.Z.***

**k. ————]—WHITE v. AKROYD**, [1919] N. Z. L. R. 813.—*N.Z.*

**l. ————]—DUCASSE v. COHEN** (1920), 1 L. R. 48 Calo. 176.—*IND.*

**m. Absolute right to refuse consent.]—Action for cancellation of a lease on the ground that deft., in violation of one of its terms, sub-let the premises without having obtained pltf.'s written consent. Deft. pleaded that pltf. refused their consent without cause, being only ready to grant the same upon the condition that the rent should be increased:—Held: the clause in the lease being absolute, pltf. had the right to refuse consent.—*RACKETT v. CARRIERE*, 23 C. L. T. 117.—*CAN.***

**n. Covenant not to underlet without consent.—Not applicable to assignment.]**

able & responsible assignee. Pltfs. were incorporated in 1913 to take over a small film-renting business, but had power by their memorandum to carry on the business of producers of films. They carried on at first a film-renting business, & shortly afterwards commenced a successful film-producing business as well with a head office in London & separate premises in eleven of the large towns in the United Kingdom. In 1920, owing to the great need of more capital for the increasing business, pltfs. passed special resolutions for voluntary liquidation for the purpose of reconstruction. The new co. was incorporated in 1920 as the Ideal Films, Ltd., with a largely increased capital all fully paid up, & with the view of carrying on exactly the same business as the old co. under the same directors & staff. Deft. was informed of these facts & was offered any further information, but refused the request of the liquidator to consent to the assignment of the underleases to the new co. The grounds alleged for the refusal were that it was a new co. which had done no business so far, & that the contemplated business of film-producing was of a highly speculative character:—*Held*: (1) the qualification of the lessee's covenant taking the shape of an express covenant by the lessor not to withhold his consent unreasonably did not put the lessee in a worse position than if there had been an express qualification in his own, but gave him a further remedy against the lessor; & if consent was unreasonably withheld the lessee could assign without it, & also bring an action for breach of the lessor's covenant; (2) on the facts, deft.'s refusal was unreasonable, not being based on a reasonable apprehension of any change calculated to imperil the solvency of his tenants, & pltfs. were therefore entitled to a declaration of their right to assign the leases without his consent.—*IDEAL FILM RENTING Co. v. NIELSEN*, [1921] 1 Ch. 575; 90 L. J. Ch. 429; 124 L. T. 749; 65 Sol. Jo. 379.

**5264. ————"Arbitrary" refusal—Equivalent to unfair & unreasonable refusal.]—TRELOAR v. BIGGE, No. 5259, ante.**

**Effect of express covenant by lessor.]—See Sect. 1, sub-sect. 2, D. (f) iv., post.**

**5265. No express provision against assigning—Lessor's consent not to be withheld except for good reason—Whether restriction on assignment implied.]—In a contract for a lease the contract did not expressly provide that the lessee should covenant not to assign without the lessor's consent, but did stipulate that the intending lessors should not withhold their consent except for exceptionally strong & good reasons:—Held: the intending lessee was not bound by implication to covenant as suggested, & the co.-pltf. who had been added as derivative assignee of the contract & of the action was entitled to maintain the suit jointly**

**—Re DOYLE & O'HARA'S CONTRACT**, [1899] 1 I. R. 113.—*IR.*

**o. Assignment to child of lessee.]—A lease contained the following clause: "It shall not be lawful for the lessee, his exors., etc., to assign, etc., the demised premises, or any part thereof, during the term, or to devise or bequeath same other than to two of his children without the previous licence or consent in writing of the lessor":—*Held*: an assignment by deed to a child of the lessee without the consent of the lessor was void.—*MAHONY v. MAHONY* (1892), 30 L. R. Ir. 475.—*IR.***

**p. Acceptance of rent from assignee—After assignment without consent—Waiver.]—A lease for years contained a covenant that the lessee was not to assign or sub-let without the consent**

with the lessee.—*DE SOYSA v. DE PLESS POL*, [1912] A. C. 194; 81 L. J. P. C. 126; 105 L. T. 642, P. C.

**5266. Lessee not to object to a sub-letting if his lessor did not—Consent of lessor obtained—Non-disclosure of terms of sub-lease to lessee—Refusal of consent.**—Resp. held premises under a lease containing covenants by him not to sublet any part without consent, & restricting the purposes for which the premises could be used, with a proviso for re-entry upon a breach. He sub-let, with consent, part of the premises to applts., who covenanted similarly as to user, & not to sub-let without the consent of resp. & his lessor, resp. agreeing that he would not object to a sub-letting if his lessor did not do so. Applts. obtained resp.'s lessor's consent to a proposed sub-letting subject to the observance of the covenants in the head lease, & thereupon applied for resp.'s consent, but declined to disclose the terms of the proposed sub-lease. Applts. having executed the sub-lease without resp.'s consent he sued them for a forfeiture under a proviso for re-entry in his lease to them:—*Held*: (1) applts. had broken their covenant, & resp. was entitled to re-enter; (2) to establish waiver of a right of re-entry, the *onus* is on the lessee to adduce some evidence of the lessor's knowledge of the relevant facts, & proof of a recognition of the tenancy does not throw the *onus* of proving absence of knowledge on the lessor.—*FULLER'S THEATRE & VAUDEVILLE CO. v. ROFE*, [1923] A. C. 435; 92 L. J. P. C. 116; 128 L. T. 774; 39 T. L. R. 236, P. C.

**5267. Whether lessee must ask for licence to assign—Even though licence could not be refused.**—*HYDE v. WARDEN*, No. 5755, *post*.

**5268. ———.**—A lease of farm lands contained a clause of forfeiture if (*inter alia*) the lessee should underlet or part with the possession of the demised premises, or any part thereof, without the consent in writing of the lessor first had & obtained, provided always that such consent should not be withheld if the proposed assignee or lessee were a respectable & responsible person:—*Held*: the consent of the lessor was not necessary if the lessee underlet or parted with possession of the premises to a respectable & responsible person.—*BURFORD v. UNWIN* (1885), Cab. & El. 494.

*Annotation*:—*Reld*. *Eastern Telegraph Co. v. Dent*, [1899] 1 Q. B. 835.

**5269. ——— Restrictions forgotten or considered unimportant.**—In a lease for years the lessees covenanted not to underlet, assign, or part with the possession of the premises, or any part thereof, without the consent in writing of the lessors, such consent not to be unreasonably withheld. The lease contained a power to re-enter upon breach of any of the covenants. The lessees, without asking for the consent of the lessors, underlet a part of the premises to a tenant who already occupied under the lessors, & to whom no objection could have been reasonably taken. In an action by the lessors to recover possession of the premises for breach of covenant:—*Held*:

the fact that the breach of covenant had been committed through forgetfulness, or because the lessees thought it unimportant, did not form a ground for giving them equitable relief against forfeiture for breach of the covenant, & *plfss.* were entitled to succeed in the action.—*EASTERN TELEGRAPH CO. v. DENT*, [1899] 1 Q. B. 835; 68 L. J. Q. B. 564; 80 L. T. 459; 15 T. L. R. 296; 43 Sol. Jo. 366, C. A.

*Annotations*:—*Consd.* *De Soysa v. De Pless Pol*, [1912] A. C. 194; *Fuller's Theatre & Vaudeville Co. v. Rofe*, [1923] A. C. 435. *Reld*. *Greville v. Parker*, [1910] A. C. 335; *Abrahams v. MacFisheries*, [1925] 2 K. B. 18.

**Effect of compulsory purchase—Licence not necessary.**—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 279, No. 2066.

## ii. On Whom binding.

*See Sub-sect. 2, G., post.*

## iii. Respectable and Responsible Person.

**5270. Question of fact.**—*DOUGLAS v. DEROY* (1895), 39 Sol. Jo. 484.

**5271. Corporation—Incapable of using premises for purposes intended by lease.**—A lease of land, with an iron furnace & mill & certain water rights for the purpose of working same, contained a covenant on the part of the lessees not to assign or underlet without the consent in writing of the lessors, "such consent not to be unreasonably refused, or refused to a person of responsibility & respectability." The lessees agreed with the corpn. of Barrow-in-Furness to assign to them, & the corpn. agreed with the lessees not to use the water rights for manufacturing iron or steel. The lessors refused to consent to the assignment, on the ground that the corporation could not use the premises for the purposes they were intended:—*Held*: the corpn. was not, under the terms of the lease, "a person of responsibility & respectability" within the meaning of the covenant therein, & the consent had not been unreasonably withheld.—*HARRISON, AINSLIE & CO. v. BARROW-IN-FURNESS CORPN.* (1891), 63 L. T. 834; 39 W. R. 250.

*Annotations*:—*Overd.* *Willmott v. London Road Car Co.*, [1910] 2 Ch. 525. *Consd.* *Re Gibbs & Houlder's Lease*, *Houlder v. Gibbs*, [1925] Ch. 575.

**5272. ——— Limited company.**—A lessee covenanted to use the demised premises for the business of a jobmaster & livery stable keeper, & not to assign or underlet or part with the possession of the premises without the written consent of the lessor, which was not to be withheld in respect of "a respectable & responsible person":—*Held*: the word "person" in the covenant included a corpn., such as a limited co., & a limited co. was capable of being "a respectable & responsible person" within the meaning of the covenant.—*WILLMOTT v. LONDON ROAD CAR CO., LTD.*, [1910] 2 Ch. 525; 80 L. J. Ch. 1; 103 L. T. 447; 27 T. L. R. 4; 54 Sol. Jo. 873, C. A.

**Corporation a person.**—*See, generally*, *CORPORATIONS*, Vol. XIII., pp. 351–353.

**5273. Limited company—Personal covenant to reside on premises.**—By a lease of an hotel the lessee covenanted (a) not to assign without the

in writing of the lessee, for breach of which the lease contained a covenant to re-enter. Disregarding this covenant, the lessee assigned to a party who in his turn assigned to a second party, who again in his turn assigned to a third. These assignments spread over a considerable period of years, during which the rent was regularly paid by the assignees to the agent of the lessor:—*Held*: the forfeiture which had accrued was waived by the acceptance of the rent from the assignees.—

*BAIRD v. GRIEVE* (1882), 6 Nfld. L. R. 452.—NFLD.

**q. Breach of covenant—Lessor standing by—Whether waiver.**—*ASHE v. HOGAN*, [1920] 1 I. R. 159.—IR.

**r. Lease assigned as collateral security—Re-assignment without consent—Whether breach.**—Where the assignees of a lease by way of collateral security are prepared to release their debt & abandon their security, a re-assignment by them without consent

is not a breach of a covenant not to assign or sub-let without consent.—*FORDHAM v. COMMONWEALTH TRUST CO., LTD.* (1915), 8 W. W. R. 164.—CAN.

## PART XXI. SECT. 1, SUB-SECT. 2.—D. (a) iii.

**t. Objection on grounds of nationality—Chinese.**—*WING v. KENRIST* (1921), 21 S. R. N. S. W. 404; 38 N. S. W. W. N. 138.—AUS.

**Sect. 1.—Right to assign or underlet: Sub-sect. 2, D. (a) iii. & iv.]**

previous consent of the lessor, unless such consent should be unreasonably withheld; (b) at all times during the term to reside upon the hotel & personally carry on the business of a licensee victualler thereon. The lessee asked permission to assign to a limited co. which carried on a brewery business. The lessor, being of opinion that an assignment to brewers would depreciate the goodwill, gave an unconditional consent to the assignment to a private person, but required as a condition of giving his consent to an assignment to a brewery firm that the rent should be increased & the term of the lease extended. In an action by the lessee for a declaration that the lessor was not entitled to impose such terms as a condition of giving his consent, the judge, whose attention was not called to the covenant as to personal residence, held that the objection of the lessor was not in itself unreasonable, but that the lessor was acting contrary to Conveyancing & Law of Property Act, 1892 (c. 13), s. 3, in attempting to insist upon an increased rent as a condition of giving his consent, & he declared that the lessee was entitled to assign to the co. without any further consent. The lessor appealed.—*Held*: without expressing any opinion upon either of the points decided by the ct. below, having regard to the covenant as to personal residence, the lease could not be assigned to a limited co.—*JENKINS v. PRICE*, [1908] 1 Ch. 10; 77 L. J. Ch. 41; 97 L. T. 734; 24 T. L. R. 70; 52 Sol. Jo. 43; 14 Mans. 343, C. A.

*Annotations*:—*Refd.* *Evans v. Levy*, [1910] 1 Ch. 452. *Mentd.* *Dyson v. A.-G.* (1910), 103 L. T. 707; *Burghes v. A.-G.*, [1911] 2 Ch. 139; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536.

**5274. Character of assignee—Effect of assignment on other property.]—BRIDEWELL HOSPITAL (GOVERNORS) v. FAWKNER & ROGERS** (1892), 8 T. L. R. 637.

*Annotation*:—*Distd.* *Re Gibbs & Houlder's Lease*, *Houlder v. Gibbs*, [1925] Ch. 575.

**5275. Possibility of depreciating trade of house.]—In 1895** defts. by an underlease demised a public-house known as "The Porcupine" for a term of forty-five years from Mar. 25, 1895, at a certain rent. The underlessee covenanted (*inter alia*) not to assign or underlet the premises without the written licence of defts. & S., the head lessor, first had & obtained, but the licence of defts. should not be arbitrarily withheld provided the licence from S. was obtained, & that the underlessee or the tenant or occupier of the premises for the time being should purchase all malt liquors to be sold or consumed on the premises or to carry on the business of a licensed victualler. There was the usual power of re-entry on breach of any of the covenants. In 1910 the underlease was vested in plffs., who did not reside on the premises, & they contracted to sell the underlease to A., & applied to S. & defts. for their written licence to the transaction. A. was of German origin, but in 1912 had become a naturalised British subject & was in other respects a responsible & respectable person. S. gave his written licence, but defts. refused for these reasons: (a) that the purchaser's name & nationality of origin would tend to depreciate the trade of the house; (b) that in accordance with the regulations or requirements of licensing justices defts. now required that their

licensees should be resident on their licensed premises, & that the purchaser had stated that it was not his intention to reside on the premises; & (c) that the purchaser was interested in other licensed & business premises & consequently could not give the attention & supervision to "The Porcupine" that should be bestowed upon it:—*Held*: plffs. were entitled to assign the underlease to A. without the written licence of defts., for that in the circumstances their refusal was wholly unreasonable.—*MILLS v. CANNON BREWERY CO.*, [1920] 2 Ch. 38; 89 L. J. Ch. 354; 123 L. T. 324; 84 J. P. 148; 36 T. L. R. 513; 64 Sol. Jo. 447.

Assignment without offering responsible or respectable person, *see* No. 5188, *ante*.

**5276. References not satisfactory.]—Pltf.**, who was the assignee of a lease which contained a covenant not to assign without the consent of the lessors, unless such consent should be unreasonably withheld, applied to the lessors for leave to assign to certain persons. The lessors stated that they would not grant any licence to assign, whereupon plff.'s solrs. wrote that in view of this attitude they would advise the issue of a writ forthwith. Before the writ was served the lessors wrote again that they were taking up the proposed assignee's references. Subsequently, the lessors wrote stating that having taken up the references they could not accept the proposed assignees. Thereupon plff. executed an assignment of the premises, & in this action claimed a declaration that the lessors had unreasonably withheld their consent:—*Held*: the lessor's consent had not been unreasonably withheld & the action failed.—*SHANLY v. WARD* (1913), 29 T. L. R. 714, C. A.

**5277. Company engaged in speculative business—Company reconstructed to carry on similar business.]—IDEAL FILM RENTING CO. v. NIELSEN**, No. 5263, *ante*.

**5278. Intention of assignee not to reside on premises—Requirements of licensing justices.]—MILLS v. CANNON BREWERY CO.**, No. 5275, *ante*.

**iv. Unreasonable Withholding.**

**5279. Refusal without stating reasons—Refusal "upon advice."]**—*TRELOAR v. BIGGE*, No. 5259, *ante*.

**5280. No sufficient reason shown for refusal—Lessee liable to heavy rent.]—In a lease** where there is a covenant not to sub-let without consent, but such consent must not be withheld except on reasonable objection, & a heavy rent is reserved by the lease, very strong ground for refusing must be shown, as the refusal throws a heavy burden of rent on the lessees.—*SHEPPARD v. HONG KONG & SHANGHAI BANKING CORPN.* (1872), 20 W. R. 459.

*Annotation*:—*Refd.* *Treloar v. Bigge* (1874), L. R. 9 Exch. 151.

**5281. Failure to give consent within reasonable time.]—LEWIS & ALLENBY** (1909), LTD. v. PEGGE, No. 5321, *post*.

**5282. Other covenants already infringed—For benefit of proposed assignee.]—By an agreement** of Mar. 7, 1900, to grant an underlease of a house & garden, No. 45, M.S. Square, for twenty-one years, it was provided that the lease should contain covenants by the lessees not to carry on any business on the premises, or any part thereof, nor to assign or demise without the consent of the lessor,

**PART XXI. SECT. 1, SUB-SECT. 2.—D. (a) iv.**

**a. Refusal without stating reasons.]—By lease a mineral field was let to**

tenants "under this condition always, that if the tenants shall desire to assign this lease, the assignation shall only be, with the written consent of the proprietor or his successor":—*Held*:

the landlord was entitled to withhold his consent without assigning any reason, or having any reason assigned by him subjected to the review or control of the ct.—*PORTLAND*

"such consent not to be unreasonably or vexatiously withheld," & a power of re-entry for breach of any of the covenants. The lessees assigned the premises comprised in this agreement to H., the predecessor of deft. H. never took up a lease. In 1913 pltf. became entitled to the residue of the term of ninety-nine years granted by the head lease of these premises in 1856, & in Feb. 1914, she discovered that a part of the garden of No. 45 had been walled off & built upon for the purpose of being used in connection with the adjoining premises, No. 44, where an hotel was carried on by deft. S. Her solrs. complained of this & various other irregularities. H. having asked pltf.'s leave to assign the residue of his lease to S., consent was refused on Feb. 6, 1914, without any reason being given. On Mar. 19, 1914, H., without having obtained the consent of pltf., assigned No. 45 to S. for the residue of the term of twenty-one years. It was admitted that S. was a respectable & responsible person. In an action by pltf. claiming to recover possession from S.:—*Held*: (1) pltf. succeeded in the action, as her consent to the assignment had not been unreasonably or vexatiously withheld; (2) H. was bound by the covenant not to assign without consent, inasmuch as such a covenant ran with the land, & bound the assigns, although not mentioned.—*GOLDSTEIN v. SANDERS*, [1915] 1 Ch. 549; 84 L. J. Ch. 386; 112 L. T. 932. *Annotation*:—*Refd. Re Stephenson, Poole v. Stephenson*, [1915] 1 Ch. 802.

**5283. Refusal for collateral reasons.—To obtain surrender of lease.—No personal objection to proposed assignee.**—A lease contained a covenant by the lessee not to assign without licence; & the lessor covenanted not to refuse his licence unreasonably or vexatiously. The lessee contracted to assign his lease to pltf. "subject to the landlord's approval." The lessor on being applied to for his licence refused to give it, not from any personal objection to the proposed assignee, but because he wished himself to buy up the lease in order to rebuild the premises. The lessee having failed to obtain the lessor's licence, surrendered the lease to the lessor for the same price for which he had agreed with pltf. In a bill by pltf. against the lessor & lessee for specific performance of the contract to assign the lease to him:—*Held*: (1) the reference to the landlord's approval in the contract did not throw upon the lessee the duty of taking legal proceedings to oblige the lessor to give his licence; (2) having used all reasonable efforts to induce the lessor to consent, he was at liberty to consider the contract at an end & make his own terms with the lessor. *Qu.*: whether the refusal on the part of the lessor in the circumstances was unreasonable & vexatious.—*LEHMANN v. MCARTHUR* (1868), 3 Ch. App. 496; 37 L. J. Ch. 625; 32 J. P. 660; 16 W. R. 877; *sub nom. LECHMANN v. MCARTHUR*, 18 L. T. 806, L. J.J.

*Annotations*:—*Refd. Evans v. Davis* (1878), 10 Ch. D. 747; *Day v. Singleton*, [1899] 2 Ch. 320.

**5284. ——— Proposed assignee a responsible person.**—A lessee covenanted with her lessor not to assign the demised premises, or any part thereof, for the whole or any part of the term, without having first obtained a written licence signed by the lessor, such licence not to be unreasonably withheld in the case of any respectable & responsible person who might be the proposed assignee.

The lease also contained a proviso for re-entry for breach of covenant. Pltf., the assignee of the lessor, being desirous of obtaining possession of the premises, commenced negotiations with the lessee for the surrender of the lease. The lessee made an offer to pltf.'s agent to sell her interest to pltf. for £400, but five days later, without further communication with pltf., contracted to assign her interest for the same sum to deft., a respectable & responsible person. The lessee had no reason or preferring deft. to pltf. Pltf. refused to give his licence for the assignment, & brought an action against the deft., to whom the lessee had assigned the lease, for recovery of possession of the premises on the ground of forfeiture by breach of covenant:—*Held*: pltf. had unreasonably withheld his licence within the meaning of the covenant.—*BATES v. DONALDSON*, [1896] 2 Q. B. 241; 65 L. J. Q. B. 578; 74 L. T. 751; 60 J. P. 596; 44 W. R. 659; 12 T. L. R. 485, O. A.

*Annotations*:—*Apld. Re Winfrey & Chatterton's Agreement*, [1921] 2 Ch. 7. *Consd. Re Gibbs & Houlder's Lease*, *Houlder v. Gibbs*, [1925] Ch. 575. *Refd. Re Meters & G. W. Ry.* (1901), 84 L. T. 515; *Mills v. Cannon Brewery Co.*, [1920] 2 Ch. 38.

**5285. ————**—*Re WINFREY & CHAT-  
TERTON'S AGREEMENT*, No. 5326, *post*.

**5286. ——— Proposed assignee tenant of adjoining premises held from same landlord.**—In a lease for years the lessees covenanted not to assign the premises, or any part thereof, without the consent in writing of the lessor, such consent not to be withheld unreasonably in the case of a respectable & responsible person or corpn. The lessees agreed to assign, subject to the consent of the lessor, to R., Ltd., who were in possession of adjoining premises on a yearly tenancy from the same lessor. The lessor refused to give his consent to the assignment on the ground that he would lose good tenants of the adjoining premises, & would have great difficulty in reletting them. The judge held that the licence had been unreasonably withheld, & that the lessees were free to assign:—*Held*: the refusal of the licence was unreasonable, as the reason given for it was one which had no reference either to the personality of the proposed assignee or to the subject matter of the lease.—*Re GIBBS & HOULDER BROTHERS & CO., LTD.'S LEASE*, *HOULDER BROTHERS & CO., LTD. v. GIBBS*, [1925] Ch. 575; 94 L. J. Ch. 312; 133 L. T. 322; 41 T. L. R. 487; 69 Sol. Jo. 541, O. A.

**5287. ——— That house might remain a free house.—Proposed assignment to brewers.**—The vendor was the lessee of a public-house. The lease under which the property was held contained a covenant against assigning without the consent of the lessor, with the usual qualification as to refusal in the case of a respectable & responsible tenant. The vendor agreed to sell the property to the purchasers, who were brewers, under an open contract. The lessor refused to give his consent to the assignment, stating that the main ground of his objection was that he desired the house to remain a free house. Upon summons taken out by the purchasers asking for a declaration that a good title had not been shown:—*Held*: the title was not one which could be forced upon an unwilling purchaser.—*Re MARSHALL & SALT'S CONTRACT*, [1900] 2 Ch. 202; 69 L. J. Ch. 542; 83 L. T. 147; 48 W. R. 508; 44 Sol. Jo. 429.

(DUKE) v. BAIRD & Co. (1865), 4 Macph. (Ct. of Sess.) 10; 38 Sc. Jur. 13.—SCOT.

b. ————]—A clause in a lease provided that "the lessee is not

entitled to sub-let the premises or any part of them except to such tenants & for such purposes as the lessor may approve":—*Held*: the lessor was entitled to refuse his approval to any sub-tenant proposed without assigning

reasons.—*THOMPSON v. SEALE* (1902), 19 S. C. 294.—S. AF.

c. *Proposed assignment injurious to adjoining property.*—*CAMILL & Co. v. DROGHEDA CORPN.* (1924), 58 L. T. 26.—IR.

*Sect. 1.—Right to assign or underlet: Sub-sect. 2, D. (a) iv., (b) & (c).]*

**5288. Conditional refusal—Conditional upon disclosure of purpose of underlease.]**—Where a landlord occupies part of a building with only one entrance & lets off another part with a covenant by the tenant not to assign or underlet without the landlord's licence, such licence not to be "unreasonably withheld," it is reasonable for the landlord, before granting a licence to underlet, to ask for what purpose the portion to be underlet is to be used, & to stipulate for a similar covenant between the undertenant & himself.—*Re SPARK'S LEASE, BERGER v. JENKINSON*, [1905] 1 Ch. 456; 74 L. J. Ch. 318; 92 L. T. 537; 53 W. R. 376.

**5289. — Conditional upon non-user of premises to compete with lessor.]**—Defts., who carried on business as a cinematograph theatre, granted a lease of premises adjoining their own, the lessees not to assign their lease without consent in writing of the lessors, such consent not to be "unreasonably or vexatiously" refused. The lessees desired to assign, but the lessors refused to consent thereto, except on condition of the insertion in the lease of a covenant not to use the demised premises for the purposes of a cinematograph theatre:—*Held*: in the circumstances the consent was "unreasonably" refused.—*PREMIER KINKS, LTD. v. AMALGAMATED CINEMATOGRAPH THEATRES, LTD.* (1912), 56 Sol. Jo. 536.

*Annotation*:—*Reid. Mills v. Cannon Brewery Co.*, [1920] 2 Ch. 38.

**5290. — Conditional upon disclosure of terms of underlease.]**—*FULLER'S THEATRE & VAUDEVILLE CO. v. ROFE*, No. 5266, *ante*.

**5291. — Conditional upon covenant by underlessee not to assign.]**—*Re SPARK'S LEASE, BERGER v. JENKINSON*, No. 5288, *ante*.

Consent conditional upon payment of a fine, *see* Sub-sect. 2, D. (b), *post*.

*(b) Consent Conditional upon Payment of Fine.*

*See* Law of Property Act, 1925 (c. 20), ss. 144, 205 (xxiii).

**5292. What amounts to a fine—Deposit of money—As security for performance of contract.]**—A building lease, which had been granted under a building contract relating also to other property, contained an absolute covenant not to assign without licence. The lessors on being applied to for a licence to assign refused to grant it unless the lessee would deposit with them £2,000 as a further security for the performance by him of the unperformed part of the building contract:—*Held*: the deposit with the lessors of a sum of money which, if the lessee performed the building contract, would revert to him, was not payment of a "fine or sum of money in the nature of a fine" within the meaning of the Conveyancing & Law of Property Act, 1892 (c. 13), s. 3, & the lessors might lawfully require such a deposit as a condition for granting the licence.—*Re COSH'S CONTRACT*, [1897] 1 Ch. 9; 66 L. J. Ch. 28; 75 L. T. 365; 45 W. R. 117; 41 Sol. Jo. 64, C. A.

*Annotation*:—*Consd. Waite v. Jennings* (1906), 95 L. T. 1.

**5293. — Covenant by assignee—To pay rent & perform covenants of lease.]**—(1) A lease contained a condition against assigning without licence, which was not to be refused unreasonably, but there was no provision as to payment of a fine in respect of such a licence. Upon an application by the holder of the lease for a licence to assign to deft. in this action *pltf.*, as lessor, required as a condition of granting the licence that deft. should covenant to pay the rent & perform the

covenants of the lease during the residue of the term. The licence to assign was by deed, to which deft. was a party, & in which he entered into the stipulated covenant. Deft. subsequently assigned the lease with licence. In an action on deft.'s covenant to recover from him one quarter's rent due from but unpaid by the tenant:—*Held*: whether such a covenant as deft. entered into was or was not in the nature of a fine within Conveyancing & Law of Property Act, 1892 (c. 13), s. 3, the statute, not having made the payment of a fine illegal, afforded no defence to an action on deft.'s covenant. *Semble*: a covenant which secures to a lessor no sum of money beyond the rent to which he is entitled under the lease is not in the nature of a fine within Conveyancing & Law of Property Act, 1892 (c. 13), s. 3.

(2) It may well be that, as between the parties to the lease, the lessee would have been entitled to disregard the absence of a licence, if the lessor refused to grant one unless & except upon the condition of a covenant for payment of rent during the term (*VAUGHAN WILLIAMS, L.J.*).—*WAITE v. JENNINGS*, [1906] 2 K. B. 11; 75 L. J. K. B. 542; 95 L. T. 1; 54 W. R. 511; 22 T. L. R. 510, C. A. *Annotations*:—*As to* (2) *Appld. Andrew v. Bridgman*, [1908] 1 K. B. 596. *Consd. West v. Gwynne* (1911), 80 L. J. Ch. 578.

**5294. — Covenant securing money to lessor—To no greater extent than rent due under lease.]**—*WAITE v. JENNINGS*, No. 5293, *ante*.

**5295. — Demand for increased rent.]**—The lessee of a hotel, who had covenanted not to assign without the lessor's consent unless "unreasonably withheld," asked permission to assign to a certain brewery. The lease had twelve years to run. The lessor, who entertained a strong opinion that a brewery tie would depreciate the value of the hotel, gave an unconditional consent to the assignment to a private person who would carry on the business as a free house, & added, "but if you desire to assign the tenancy to a brewery firm, then the rent must be increased by £25 *per annum* & the term extended from twelve to twenty-one years." His whole object in imposing these conditions was to recoup himself for the depreciation that would be caused by the tie:—*Held*: (1) the demand of an increased rent as a condition for consenting to an assignment to a brewery was a demand of a "fine or sum of money in the nature of a fine," & being as such directly contrary to the proviso precluding any such demand imported into the lease by Conveyancing & Law of Property Act, 1892 (c. 13), s. 3, was unreasonable. The consent had therefore been "unreasonably withheld," & the lessee was entitled to assign to the brewery without further consent; (2) the lessee, having no cause of action against the lessor for unreasonably withholding his consent, was not entitled to the costs of an action to obtain the above declaratory judgment.—*JENKINS v. PRICE*, [1907] 2 Ch. 229; 76 L. J. Ch. 507; 23 T. L. R. 608; *on appeal*, [1908] 1 Ch. 10, C. A.

*Annotations*:—*As to* (2) *Folld. Evans v. Levy*, [1910] 1 Ch. 452. *Reid. Burghes v. A.-G.*, [1911] 2 Ch. 139; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536.

**5296. Whether fine illegal—Effect of Conveyancing Act, 1892 (c. 13), s. 3.]**—*WAITE v. JENNINGS*, No. 5293, *ante*.

**5297. —**—*]*—Above sect. does not make illegal the payment & acceptance of a fine for the lessor's consent to the assignment of a lease which contains a covenant against assignment without consent. If such a payment is made by a lessee, not under protest, he cannot recover it back. If consent is refused except on payment, the lessee

is entitled to disregard the covenant & assign without consent.—**ANDREW v. BRIDGMAN**, [1908] 1 K. B. 596; 77 L. J. K. B. 272; 98 L. T. 656; 52 Sol. Jo. 148, C. A.

*Annotation*:—**Fold**. *West v. Gwynne*, [1911] 2 Ch. 1.

**5298.** ———.]—(1) Above sect. applies to all leases whether executed before or after the commencement of the Act, & in the absence of express provision to the contrary, engrafts upon every covenant in any such lease against assignment or underletting without consent a proviso that no money shall be payable in respect of such consent. If a lessor refuses to give a consent except upon payment, the lessee is relieved from obtaining his consent & can make a valid assignment or underlease without it.

(2) But he is also entitled to bring an action for a declaration to that effect, in which costs will be given him though no relief is asked for beyond the declaration.—**WEST v. GWYNNE**, [1911] 2 Ch. 1; 80 L. J. Ch. 578; 104 L. T. 759; 27 T. L. R. 444; 55 Sol. Jo. 519, C. A.

*Annotations*:—*Generally*, **Mentd.** *Henshall v. Porter*, [1923] 2 K. B. 193; *Re Clemmons Aluminium* (1924), 94 L. J. K. B. 487; *Re Snowdown Colliery*, South Eastern Coalfield Extension Co. v. Snowdown Colliery Co. (1925), 94 L. J. Ch. 305.

*See, now*, Law of Property Act, 1925 (c. 20), s. 144.

**5299. Effect of imposing condition—Lessee may assign without consent.**—**JENKINS v. PRICE**, No. 5295, *ante*.

**5300.** ———.]—**ANDREW v. BRIDGMAN**, No. 5297, *ante*.

**5301.** ———.]—**WEST v. GWYNNE**, No. 5298, *ante*.

What amounts to unreasonably withholding consent, *see* Sub-sect. 2, D. (a) iv., *ante*.

**5302. Effect of payment by lessee—Whether recoverable—Payment not under protest.**—**ANDREW v. BRIDGMAN**, No. 5297, *ante*.

Effect of payment under protest, *see* CONTRACT, Vol. XII., pp. 561, 562

**5303. Agreement to pay fine—Out of consideration for assignment—How enforced—Action for money had & received.**—A tenant having agreed with his landlady that if she would accept another for her tenant in his place, he being restrained from assigning the lease without her consent, he would pay her £40 out of £100 which he was to receive for the goodwill, if her consent were obtained; & having received the £100 from the new tenant, who was cognisant of this agreement; is liable to the landlady in an action for money had & received for her use; the consideration being executed, & therefore the case being taken out of Stat. Frauds, as a contract for an interest in land.—**GRIFFITH v. YOUNG** (1810), 12 East, 513; 104 E. R. 201.

*Annotations*:—*Consd.* *Cocking v. Ward* (1845), 1 C. B. 858. *Refd.* *Green v. Saddington* (1857), 7 E. & B. 503. *Mentd.* *Cheshire v. Vaughan*, [1920] 3 K. B. 240.

**5304.** ———.]—**Whether writing necessary.**—**GRIFFITH v. YOUNG**, No. 5303, *ante*.

*See, generally*, CONTRACT, Vol. XII., pp. 118 *et seq.*

*See, now*, Law of Property Act, 1925 (c. 20), s. 40.

#### (c) Application for Licence.

**5305. Who must apply—Assignor.**—(1) If the vendor of a lease, in which is a covenant not

to assign, contract to assign his interest, it is incumbent on him, & not on the purchaser, to procure the lessor's licence for the assignment.

(2) *Semble*: if a covenant not to assign contain an exception in favour of assignment by will, exors. claiming under the will are not within the exception, so as to be at liberty to sell for payment of debts without licence of the lessor.—**LLOYD v. CRISP** (1813), 5 Taunt. 249; 128 E. R. 685.

*Annotations*:—*As to* (1) *Refd.* *Mason v. Corder* (1816), 2 Marsh. 332; *Smith v. Butler* (1900), 48 W. R. 583. *Generally*, *Refd.* *Walls v. Atcheson* (1826), 3 Bing. 462. *Mentd.* *McNeill v. Reid* (1832), 9 Bing. 68.

**5306.** ———.]—(1) A lease contained a covenant not to assign without the licence of the lessor, with a proviso for re-entry on breach. The lessee became bkpt., & the assignees assigned to deft., who contracted to sell the term to pltf. Pltf. required deft. to obtain the licence of the lessor, which deft. failed to do:—*Held*: deft. was bound to obtain the landlord's licence to assign, as the assignment by the assignees was no breach of the covenant.

(2) Deft. being in possession under a lease, under covenant not to assign without the lessor's assent, agreed to sell the residue of her term to pltf., he paying £750, part of the purchase-money, before the completion of the purchase. If the lessor's assent to the assignment could not be obtained, deft. was to be at liberty to rescind the contract, & was thereupon to return the £750. Pltf. paid the £750, & afterwards endeavoured to obtain a new lease; in this endeavour he was assisted by deft. The lessors offered a new lease for the same term & at the same rent, but containing different covenants, & refused to give their assent to the assignment of the term. Pltf. declined to accept this lease & brought an action to recover the £750:—*Held*: the application for a new lease did not operate as a rescission of the original contract, & therefore, pltf. was entitled to have the lessors' assent to the assignment, or failing that to recover the deposit.—**WINTER v. DUMERQUE** (1866), 12 Jur. N. S. 726; 14 W. R. 699, Ex. Ch.

**5307. Duty of assignor—Must use best endeavours—Not bound to institute proceedings.**—**LEHMANN v. MCARTHUR**, No. 5283, *ante*.

**5308.** ———.]—**DAY v. SINGLETON**, No. 5310, *post*.

**5309. Effect of unsuccessful application—Agreement containing clause for rescission if licence refused.**—**WINTER v. DUMERQUE**, No. 5306, *ante*.

**5310.** ———.]—**Refusal induced by vendor—Assignee's right to damages.**—A purchaser of leasehold property, which the vendor cannot assign without a licence from his lessor, is entitled to damages, beyond return of the deposit, with interest & expenses, for loss of his bargain by reason of the vendor's omission to do his best to procure such licence.

A vendor agreed with a purchaser for the sale of a leasehold hotel, subject to the consent of the lessor being obtained to the assignment of the lease, & the purchaser paid a deposit on his purchase-money. The vendor died without having completed his contract, & the purchaser then brought an action against his legal personal representative for specific performance. Deft., being desirous of freeing the vendor's estate from the action, induced the lessor to refuse his consent to the assignment, which the lessor accordingly did, &

#### PART XXI. SECT. 1, SUB-SECT. 2.— D. (c).

**53051. Who must apply—Assignor.**—If a lessee agrees to assign his lease for J.—VOT. 1111.

a valuable consideration, but the lease is only assignable with the lessor's consent, it is the duty of the lessee, & not of the assignee, to obtain such consent; & it must be obtained before

the lessee can on tender of the assignment demand payment therefor.—**MAAS v. MCMAHON** (1921), 62 D. L. R. 317; 17 Alta. L. R. 60; [1921] 3 W. W. R. 378.—**CAN.**

*Sect. 1.—Right to assign or underlet: Sub-sect. 2, D. (c), (d), (e) & (f) i. & ii.]*

the purchaser thus lost his bargain. Thereupon the purchaser amended his action by claiming damages & return of the deposit:—*Held*: *pltf.* was entitled, not only to the return of his deposit, with interest & costs of investigating title, but also to the damages he had sustained by the loss of his bargain through the omission of *deft.* to obtain the lessor's consent.—*DAY v. SINGLETON*, [1899] 2 Ch. 320; 68 L. J. Ch. 593; 81 L. T. 306; 48 W. R. 18; 43 Sol. Jo. 671, C. A.

*Annotations*:—*Distd. Pease v. Courtney*, [1904] 2 Ch. 503. *Reid. Smith v. Butler* (1900), 48 W. R. 583; *Re Daniel, Daniel v. Vassall*, [1917] 2 Ch. 405; *Braybrooks v. Whaley*, [1919] 1 K. B. 435.

**5311. Effect of non-application—Agreement to assign unenforceable by assignor.**—A. assigned his effects to B. for the benefit of his creditors, & among other things, a lease of a farm from C. which contained a covenant not to assign, without C.'s consent in writing. B. agreed to assign the lease to D.'s nominee; D. to pay the expense of the assignment, & £180 on a day certain for the improvements & manure; to take the crops at a valuation; & to have immediate possession:—*Held*: to support an action on this agreement, B. must show that he had obtained C.'s consent in writing to the assignment; though D. had taken possession of the premises, had cut down the crops, & had paid part of the £180 to B.—*MASON v. CORDER* (1816), 7 Taunt. 9; 2 Marsh. 332; 129 E. R. 4.

*Annotation*:—*Mentd. Ferry v. Williams* (1817), 1 Moore, C. P. 498.

(d) *Form of Licence.*

**5312. Necessity for writing—Lease providing for written licence.**—A lessee for years upon condition that he shall not alien any part without licence in writing from the lessor obtained licence in writing to alien part.

The licence of its nature cannot be without writing (*per CUR.*).—*BELLAMY'S CASE* (1605), 6 Co. Rep. 38 a; 77 E. R. 309; *sub nom. WALKER v. BALLAMIE*, Cro. Jac. 102.

**5313. ——— Whether parol licence sufficient.**—*ROR d. GREGSON v. HARRISON*, No. 5357, *post*.

**5314. ——— Effect of fraud.**—Proviso in a lease that lessees should not demise the premises, without a licence in writing. A parol licence to underlet insufficient; but if such licence is given as a snare, & under circumstances of fraud, this ct. will relieve.—*RICHARDSON v. EVANS* (1818), 3 Madd. 218; 56 E. R. 490.

*Annotation*:—*Consd. Millard v. Humphreys* (1918), 62 Sol. Jo. 505.

**5315. ——— Walver.**—A lease contained a covenant by the lessee not to assign the premises without the consent in writing of the lessor. At an interview between the lessor, the lessee, & *deft.*, the lessor, by words & conduct,

led both the lessee & *deft.* to believe that he accepted *deft.* as assignee of the lease. *Deft.* thereupon entered into obligations with the lessee to the knowledge of the lessor. At the interview there was also handed to *deft.* by the lessee, in the presence of the lessor, a letter from the lessor to the lessee giving the lessee an option of renewing the lease or of assigning it. The lease having been assigned to *deft.*, the lessor brought an action for the recovery of the premises, on the ground that his written consent to the assignment had not been obtained:—*Held*: (1) there was a waiver of the provision in the lease that there should be a written consent to the assignment of the lease; (2) the option was equivalent to a consent in writing to any approved tenant, that is, to a respectable & responsible tenant within the meaning of the lease.—*MILLARD v. HUMPHREYS* (1918), 62 Sol. Jo. 505.

**5316. What amounts to a licence—Letter giving option to renew or assign.**—*MILLARD v. HUMPHREYS*, No. 5315, *ante*.

**5317. Licence to assign to person named—Whether successive assignments valid.**—The predecessor in title of *pltf.* let about thirty-three acres of land to one Bradburn, who covenanted amongst other things, that he, his exors., administrators, or assigns, or any of them, should not during the term demise, let, assign, make over, or part with the possession of the lands (except to the extent of three acres therein described), without the licence & consent in writing of the lessor, his heirs or assigns. There was a proviso in the lease for re-entry upon breach of a covenant. After the passing of Law of Property Amendment Act, 1859 (c. 35), the lessor gave Bradburn a licence in writing to assign, transfer, & set over the premises to *deft. Jones*, his exors., administrators, & assigns, upon condition that Jones would not at any time assign or transfer the premises without the consent of the lessor, his heirs or assigns. Jones assigned the three excepted acres to another *deft.*, Edge, for the remainder of the term, & let the rest of the premises by the year to another *deft.*, Jones; this Jones let the thirty acres to Edge by the year. There was no other licence by the lessor but that mentioned. In an action of ejectment to which *deft. Edge* alone appeared & defended only as to the excepted three acres:—*Held*: the words of the licence did not justify the letting of the thirty acres without a further licence; & this breach of covenant created a forfeiture of the whole of the premises let under the original lease.—*EYTON v. JONES* (1870), 21 L. T. 789.

**5318. Licence to joint lessees.**—A lease was made to A., B. & C. upon condition that they nor any of them should alien without licence; & the lessor made a licence that A., B. or C. might alien; same is a good licence, notwithstanding the uncertainty; & thereby they have several authorities to alien: as a letter of attorney to A. or B.

**5311 i. Effect of non-application—Agreement to assign unenforceable by assignor.**—Where a lease contained a condition forbidding sub-letting or transferring, the lessee entered into agreement for a sub-lease, without obtaining a licence to sub-let:—*Held*: he could not maintain an action for breach of the agreement unless he had obtained such licence before the commencement of the action.—*HAIMES v. JOHNSTON* (1879), 5 V. L. R. 398.—*AUS.*

**PART XXI. SECT. 1, SUB-SECT. 2.—D. (d).**

d. *Necessity for writing.*—*BOWEN*

*v. WRATTEN* (1892), 18 V. L. R. 371.—*AUS.*

e. *Whether parol licence sufficient.*—In ejectment, for breach of covenant not to assign without licence, against the assignee of the lessee, *pltf.*'s oral assent to the assignment before *deft.* entered into possession is no defence.—*CARTER v. HIBBLETHWAITE* (1856), 5 C. P. 475.—*CAN.*

f. *———*—A lease containing an agreement prohibiting alienation without the consent in writing of the landlord first obtained, was assigned by deed:—*Held*: the assignment was void, although the landlord had verbally assented to the assignment.—

*DONOUGHMORE (EARL) v. FORREST* (1871), 1 R. 5 C. L. 443.—*IR.*

g. *Consent indorsed on lease—Not on assignment.*—A lease contained a clause that the lessee should not assign the premises without the consent in writing of the lessor to be indorsed on the lease. The lessee assigned, with the contemporaneous consent in writing of the lessor, which was indorsed on the lease, but not on the assignment:—*Held*: the assignment was valid.—*Re ULSTER PERMANENT BUILDING SOCIETY & JUNIOR ARMY & NAVY STORES* (1884), 13 L. R. Ir. 67.—*IR.*

h. *Consent indorsed on assignment—By heir of original lessor.*—

to make livery; but a gift to A. or B. is void for the uncertainty. But if a licence be to A. & B. or C. some conceived that A. or B. might alien; but not C. *Et e converso*.—LEEDS & CROMPTON'S CASE (1586), Godb. 93; 78 E. R. 57.

Annotation:—*Consd.* Dumptor's Case (1603), 4 Co. Rep. 119 b.

(e) *Costs of Licence.*

See Law of Property Act, 1925 (c. 20), s. 144.

Who must apply for licence, see Sub-sect. 2, D. (c), *ante*.

(f) *Effect of Unreasonable Withholding.*

i. *Right to Assign.*

**5319. General rule—Lessee may assign without consent.**—TRELOAR v. BIGGE, No. 5259, *ante*.

**5320. ——— Such assignment not a breach of covenant.**—A covenant by a lessee not to assign without the consent of the lessor was followed by the words "but such consent not to be unreasonably withheld":—*Held*: the latter words do not amount to a covenant on the part of the lessor not to withhold his consent unreasonably, but to a qualification only of the covenant entered into by the lessee, so that if the consent be unreasonably withheld an assignment without consent does not amount to a breach of covenant.—SEAR v. HOUSE PROPERTY & INVESTMENT SOCIETY (1880), 16 Ch. D. 387; 50 L. J. Ch. 77; 43 L. T. 531; 45 J. P. 204; 29 W. R. 192.

Annotations:—*Fold.* Goodwin v. Saturley (1900), 16 T. L. R. 437. *Refd.* Andrew v. Bridgman, [1908] 1 K. B. 596; Westacott v. Hahn, [1917] 1 K. B. 605; Fuller's Theatre & Vaudeville Co. v. Rofo, [1923] A. C. 435.

**5321. ———**—A limited co. demised a residential flat for a term of years, & the lessee covenanted not to assign or underlet the premises without the consent of the co., such consent not to be withheld in the case of a respectable & responsible person. On Apr. 3, 1913, the lessee applied to the secretary of the co. for leave to sub-let to H., a respectable & responsible person, & asked to know by Apr. 14, as H. wanted possession on that date. The secretary forgot to communicate with his directors. On Apr. 14, the lessee, not having received a reply, sub-let to H. & gave him possession. In an action by the co. to recover possession for breach of the covenant:—*Held*: (1) there had been no breach of the covenant, for that the consent of the co. was a pure formality & had been withheld; (2) the period from Apr. 3 to 14, was in the circumstances a reasonable time to wait for a reply—LEWIS & ALLENBY (1909), LTD. v. PEGGE, [1914] 1 Ch. 782; 83 L. J. Ch. 387; 110 L. T. 93; 58 Sol. Jo. 155.

**5322. ———**—WAITE v. JENNINGS, No. 5293, *ante*.

**5323. ———**—ANDREW v. BRIDGMAN, No. 5297, *ante*.

**5324. ———**—WEST v. GWYNNE, No. 5298, *ante*.

**5325. ———**—MILLS v. CANNON BREWERY CO., No. 5275, *ante*.

**5326. ———**—A tenancy agreement of a house to plff. contained a provision that the tenant was not to assign, underlet, or part with the

possession of the house without the consent of the landlord, which consent was "not to be unreasonably withheld in the case of a respectable & responsible person." Deft. purchased the reversion, thus becoming the landlord, intending to occupy the house herself, & she alleged a bargain with plff. for the purchase of the house, but plff. denied that the matter has gone beyond negotiation. Plff. assigned her interest to a respectable & responsible person, but deft. refused to consent to the assignment:—*Held*: the refusal was unreasonable, & plff. was entitled to assign without licence.—*Re* WINFREY & CHATTERTON'S AGREEMENT, [1921] 2 Ch. 7; *sub nom.* *Re* WINFREY & CHATTERTON'S AGREEMENT, CHATTERTON v. EVISON, 90 L. J. Ch. 417; 125 L. T. 159; 37 T. L. R. 428; 65 Sol. Jo. 379.

Annotation:—*Refd.* *Re* Gibbs & Houlder's Lease, Houlder v. Gibbs, [1925] Ch. 575.

**5327. Where lessor covenants not to withhold consent unreasonably—Lessee may assign without consent.**—IDEAL FILM RENTING CO. v. NIELSEN, No. 5263, *ante*.

**5328. Lessee can make a good title—Assignee compelled to accept it.**—By the lease under which plff. held, there was a covenant that the lessee would not assign or underlet without the licence in writing of the lessor, but the licence was not to be withheld in the case of the lessee obtaining a respectable & responsible person as tenant. Deft. was a respectable & responsible tenant, but the lessor declined to consent to the underlease, unless a certain undertaking was given by deft. This refusal to consent was also pleaded as a defence to an action by plff. for specific performance of the agreement:—*Held*: deft. would get a good title & run no substantial risk of having it impeached on the ground of any breach of covenant by the granting of an underlease. He was therefore ordered to specifically perform the contract.—WHITE v. HAY (1895), 72 L. T. 281.

Annotation:—*Refd.* Douglas v. Deroy (1895), 39 Sol. Jo. 484.

ii. *Right to Declaratory Order.*

See R. S. C., Ord. 25, r. 5; & generally, JUDGMENTS, Vol. XXX., pp. 140 *et seq*

**5329. Form of order.**—Where a lease contains a covenant by the lessee not to assign without the licence in writing of the lessor, "such licence not to be unreasonably withheld," although the lessor, in refusing a licence to assign, is not bound to give any reason for his refusal, yet if, in granting a licence he attaches to it a condition which, in the opinion of the ct., is unreasonable, the ct. will, in an action brought by the lessee for the purpose, make a declaratory order under R. S. C., Ord. 25, r. 5, declaring that the lessor is not entitled to impose the unreasonable condition, & that the lessee is entitled to assign without any further consent of the lessor.—YOUNG v. ASHLEY GARDENS PROPERTIES, LTD., [1903] 2 Ch. 112; 72 L. J. Ch. 520; 88 L. T. 541, C. A.

Annotations:—*Fold.* Evans v. Levy (1910), 79 L. J. Ch. 383. *Refd.* West v. Gwynne (1911), 104 L. T. 759; *Re* Gibbs & Houlder's Lease, Houlder v. Gibbs, [1925] Ch. 575.

**5330. Costs of order—When no consequential relief asked.**—JENKINS v. PRICE, No. 5295, *ante*.

TOBIN v. CLEARY (1872), 1 R. 7 C. L. 17.—IR.

PART XXI. SECT. 1, SUB-SECT. 2.—  
D. (f) i.

**5319 i. General rule—Lessee may assign without consent.**—Where a lessee under a lease containing a covenant against assigning or without consent applies for such consent which is caprici-

ously refused, he may proceed with the assignment & give possession of the premises notwithstanding such refusal.—MARTIN v. COULTAS (1911), S. A. L. R. 1.—AUS.

**5319 ii. ———**—CORNISH v. BOLES (1914), 25 O. W. R. 677; 5 O. W. N. 799; 31 O. L. R. 505; 19 D. L. R. 447; 6 O. W. N. 514.—CAN.

**5319 iii. ———**—JOSEPH v. BELGRAVE (1881), 1 N. Z. L. R. 16 (S. C.).—N.Z.

k. *Where lessor covenants not to withhold consent unreasonably—Lessee's remedy—Specific performance or damages.*—BLAKE v. RENDELL'S OFFICIAL ASSIGNEE (1909), 28 N. Z. L. R. 571.—N.Z.

*Sect. 1.—Right to assign or underlet: Sub-sect. 2, D. (f) ii., iii. & iv., (g), & E. (a).]*

**5331.** ———.]—By a lease made in 1901 a house in Oxford Street was demised by defts. to the predecessors of pltf. for thirty-one years, less fifteen days, at a rent of £450 a year. The lease contained some onerous covenants, including a covenant by the lessees that they would not, without the licence in writing of the lessors, such licence not to be unreasonably or arbitrarily withheld, assign, transfer, or underlet the demised premises. In 1905 pltf. purchased the residue of the term in the lease & desired to assign it to his wife. The lessors objected to an assignment to a married woman, & would only grant their licence to assign on condition that pltf. executed a covenant for himself, his exors. & administrators, at all times during the continuance of the lease of 1901 to pay the rent & perform all the covenants, agreements, & provisions contained in the lease, as if he had been a party thereto. Upon a summons in an action by the lessee against the lessors, the lessee claimed a declaration that he was entitled to assign the lease without the licence of the lessors, & free from conditions:—*Held*: the condition sought to be imposed by the lessors was altogether unreasonable, & the declaration asked would be made; but as no relief was sought against the lessors the declaratory order would be made without costs, according to the principle laid down in *Jenkins v. Price*, No. 5295, *ante*.—*EVANS v. LEVY*, [1910] 1 Ch. 452; 79 L. J. Ch. 383; 102 L. T. 128.

*Annotation:—Mentd. Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536.

**5332.** ———.]—*WEST v. GWYNNE*, No. 5298, *ante*.

### iii. Whether Grant of Licence Enforceable.

**5333. Alleged acquiescence in assignment.]—**The ct. will not compel a deft. specifically to perform an agreement when the result would be to compel him to commit a breach of a prior agreement with another person.

The lessee of three acres of land agreed in Jan. 1874, to let one acre to pltf. for the whole of the residue of his term, & he agreed also to sell to pltf. his interest in the whole three acres at any time within five years from the date of the agreement. The lease contained a covenant by the lessee not to assign the property, or to part with the possession of it, or any part of it, without the written consent of the lessor. Pltf. was not, in fact, aware of this covenant. He was let into possession of the one acre, & he laid out money upon it, & also upon adjoining property of his own, with the view of occupying the two together. The lessor was aware of this expenditure. In Oct. 1877, the lessee, without pltf.'s knowledge surrendered the lease to the lessor, in exchange for a new lease for a longer term of the three acres, together with other property. The new lease contained a similar covenant by the lessee not to assign, etc., without licence. In Nov. 1877, pltf. gave the lessee notice of his desire to exercise his option to purchase his interest under the original lease in the three acres. The lessee declined to perform his agreement, on the ground that the lessor refused to give his licence to an assignment. Pltf. brought the action against the lessee & the lessor, claiming specific performance of the agreement by the lessee, & to compel the lessor to give his licence, on the ground (*inter alia*) that he had acquiesced in pltf.'s expenditure, knowing that he was acting in the

mistaken belief that the lessee was able to assign the property to him. It appeared that the lessor was not, when pltf.'s expenditure was incurred, aware of the existence of the lessee's covenant not to assign without licence:—*Held*: (1) the lessee could not be compelled to perform his agreement, inasmuch as his doing so would involve a breach of his prior covenant not to assign without licence, for that, as pltf. was seeking to treat the original lease as still subsisting for one purpose, he must treat the covenant not to assign contained in it as still subsisting; (2) inasmuch as the lessor was ignorant of his own rights, & there was nothing to show that he knew that pltf. had been acting in ignorance of his legal rights, the lessor could not be compelled to give his licence to assign to pltf. Mistake of fact is not the less a ground for relief because the person who has made the mistake had the means of knowledge.—*WILLMOTT v. BARBER* (1880), 15 Ch. D. 96; 49 L. J. Ch. 792; 43 L. T. 95; 28 W. R. 911; *on appeal* (1881), 17 Ch. D. 772, C. A.

*Annotations:—As to (1) Consd. Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37. *As to (2) Consd. Russell v. Watts* (1883), 25 Ch. D. 559; *Civil Service Musical Instrument Assocn. v. Wiltman* (1899), 69 L. J. Ch. 484; *Marrell v. Studt & Millington*, [1913] 2 Ch. 648. *Reid. Preston Corpn. v. Fullwood L. B.* (1885), 53 L. T. 718; *Re Gorton, Dowse v. Gorton* (1889), 60 L. T. 305; *Marriott v. Reid* (1900), 82 L. T. 369; *King v. Bird* (1909), 100 L. T. 478; *Hoare v. Kingsbury U. C.*, [1912] 2 Ch. 452; *Jones Bros. Holloway v. Woodhouse*, [1923] 2 K. B. 117. *Generally, Mentd. Middleweek v. Pearsley* (1881), 50 L. J. Ch. 777; *Roberts v. Jones*, *Willey v. G. N. Ry.*, [1891] 2 Q. B. 194; *Bradford Corpn. v. Pickles*, [1894] 3 Ch. 53; *Re Chaplin, Milne, Grenfell* (1915), 31 T. L. R. 279.

### iv. Where Lessor Expressly Covenants.

Whether covenant not to refuse consent unreasonably lessor's covenant, *see* Sub-sect. 2, D. (a) i., *ante*.

**5334. Whether assignor bound to enforce—By legal proceedings.]—***LEHMANN v. MCARTHUR*, No. 5283, *ante*.

**5335. Assignor's remedy for breach—Action.]—***IDEAL FILM RENTING Co. v. NIELSEN*, No. 5263, *ante*.

### (g) Effect of Withholding on Agreements to Assign.

**5336. When agreement conditional upon consent—Recovery of deposit—Total failure of consideration.]—***Mrs. W.* contracted with deft. for the purchase of the goodwill & fixtures of a public-house for £120, of which £50 was to be paid on a fixed day, if deft.'s landlord consented to the change of tenancy; & on payment of the remainder deft. was to give up possession to Mrs. W. The £50 was paid, & the landlord gave the required consent verbally. Mrs. W. came with her furniture to the house, & carried on the business for some time, deft., however, still residing there. Before the remaining £70 was paid, & before exclusive possession was given to deft., the landlord withdrew his consent:—*Held*: the contract being conditional on the obtaining his consent, & no change of tenancy having taken place before he withdrew it, it must be considered as never having been given; so that the condition not having been performed, the £50 had been paid to deft. on a consideration which had failed, & might be recovered from him as for so much money had & received.—*WRIGHT v. NEWTON* (1835), 2 Cr. M. & R. 124; 5 Tyr. 736; 1 Gale, 67; 150 E. R. 53.

**5337. ——— Refusal caused by proposed assignee.]—**Declaration, stating an agreement, by which pltf. was to sell to deft. a certain lease, etc., subject to the approval by the landlord

of deft., the vendee, becoming his tenant, & on the terms of deft. paying down £500 as deposit money, & completing the purchase by a fixed day, went on to allege, that in consideration of pltf. dispensing with the payment down of the £500, & taking an I.O.U. for the amount, deft. promised to pay pltf. the sum as soon as he could write to his bankers, & procure them to remit him the sum; & alleged a breach in the non-payment of the £500. Pleas, fifth, that before deft. could procure his bankers to remit, etc., deft. was disapproved of by the landlord, etc.; sixth, on equitable grounds, that before demand by pltf. of payment of the I.O.U. deft. was disapproved of, etc., & that pltf. was thereby disabled to sell the lease, etc., to deft. Replication thereto, that before any such disapproval, etc., deft. applied to the landlord to accept him as tenant, & afterwards, & before any such disapproval, deft. withdrew such application, & declined to the landlord to be accepted as tenant; & that deft., by deft.'s own act, & without any default in pltf., procured the landlord to disapprove, etc.:—*Held*: (1) the fifth plea furnished a good answer to pltf.'s claim; (2) the sixth plea was probably bad, as confessing a breach of contract, entitling pltf. to the use of the £500, until the time arrived for the completion of the purchase, & showing no grounds on which a ct. of equity would restrain a party from recovering damages in respect of such breach; (3) the replication stated a good answer to the plea.—*DAVIS v. NISBETT* (1861), 10 C. B. N. S. 752; 31 L. J. C. P. 6; 8 Jur. N. S. 211; 9 W. R. 840; 142 E. R. 649.

*Annotation*:—*As to* (1) *Consd. Smith v. Butler*, [1900] 1 Q. B. 694.

**5338.** ———.]—*WINTER v. DUMERQUE*, No. 5306, *ante*.

**5339. Rights of proposed assignee—Cognisant of restriction—May insist on grant of underlease.**—*GOODWIN v. FIELDING*, No. 5208, *ante*.

**5340.** ———.]—*Ignorant of restriction—Specific performance or damages.*—Deft., a leaseholder, agreed to let certain property to pltf., who thereupon entered upon the premises. Shortly afterwards pltf. requested deft. to execute the lease, but he declined on the ground that the lease contained a covenant not to assign or underlet without the consent of his lessor, & that the lessor had refused such consent, except on payment of £50, & an increased rent of £6 *per annum*. Pltf. then filed a bill for specific performance of the agreement, praying that if deft. should be unable in consequence of the refusal of his lessor to consent to the underlease, or otherwise to perform the agreement, he might be ordered to pay to pltf. damages for the injury he had sustained through the breach thereof:—*Held*: pltf. was entitled to a decree in the terms of his prayer.—*HILTON v. TIPPER* (1868), 18 L. T. 626; 16 W. R. 888.

*Annotation*:—*Refd. West v. Gwynne* (1911), 80 L. J. Ch. 578.

**5341.** ———.]—*Agreement to assign agreement for lease—Proposed assignee only entitled to expenses incurred.*—F. was in possession of a mining royalty under a written agreement for a lease, of which he had taken an assignment. One of the stipulations of the agreement was that H., the person with whom the agreement was originally made, should not assign without the licence of the lessors. They were ready to consent to the assignment to F. provided he would execute a duplicate of the agreement containing this stipulation. Though repeatedly communicated with on the subject he delayed doing so. He

entered into a contract with B. to sell his interest in the royalty, it was afterwards found that the lessors absolutely refused their assent to the transfer, & F. was unable to perform his contract with B. In an action by B. against F. for its non-performance:—*Held*: B. could only recover the expenses he had incurred, but not damages beyond them.—*BAIN v. FOTHERGILL* (1874), L. R. 7 H. L. 158; 43 L. J. Ex. 243; 31 L. T. 387; 39 J. P. 228; 23 W. R. 261, H. L.

*Annotations*:—*Consd. Burrow v. Scammell* (1881), 19 Ch. D. 175. *Extd. Day v. Singleton*, (1899) 2 Ch. 320. *Consd. Braybrooks v. Whaley*, [1919] 1 K. B. 435. *Refd. Gas Light & Coke Co. v. Towse* (1887), 35 Ch. D. 619; *Baynes v. Lloyd*, [1895] 2 Q. B. 610; *Pease v. Courtney*, [1904] 2 Ch. 503; *Re Daniel, Daniel v. Vassall*, [1917] 2 Ch. 405. *Mentd. Gray v. Fowler* (1873), L. R. 8 Exch. 249; *Smith v. Groen* (1875), 1 C. P. D. 92; *Re Higgins & Hitchman* (1882), 30 W. R. 700; *Rock Portland Cement Co. v. Wilson* (1882), 52 L. J. Ch. 214; *Coombs v. Cook* (1883), Cab. & El. 75; *Re Hargreaves & Thompson's Contract* (1886), 32 Ch. D. 454; *Rowe v. London School Board* (1887), 36 Ch. D. 610; *Royal Bristol Permanent Bldg. Soc. v. Bomash* (1887), 35 Ch. D. 390; *Lee v. Soames* (1888), 36 W. R. 884; *Synge v. Synge* (1893), 63 L. J. Q. B. 202; *Re Wilsons & Stevens' Contract*, [1894] 3 Ch. 546; *Re Scott & Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596; *Jones v. Gardiner*, [1902] 1 Ch. 191; *Hollwell v. Seacombe*, [1906] 1 Ch. 426; *Addis v. Gramophone Co.*, [1909] A. C. 488; *Morgan v. Huswell*, [1909] 1 K. B. 357; *Goffin v. Houlder* (1920), 90 L. J. Ch. 488; *Grindell v. Bass*, [1920] 2 Ch. 487; *Keon v. Moar*, [1920] 2 Ch. 574.

**5342. Where agreement includes sale of tenant's fixtures—Whole agreement unenforceable.**—A., the lessee for years of premises, under a lease containing a stipulation that all improvements made by him were to belong to the lessor at the end of the lease, except any greenhouse he might erect, bargained with B. to assign the lease to him, & to sell him a greenhouse which he had erected, & which was affixed to the freehold together with the furniture, crops of fruit, & plants therein, for a certain sum. B. was let into possession of the greenhouse & its contents, but, owing to a difficulty in obtaining the lessor's consent, no assignment of the lease was made to him:—*Held*: the contract was an entire one for the assignment of the lease & the sale of the greenhouse, & until the lease was assigned B. could not be sued by A. for the price of the greenhouse.—*SLEDDON v. CRUIKSHANK* (1846), 16 M. & W. 71; 16 L. J. Ex. 61; 8 L. T. O. S. 121; 153 E. R. 1103.

#### *E. Effect of Death of Lessee.*

##### *(a) Disposition by Will.*

**5343. Whether breach.**—Lease for years, with a clause of re-entry, if lessee during his life should alienate his term without the assent, etc. *Qu.*: whether a devise of it without assent be a forfeiture.—*PARRY v. HARBERT* (1539), 1 Dyer, 45 b; 73 E. R. 98.

*Annotations*:—*Refd. Fox v. Whitechocke* (1614), 2 Bulst. 290; *Harris v. Austin* (1615), 3 Bulst. 36.

**5344.** ———.]—*WINDSOR (LORD) v. BERRY* (1582), 1 Dyer, 45 b (n); 73 E. R. 98.

**5345.** ———.]—A proviso that a lessee shall not alienate his term without the lessor's consent is a condition precedent; & devising it is a breach.—*KNIGHT v. MORY* (1587), Cro. Eliz. 60; 78 E. R. 321.

**5346.** ———.]—A devise is a breach of a condition not to alien.—*BAIRY v. STANTON* (1594), Cro. Eliz. 330; 78 E. R. 580; *sub nom. BERRY v. TAUNTON*, Cro. Eliz. 581; *sub nom. TAUNTON v. BARREY*, Poph. 106; *sub nom. COLE v. TAUNTON*, Gouldsb. 184; *sub nom. TAUNTON'S CASE*, Owen, 14.

**5347.** ———.]—A devise is not an assignment. In this case it was also said that if lessee for years

*Sect. 1.—Right to assign or underlet: Sub-sect. 2, E. (a), (b) & (c), & F. (a), (b) & (c).]*

do covenant with the lessor not to assign over his term without the lessor's consent in writing, & do afterwards without such consent devise the term to S. this is not a breach of the covenant, for a devise is not a lease.—*FOX v. SWANN* (1655), Sty. 482; 82 E. R. 881.

*Annotation:—Mentd. Bell v. Harwood* (1789), 3 Term Rep. 308.

**5348.** ———.]—*CRUSOE d. BLENCOWE v. BUGBY*, No. 5384, *post*.

**5349. Covenant not to alien to any but children—Devise subject to wife's life interest.]—**A condition not to alien a lease to any but his children, is not broken by a devise of part of the term to his son after the death of his wife.—*HORTON v. HORTON* (1604), Cro. Jac. 74; 70 E. R. 63.

*Annotations:—Mentd. Couden v. Clarke* (1612), Hob. 29; *Gardner v. Sheldon* (1671), 2 Keb. 781; *Pibus v. Mitford* (1674), 1 Vent. 372; *Smartle v. Scholler* (1676), T. Jo. 98; *Holmes v. Meynel* (1681), T. Rayn. 452; *Phillips v. Phillips* (1701), 1 P. Wms. 34; *Roe d. Bendale v. Summerset* (1770), 5 Burr. 2608; *Humphreys v. Humphreys* (1867), L. R. 4 Eq. 475; *Re Willatts, Willatts v. Artley*, [1905] 1 Ch. 378.

**Devise to executors.]—See No. 5346, ante, Nos. 5350, 5351, post.**

*(b) Lease passing to Personal Representatives.*

**5350. Devise to executors—Acceptance as executors & not as devisees—Condition against disposition by will.]—**Lessee for years upon condition that he shall not grant over the land by will or otherwise, devises same to his exors., who accept it only as exors. & not as devisees:—*Held: condition broken, because he had done as much as in him lay to have granted it over.*—*PARRY & HERBERT'S CASE* (1577), 4 Leon. 5; 74 E. R. 688.

*Annotation:—Mentd. Ashburnham v. Bradshaw* (1740), West temp. Hard. 505.

**5351.** ———.]—*WINDSOR (LORD) v. BURRY* (1582), 1 Dyer, 45 b (n); 73 E. R. 98.

**5352. Lease vesting in personal representative—Intestacy.]—CRUSOE d. BLENCOWE v. BUGBY**, No. 5384, *post*.

*See, generally, EXECUTORS, Vol. XXIII., pp. 302 et seq.*

*(c) Assignment by Personal Representatives.*

**5353. General rule—Executors may assign without consent.]—ANON.** (1551), Moore, K. B. 11; 72 E. R. 405.

**5354.** ———.]—**For purposes of administration.]—**Lease forfeited by alienation without licence by exor. relieved, it being sold for payment of debts.—*COX v. BROWN* (1656), 1 Rep. Ch. 170; 21 E. R. 540.

**5355.** ———.]—(1) Exors. may dispose of a lease for years as assets, notwithstanding a proviso or covenant that lessee shall not alien.

(2) Testator may provide, that in case of a devolution to exors. they shall not alien; but it must be very special.—*SEERS v. HIND* (1791), 1 Ves. 294; 1 Hov. Supp. 128; 30 E. R. 351, L. C.

*Annotations:—Generally, Mentd. Ashburnham v. Thompson* (1807), 13 Ves. 402; *Tebbs v. Carpenter* (1816), 1 Madd. 290.

**5356. Restriction including personal representatives—Consent necessary for assignment.]—**An administrator is in law an assignee.

A lease was made for years upon condition that the lessee, his exors., or assigns, should not alien without assent of the lessor. The lessee died intestate, & the ordinary granted administration to S. who assigned without licence. It was adjudged, that the condition was broken, for he was an assignee in law.—*MORE'S CASE* (1584), Cro. Eliz. 26; 78 E. R. 291.

**5357.** ———.]—(1) If a lease contain a proviso, that the lessee & his administrators shall not set, let, or assign over, the whole or part of the premises without leave in writing, on pain of forfeiting the lease, the administratrix of the lessee cannot underlet without incurring a forfeiture.

(2) A parol licence to let part of the premises does not discharge the lessee from the restriction of such a proviso.—*ROE d. GREGSON v. HARRISON* (1788), 2 Term Rep. 425; 100 E. R. 229.

*Annotations:—As to (1) Distd. Doe d. Goodbohere v. Bevan* (1815), 3 M. & S. 353. *As to (2) Refd. Little v. Holland* (1790), 3 Term Rep. 590, n. *Generally, Mentd. Arnsby v. Woodward* (1827), 9 Dow. & Ry. K. B. 536; *Willmott v. Barber* (1880), 15 Ch. D. 96.

**5358.** ———.]—**Must be clear.]—SEERS v. HIND**, No. 5355, *ante*.

**5359. Exception in favour of disposition by will—Whether sale by personal representatives included—Sale in course of administration.]—LLOYD v. CRISPE**, No. 5305, *ante*.

**Assignment by assignee.]—See Sub-sect. 2, G., post.**

**Power of personal representatives to assign & grant underleases generally.]—See EXECUTORS, Vol. XXIV., p. 568.**

*F. Assignment by Operation of Law.*

*(a) In General.*

**5360. General rule—Restriction does not apply.]—DENN d. STANHOPE (LORD) v. SKEGGS** (1781), cited in 8 Term Rep. at p. 59; 101 E. R. 1266.

*Annotations:—Consd. Roe d. Hunter v. Gallers* (1787), 2 Term Rep. 133. *Distd. Roe d. Gregson v. Harrison* (1788), 2 Term Rep. 425. *Apld. Crosbie v. Tooke* (1833), 1 My. & K. 431. *Refd. Doe d. Mitchinson v. Carter* (1798), 8 Term Rep. 57; *Wilkinson v. Wilkinson* (1819), 2 Wils. Ch. 47; *Keeves v. Dean, Nunn v. Pellegrini* (1923), 130 L. T. 593.

**5361.** ———.]—Even in cases where alienation without licence from the landlord is expressly prohibited & guarded by a clause of forfeiture, such a clause has been held to furnish no protection against an assignment of the lease by operation of law under a commission of bkpcy., for example, or upon an execution for debt (*LORD BROUGHAM, C.*)—*CROSBIE v. TOOKE* (1833), 1 My. & K. 431; 1 Mont. & A. 215, n.; 2 L. J. Ch. 83; 39 E. R. 745, L. C.

*Annotations:—Refd. Morgan v. Rhodes* (1834), 1 Mont. & A. 214; *Buckland v. Papillon* (1866), 15 W. R. 92.

**5362.** ———.]—The exception in the prohibition of assignment or alienation of "by operation of law" extends to enable a person, such as a liquidator, to whom the property passes by operation of law with an obligation to realise it, to assign the property.—*Re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY, OFFICIAL RECEIVER v. LICENSES INSURANCE CORPN.*, [1913] 2 Ch. 34; 6 B. W. C. C. N. 150; *sub nom. BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY v. LICENSES' INSURANCE CORPN. & GUARANTEE FUND, LTD.*, 82 L. J. Ch. 386; *sub nom. Re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY, Ex p. OFFICIAL RECEIVER*, 57 Sol. Jo. 559.

*Annotations:—Consd. Cohen v. Popular Restaurants*, [1917] 1 K. B. 480; *Re Farrow's Bank*, [1921] 2 Ch. 164.

PART XXI. SECT. 1, SUB-SECT. 2.—E. (b).

**53521. Lease vesting in personal representative—Intestacy.]—Re MURRAY, MURRAY v. CONDREN**, [1916] 1 I. R. 302.—IR.

(b) *Compulsory Purchase.*

**5363. Effect of statutory notice of intention to take land—Licence to assign no longer required.]**—

Where a railway co. serves a notice under Land Clauses Act, 1845 (c. 18), s. 119, on a lessee to take land held under a lease containing a proviso against assignment without the licence of the lessor the necessity for such licence is taken away by the operation of the Act.—*SLIPPER v. TOTTENHAM & HAMPSTEAD JUNCTION RY. CO.* (1867), L. R. 4 Eq. 112; 36 L. J. Ch. 841; 16 L. T. 446; 15 W. R. 861.

*Annotation:—Distd. Metropolitan Water Board v. Solomon*, [1908] 2 Ch. 214.

**5364. Position of purchasers by statute.]**—*METROPOLITAN WATER BOARD v. SOLOMON*, No. 5242, *ante*.

**Effect of exercise of compulsory powers of purchase.]**—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 279.

(c) *Bankruptcy of Lessee.*

*See BANKRUPTCY*, Vol. V., p. 953, Nos. 7809–7813.

**5365. General rule—Not an assignment within the restriction.]**—*CRUSOE d. BLENCOWE v. BUGBY*, No. 5384, *post*.

**5366. ———.]**—*DENN d. STANHOPE (LORD) v. SKEGGS* (1781), cited in 8 Term Rep. at p. 59; 101 E. R. 1266.

*Annotations:—Consd. Roe d. Hunter v. Galliers* (1787), 2 Term Rep. 133. *Distd. Roe d. Gregson v. Harrison* (1788), 2 Term Rep. 425. *Apld. Crosbie v. Tooke* (1833), 1 My. & K. 431. *Refd. Doe d. Mitchinson v. Carter* (1798), 8 Term Rep. 57; *Wilkinson v. Wilkinson* (1819), 2 Wils. Ch. 47; *Keeves v. Dean, Nunn v. Pellegrini* (1923), 130 L. T. 593.

**5367. ——— Adjudication on lessee's own petition.]**—A lease contained a covenant not to assign without licence, & a proviso for re-entry on bkpcy. of the lessee or breach of any covenant. The lessee having been adjudicated bkpt. on his own petition the lessor purported to determine the lease under the proviso of re-entry & obtained peaceable possession from the lessee without giving any notice under Conveyancing & Law of Property Act, 1881 (c. 41), s. 14:—*Held*: (1) the lessor's re-entry was void as against the lessee's trustee in bkpcy., for the statutory notice was necessary before the lessor could obtain possession either peaceably or by action; (2) the lessee's being adjudicated bkpt. on his own petition did not operate as a breach of his covenant not to assign.—*Re RIGGS, Ex p. LOVELL*, [1901] 2 K. B. 16; 84 L. T. 428; *sub nom. Re RIGGS, Ex p. TRUSTEE*, 70 L. J. K. B. 541; 49 W. R. 624; 45 Sol. Jo. 408; 8 Mans. 233.

*Annotations:—As to (1) Refd. Cohen v. Popular Restaurants*, [1917] 1 K. B. 480. *As to (2) Distd. Re Cotgrave, Mynors v. Cotgrave*, [1903] 2 Ch. 705; *Cohen v. Popular Restaurants*, [1917] 1 K. B. 480.

**5368. ———.]**—*Re FARROW'S BANK, LTD.*, No. 5380, *post*.

**5369. Effect of—Restriction against assignment superseded.]**—*WEATHERALL v. GEERING*, No. 5165, *ante*.

*See, now*, No. 5306, *ante*.

**5370. ——— Lease re-assigned to bankrupt after his discharge—Subsequent assignment by bankrupt.]**—A. granted a lease to B., which contained a covenant that B., his exors. or administrators without mentioning "assigns" should not underlet, without the consent of the lessor. B. became bkpt., & his assignees assigned the premises to C. B. obtained his certificate, & C. re-assigned the premises to him, after which he underlet them to another person:—*Held*: B. having been discharged at the time of his bkpcy. from all covenants

in the lease, by 49 Geo. 3, c. 121, s. 19, the underletting by him, which was in the character of assignee, was no forfeiture of the lease.—*DOE d. CHEERE v. SMITH* (1814), 5 Taunt. 795; 1 Marsh. 359; 128 E. R. 905.

*Annotation:—Refd. Williams v. Earle* (1868), L. R. 3 Q. B. 739.

**5371. ——— Trustee in bankruptcy may assign without consent.]**—Demise for years to S., & S. covenants that he, his exors., administrators, or assigns, would not assign the indenture, or his or their interest therein, or assign the premises to any person whatsoever, without consent in writing of lessor. Proviso that in case S., his exors., administrators, or assigns should part with his or their interest contrary to his covenant that lessor might re-enter. S. deposited the lease as a security for money borrowed, & became bkpt., & the lease was sold by direction of the Chancellor to pay that debt:—*Held*: the assignees under the commission might assign the lease to the vendee without consent of lessor.—*DOE d. GOODBEHERE v. BEVAN* (1815), 3 M. & S. 353; 105 E. R. 644.

*Annotations:—Apld. Winter v. Dumerque* (1865), 12 Jur. N. S. 56; *Re Birkbeck Permanent Benefit Bldg. Soc., Official Receiver v. Licenses Insee. Corp.*, [1913] 2 Ch. 34. *Consd. Re Farrow's Bank*, [1921] 2 Ch. 164. *Refd. Dyke v. Taylor & Cannan* (1860), 6 Jur. N. S. 1329; *Re Riggs, Ex p. Lovell*, [1901] 2 K. B. 16; *Cohen v. Popular Restaurants*, [1917] 1 K. B. 480.

**5372. ———.]**—*Re HAND, Ex p. COCKS*, No. 197, *ante*.

**5373. ———.]**—Covenant by lessee, not to assign without licence, does not bind the assignee of the lessee under a commission of bkpcy., in case he makes a fair assignment. In this case the assignment was fraudulent:—*Held*: the assignee under the commission continued liable to the rent after he had assigned.—*PHILPOT v. HOARE & ROBERTSON* (1741), Amb. 480; 2 Atk. 210; 27 E. R. 314, L. C.

*Annotations:—Consd. Valliant v. Dodemede* (1742), 2 Atk. 546. *Distd. Onslow v. Corrie* (1817), 2 Madd. 330. *Consd. Hopkinson v. Lovering* (1883), 11 Q. B. D. 92. *Refd. Harley v. King* (1835), 2 Cr. M. & R. 18.

**5374. ——— Whether assignee of trustees in bankruptcy may assign without consent.]**—*WINTER v. DUMERQUE*, No. 5306, *ante*.

**5375. ——— Bankruptcy of executor of lessee.]**—*GORING v. WARNER* (1724), 2 Eq. Cas. Abr. 100; 22 E. R. 86, L. C.

*Annotations:—Consd. Weatherall v. Geering* (1806), 12 Ves. 504. *Refd. Doe d. Mitchinson v. Carter* (1798), 8 Term Rep. 57; *Doe d. Goodbehere v. Bevan* (1815), 3 M. & S. 353.

**5376. ———.]**—*Re FARROW'S BANK, LTD.*, No. 5380, *post*.

**Restriction expressly extending to assignment by operation of law.]**—*See* No. 5568, *post*.

**5377. Liability of trustee in bankruptcy—Fraudulent assignment.]**—*PHILPOT v. HOARE & ROBERTSON*, No. 5373, *ante*.

**5378. ——— Restriction extending to assignees by operation of law.]**—*Re JOHNSON, Ex p. BLACKETT*, No. 5568, *post*.

**5379. Effect of assignment for benefit of creditors.]**—The lessee under a lease containing a covenant not to assign, executed a deed of assignment, vesting his estate in trustees for the benefit of his creditors under 24 & 25 Vict. c. 134, s. 192, & subsequent sects.:—*Held*: his so doing was a breach of the covenant, & operated as a forfeiture of the lease.—*HOLLAND v. COLE* (1862), 1 H. & C. 67; 31 L. J. Ex. 481; 6 L. T. 503; 27 J. P. 56; 8 Jur. N. S. 1066; 10 W. R. 563; 158 E. R. 803.

*Annotations:—Refd. Porter v. Kirkus* (1867), L. R. 2 C. P. 590; *Re Riggs, Ex p. Lovell*, [1901] 2 K. B. 16.

*See, also*, No. 5258, *ante*.

**Sect. 1.—Right to assign or underlet: Sub-sect. 2, F. (d), (e) & (f), G., H. & I. Sect. 2: Sub-sect. 1, A. (a).]**

(d) *Winding Up of Tenant Company.*

**5380. Position of liquidator & trustee in bankruptcy distinguished.]—**(1) A covenant in a lease to a co. against assignment without the consent of the lessor is binding on the liquidator in a compulsory winding up of the co. There is no distinction for this purpose between a voluntary & a compulsory winding up.

(2) The cases in bkpcy. in which it has been held that a trustee in bkpcy. can assign free from bkpt.'s covenant against assignment without licence depend on the circumstance that bkpt.'s leasehold interest vests in his trustee by operation of law, so that he is not an assign of the bkpt. & consequently not bound by the covenant. These cases therefore have no application to a liquidator of a co., because the co.'s leasehold interest remains vested in the co. after a winding up order, & the liquidator acts on behalf of the co. in assigning it.—*Re FARROW'S BANK, LTD.*, [1921] 2 Ch. 164; 90 L. J. Ch. 465; 125 L. T. 609; 37 T. L. R. 847; 65 Sol. Jo. 679, C. A.

*See, also*, No. 5188, *ante*.

**Consequences of winding up—Proviso for re-entry on liquidation.]—***See COMPANIES*, Vol. X., pp. 995, 996, Nos. 6905, 6906.

**5381. Assignment by liquidator—Whether breach of restriction—Liquidation voluntary.]—***COHEN v. POPULAR RESTAURANTS, LTD.*, No. 5188, *ante*.

**5382. ———.]—***Re FARROW'S BANK, LTD.*, No. 5380, *ante*.

**5383. ———. Liquidation compulsory.]—***Re FARROW'S BANK, LTD.*, No. 5380, *ante*.

*See, also*, Nos. 5263, 5362, *ante*.

(e) *Execution against Lessee.*

**5384. General rule—Not an assignment within the restriction.]—**Lessee for twenty-one years, covenants not to assign, etc., he makes an underlease for part of the term, this is not a breach of the covenant.

The devising a term was a doing or putting it away, the lessee becoming a bkpt. was a putting or doing it away, a dying intestate was a putting it away; so, being in debt by confessing a judgment & having the term taken in execution, was the like; but none of these amounted to an assignment, or to a breach of the covenant or condition (*per Cur.*).—*CRUSOE d. BLENOWE v. BUGBY* (1771), 3 Wils. 234; 2 Wm. Bl. 766; 95 E. R. 1030.

**Annotations:—***Apld.* *Doe d. Mitchinson v. Carter* (1798), 8 Term Rep. 57; *Doe d. Pitt v. Hogg* (1824), 4 Dow. & Ry. K. B. 226. *Refd.* *Kinnersley v. Orpe* (1779), 1 Doug. K. B. 56; *Roe d. Gregson v. Harrison* (1788), 2 Term Rep. 425; *Greenaway v. Adams* (1806), 12 Ves. 395; *Doe d. Holland v. Worsley* (1807), 1 Camp. 20; *Doe d. Goodbehore v. Bevan* (1815), 3 M. & S. 353; *Doe d. Lloyd v. Ingleby* (1846), 15 M. & W. 465; *Varley v. Coppard* (1872), L. R. 7 C. P. 505; *Bryant v. Hancock*, [1898] 1 Q. B. 716; *Grove v. Portal*, [1902] 1 Ch. 727; *Russell v. Beecham*, [1924] 1 K. B. 525; *Abrahams v. MacFishes*, [1925] 2 K. B. 18.

**5385. ———.]—***DENN d. STANHOPE (LORD) v. SKEGGS* (1781), cited in 8 Term Rep. at p. 59; 101 E. R. 1266.

**Annotations:—***Consd.* *Roe d. Hunter v. Galliers* (1787), 2

Term Rep. 133. *Distd.* *Roe d. Gregson v. Harrison* (1788), 2 Term Rep. 425. *Apld.* *Crosbie v. Tooke* (1833), 1 My. & K. 431. *Refd.* *Doe d. Mitchinson v. Carter* (1798), 8 Term Rep. 57; *Wilkinson v. Wilkinson* (1819), 2 Wils. Ch. 47; *Keeves v. Dean*, *Nunn v. Pellegrini* (1923), 130 L. T. 593.

*See EXECUTION*, Vol. XXI., pp. 490, 491, Nos. 687, 688.

(f) *Death of Lessee.*

*See* Sub-sect. 2, E., *ante*.

G. *Application of Restriction.*

**5386. Proviso against assignment—In lease to lessee, "his executors, administrators or assigns"—Meaning of assigns—Such assigns as lessee may lawfully have.]—***WEATHERALL v. GEERING*, No. 5165, *ante*.

**5387. Covenant including assigns—Whether binding on underlessee.]—**A lease of mines was granted by S. to W., his exors., administrators, & assigns (described as the "lessee or lessees"), W. covenanting that the lessee or lessees would not assign or underlet without the consent of S., his heirs or assigns. There was a proviso of re-entry in case they did so. W. died, & his exor. agreed, with the consent of S., to underlet a part of the property comprised in the lease to B., the underlease to contain "the like provisions & conditions" as were contained in the original lease. W.'s interest in the original lease was then assigned to C., subject to the agreement with B. A question was raised by C., as underlessor, whether the lease to B. ought to be so framed as to require the consent of the original lessor or of the underlessor to any assignment or underlease by B.:—*Held*: (1) the lease must be so framed as to require only the consent of the underlessor, & also upon the true construction of the original lease, the consent of S. was not required to any assignment or underlease made by an underlessee of whom S. had approved; (2) the original lessor could not, by the terms of a licence to underlet, enlarge the proviso for re-entry reserved by the original lease.—*WILLIAMSON v. WILLIAMSON* (1874), 9 Ch. App. 729; 43 L. J. Ch. 738; 31 L. T. 291, L. JJ.

**Annotations:—***As to* (1) *Distd.* *Haywood v. Silber* (1885), 30 Ch. D. 404. *Fold.* *Slough Picture Hall Co. v. Wade*, *Wilson v. Neville*, *Reid* (1916), 32 T. L. R. 542. *Consd.* *Mackusick v. Carmichael*, [1917] 2 K. B. 581. *Refd.* *Re Spark's Lease*, *Berger v. Jenkinson*, [1905] 1 Ch. 456. *Generally, Mentd.* *Re Wedgwood Coal & Iron Co.* (1882), 47 L. T. 612.

**5388. ———.]—**A lessee of premises covenanted with the lessor "for himself, his heirs, exors., administrators, & assigns" not to assign, underlet, or part with the possession of the premises without the consent in writing of the lessor. The lease contained clause of re-entry for breach of covenant. The lessee, with the consent of the lessor, underlet part of the premises, & the underlessee, without obtaining the consent of the lessor, let part of the premises to another person:—*Held*: an underlessee was not an "assign," & therefore this was not a breach of the lessee's covenant.—*VILLIERS v. OLDCORN* (1903), 20 T. L. R. 11.

**5389. ———.]—***MACKUSICK v. CARMICHAEL*, No. 5227, *ante*.

#### PART XXI. SECT. 1, SUB-SECT. 2.—F. (e).

**53841. General rule—Not an assignment within the restriction.]—**A condition inserted in a Crown lease under Land Act, 1869, s. 20 (5), that no assignment or transfer should have any validity whatever, until sanctioned by the Governor in Council, does not

apply to an involuntary assignment, as by sale under a writ of *f. fa.*—*Re TRANSFER OF LAND STATUTE, Ex p. ELLISON, Ex p. AMESS* (1879), 5 V. L. R. 59.—*AUS.*

**538411. ———.]—***NIL MADHAB SIKDAR v. NARATTAM SIKDAR* (1890), 1 L. R. 17 Calc. 826.—*IND.*

**5384111. ———.]—***ROGERS v.*

*BATEMAN* (1841), Fl. & K. 432.—*IR.*

#### PART XXI. SECT. 1, SUB-SECT. 2.—G.

**1. Covenant running with the land.]—***Held*: the lessee's covenant against reletting without the lessor's consent ran with the land & bound the lessee's assigns although they were not named.—*MILLER v. JENNER*, [1921] N. Z. L. R. 841.—*N.Z.*

**5390. Covenant only on behalf of executors & administrators—Whether assigns bound.]—**DOE d. CHEERE v. SMITH, No. 5370, *ante*.

**5391. ———.]—**Re STEPHENSON (ROBERT) & CO., LTD., POOLE v. THE CO., No. 5172, *ante*.  
*See, also*, Nos. 5169–5171, *ante*.

**Assignment by operation of law.]—***See* Sub-sect. 2, F., *ante*.

#### H. Restriction limited to Particular Persons.

**5392. One person excepted from restriction—Whether assignment by excepted person requires licence.]—**On a covenant that neither the lessee nor his assigns shall aliene without licence, except to his wife; he devises the term to his wife, who takes husband, & they assign it. This is a breach of the covenant.—THORNHILL & ADAMS v. KING (1600), Cro. Eliz. 757; 78 E. R. 988.

**5393. ———.]—**(1) A condition in a lease that the lessee or his assigns shall not aliene without the special licence of the lessor, is determined by an alienation by licence, & no subsequent alienation is a breach of the condition, nor does it give a right of entry to the lessor.

(2) A condition not to aliene without licence, determined by licence of the lessor as to one of several lessees, is determined as to all. So a condition not to aliene without licence determined by licence as to part of the land, is determined as to the residue.

(3) A condition cannot be apportioned by the act of the parties; but it may be apportioned by act of law, or by act & wrong of the lessee.

(4) If there be a proviso in an indenture of lease not to aliene without licence except to one of the sons of the lessee, & the lessee dies, & his exor. assigns the lease to one of the lessee's sons, the son may aliene to whom he will without licence.—DUMPER'S CASE (1603), 4 Co. Rep. 119 b; 76 E. R. 1110; *sub nom.* DUMPER v. SYMS, Cro. Eliz. 815.

*Annotations:—As to (1)* Foll. Fox v. Whitchocke (1614), 2 Bulst. 290. *Distd.* Northcote v. Duke (1765), Amb. 511. *Foll.* Brummell v. Macpherson (1807), 14 Ves. 173. *Distd.* Doe d. Boscawen v. Bliss (1813), 4 Taunt. 735; Lloyd v. Crispe (1813), 5 Taunt. 249. *Refd.* Church v. Brown (1808), 15 Ves. 258; Mason v. Corder (1816), 7 Taunt. 9; Doe d. Griffith v. Pritchard (1833), 5 B. & Ad. 765; Dowell v. Dew (1842), 1 Y. & C. Ch. Cas. 345; Saunders v. Merryweather (1865), 13 W. R. 814; Eyton v. Jones (1870), 21 L. T. 789; Waldron v. Hawkins (1875), 23 W. R. 390; Grove v. Portal (1902), 18 T. L. R. 319; Jackson v. Simons, [1923] 1 Ch. 373. *As to (3)* *Refd.* Doe d. de Hutzen v. Lewis (1836), 5 Ad. & El. 277. *Generally, Refd.* Thornhill & Adams v. King (1600), Cro. Eliz. 757; Winter v. Dumergue (1865), 14 W. R. 281. *Mentd.* Lyn v. Wyn (1665), O. Bridg. 122; Bagshaw v. Bussley (1790), 4 Term Rep. 78; Morgan v. Slaughter (1793), 1 Esp. 8; Russell v. Sa Da Bandeira (1862), 13 C. B. N. S. 149; Pye v. Butterfield (1864), 5 B. & S. 829; Moxborough v. Whitwood U. D. C., [1897] 2 Q. B. 111.

**5394. ———.]—**On a condition to assign only to A., after the performance, A. may assign to another.—WHITCHCOT v. FOX (1616), Cro. Jac. 398; 1 Roll. Rep. 389; 79 E. R. 340; *sub nom.* FOX v. WHITCHCOCKE, 2 Bulst. 290.

*Annotations:—Distd.* Bally v. Wells (1769), Wilm. 341; *Re* Stephenson & Co., Poole v. The Co., [1915] 1 Ch. 802. *Refd.* Tongue v. Pitcher (1691) 3 Lev. 295; Dowell v. Dew (1842), 1 Y. & C. Ch. Cas. 345. *Mentd.* Rockingham v. Oxenden (1711), 2 Salk. 578.

**5395. Restriction limited to one person—Assignment by third person to person forbidden—Whether breach of covenant.]—**Of a condition in a lease not to aliene to A. Alienation to B. who alienes to A. is no breach.—ANON. (1539), 1 Dyer, 45 a; 73 E. R. 97.

**Effect of licence to assign—At common law.]—***See* Nos. 5184, 5393, 5394, *ante*.

#### I. Effect of Assignment in Breach of Covenant.

**5396. Whether interest passes.]—**ELLIOTT v. JOHNSON, No. 5185, *ante*.

**5397. Liability of assignee—Under covenants in lease.]—**A person who comes in under an assignment or sub-lease, where there is a covenant not to assign or sub-let, is nevertheless bound by the provisions & stipulations contained in the lease (LORD COLLIERIDGE, C.J.).—SILCOCK v. FARMER (1882), 46 L. T. 404.

*Annotations:—Consd.* *Re* Morrish, *Ex p.* Hart Dyke (1882), 22 Ch. D. 410. *Refd.* Lybbe v. Hart (1885), 29 Ch. D. 8.

**5398. ———.]—**After reassignment.]—PAUL v. NURSE, No. 5567, *post*.

**5399. Assignment by trustee in bankruptcy.]—**Re JOHNSON, *Ex p.* BLACKETT, No. 5568, *post*.

**5400. Assignment to escape liability.]—**THOMPSON v. THOMPSON, No. 5585, *post*.

**Remedies of landlord.]—***See* Sect. 1, sub-sect. 2, C., *ante*.

**5401. Acceptance of assignee by landlord—What amounts to.]—**When a lease is not assignable without the landlord's assent, the fact that the landlord did not object to the assignees taking possession cannot, irrespective of all other circumstances, be held sufficient to imply his recognition of the assignees.—ELPHINSTONE (LORD) v. MONKLAND IRON & COAL CO. (1886), 11 App. Cas. 332; 35 W. R. 17, H. L.

*Annotations:—Refd.* *Re* Midland Coal, Coke & Iron Co., Craig's Claim, [1895] 1 Ch. 267. *Mentd.* Adams v. G. N. of Scotland Ry., [1891] A. C. 31; Law v. Redditch L. B., [1892] 1 Q. B. 127; Willson v. Love, [1896] 1 Q. B. 626; Stegmann v. O'Connor (1899), 81 L. T. 627; Clydebank Engineering & Shipbuilding Co. v. Yzquierdo y Castaneda, [1905] A. C. 6; Dieckal v. Stevenson, [1906] 2 K. B. 345; *Re* Law Car & General Inspec. Corp., [1913] 2 Ch. 103; Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co., [1915] A. C. 79.

## SECT. 2.—MODE OF ASSIGNMENT.

### SUB-SECT. 1.—REQUISITES OF VALID ASSIGNMENT.

#### A. Statute of Frauds.

##### (a) What Contracts within Statute.

*See, now*, Law of Property Act, 1925 (c. 20), ss. 40, 53–55.

**5402. Agreement to assign.]—**ANON. (1682), 1 Vent. 361; 86 E. R. 233.

**5403. ———.]—**Residue of term less than three years.]—POULTNEY v. HOLMES (1720), 1 Stra. 405; 93 E. R. 590, N. P.

*Annotations:—Dtd.* Barrett v. Rolph (1845), 14 M. & W. 348. *Consd.* Pollock v. Stacy (1847), 9 Q. B. 1033. *Mentd.* Palmer v. Edwards (1783), 1 Doug. K. B. 187, n.; Preece v. Corrie (1828), 5 Bing. 24; Pluck v. Digges (1831), 6 Bll. N. S. 31; Baker v. Gostling (1834), 1 Bing. N. C. 19; Cottee v. Richardson (1851), 7 Exch. 143.

**5404. ———.]—***Seem*: an agreement by a lessee for the transfer of his interest in the term, not exceeding three years, which, not being in writing, is invalid as an assignment by Stat. Frauds, cannot operate as an underlease.—BARRETT v. ROLPH (1845), 14 M. & W. 348; 14 L. J. Ex. 308; 153 E. R. 509.

*Annotations:—Consd.* Pollock v. Stacy (1847), 9 Q. B. 1033. *Refd.* Cottee v. Richardson (1851), 7 Exch. 143.

**5405. Assignment of tenancy from year to year.]—**A parol assignment of a lease from year to year, granted by parol, is void under Stat. Frauds.—BOTTING v. MARTIN (1808), 1 Camp. 317.

**Sect. 2.—Mode of assignment: Sub-sect. 1, A. (a), (b) & (c), & B.]**

**5406. Lessee to relinquish possession—Agreement relating to sale of an interest in land.]—**Where A., being possessed of a messuage & premises for the residue of a certain term of years, agreed with B. to relinquish possession to him, & to suffer him to become tenant of the premises for the residue of the term, in consideration of B.'s paying a sum of money towards completing certain repairs of the premises:—**Held:** (1) this was an agreement relating to the sale of an interest in land, within Stat. Frauds, s. 4; (2) in an action brought by A. on this contract, B. was entitled to avail himself, under *non assumpsit*, of the objection that there was no memorandum or note in writing, etc., of such contract.—**BUTEMERE v. HAYES** (1839), 5 M. & W. 456; 9 L. J. Ex. 44; 3 Jur. 704; 151 E. R. 193.

**Annotations:—**As to (2) **Apld.** Eastwood v. Kenyon (1840), 11 Ad. & El. 438. **Consd.** Leaf v. Tuton (1842), 10 M. & W. 393. **Apld.** Cocking v. Ward (1845), 1 C. B. 858. **Refd.** Reade v. Lamb (1851), 2 L. M. & P. 67.

**5407. ———.]—**(1) A party possessed of a term of years in certain premises, agreed by parol with another that the lessee should quit possession on a certain day & pay all outgoings up to that time, in consideration of which, the other agreed to pay him the sum of £150 & take a fair valuation of all the things which the lessee had to part with, except furniture, the purchaser having previously made an agreement with the lessor for a new lease to him on the determination of the existing term:—**Held:** the above contract was within Stat. Frauds, s. 4, as being an interest in land, & consequently void for want of a written agreement.

(2) Another contract similar to the former, save that instead of saying that *pltf.* was to quit possession of the land, it stated that he was "to part with it, & that *deft.* was to take same":—**Held:** within the meaning of the statute.—**SMITH v. TOMBS** (1839), 3 Jur. 72.

**5408. ———.]—**An agreement respecting the transfer of an interest in land, required by Stat. Frauds to be in writing & signed, cannot be enforced by an action upon the agreement against the transferee for the stipulated consideration, notwithstanding that the transfer has been effected & nothing remains to be done but to pay the consideration; but when, after the transfer, the transferee admits to the transferor that he owes him the stipulated price, the amount may be recovered in a count upon an account stated.

A count in *assumpsit* stated that A. was the occupier of a farm, as tenant to one V.; that B., *deft.*, was desirous of renting the farm from V., & had applied to & requested A. to surrender, & relinquish possession thereof, to V., & to endeavour to prevail upon V. to accept such surrender, & to accept B. as tenant in lieu of A.; & that, in consideration that A. would surrender, & relinquish possession of the farm to V., & would also apply to V. & endeavour to prevail upon him to accept of such surrender, & to accept B. as tenant in lieu of *pltf.*, B. promised to pay A. £100 when he should become such tenant. It then averred that A. did surrender, & relinquish, etc., & did apply to & endeavour to prevail upon V. to accept of such surrender, & to accept B. as tenant in lieu of A.; & that V. accepted the surrender, & accepted B. as tenant; but that B. refused to pay the £100:—**Held:** this was a contract for an interest in or concerning lands; & therefore the special count could only be proved by a note or memorandum in writing, in conformity with Stat. Frauds, s. 4; but A. was entitled to recover the £100 upon a

count on an account stated, upon proof that B. had, since he obtained possession of the farm, acknowledged his liability & promised to pay that sum.—**COCKING v. WARD** (1845), 1 C. B. 858; 15 L. J. C. P. 245; 135 E. R. 781.

**Annotations:—****Apld.** Kelly v. Webster (1852), 12 C. B. 283; Smart v. Harding (1855), 15 C. B. 652. **Distd.** Green v. Saddington (1857), 7 E. & B. 503; Hodgson v. Johnson (1858), E. B. & E. 685. **Expld.** Pulbrook v. Lawes (1876), 1 Q. B. D. 284. **Refd.** Angell v. Duke (1875), L. R. 10 Q. B. 174; Sanderson v. Graves (1875), L. R. 10 Exch. 234. **Mentd.** Lindus v. Bradwell (1848), 5 C. B. 583; Westlake v. Adams (1858), 5 C. B. N. S. 248; Flight v. Reed (1863), 1 H. & C. 703; Kennedy v. Broun (1863), 13 C. B. N. S. 677; Re Laycock v. Pickles (1863), 4 B. & S. 497; Savage v. Canning (1867), 16 W. R. 133; Knowlman v. Bluet (1874), L. R. 9 Exch. 307; Evans v. Heathcote, [1918] 1 K. B. 418; Camillo Tank S.S. Co. v. Alexandria Engineering Works (1921), 38 T. L. R. 134.

**5409. ———.]—**In consideration that A., who was tenant of a messuage & premises under a parol agreement for a seven years' lease, would give up the immediate possession thereof to B., in order that B. might enter thereon as tenant, & also as a compensation for certain improvements made by A. on the premises, & for the value of certain articles left thereon by A., B. agreed to pay A. £100. A. accordingly relinquished & gave up possession of the premises to B., who was thereupon accepted as tenant from year to year, at a different rent from that formerly paid by A.; & B. afterwards, in part performance of the agreement on his part, paid A. £51. In an action brought by A., in the county ct., to recover the balance of the £100, the judge ruled that the contract in respect of which *pltf.* sued was not a contract for the sale of an interest in or concerning lands, within Stat. Frauds, s. 4. The ct., on appeal, reversed his decision.—**KELLY v. WEBSTER** (1852), 12 C. B. 283; 21 L. J. C. P. 163; 19 L. T. O. S. 298; 16 J. P. 458; 16 Jur. 838; 138 E. R. 912.

**Annotation:—****Refd.** Hodgson v. Johnson (1858), E. B. & E. 685.

**5410. ———.]—**In consideration that A., who was in the possession & occupation of premises wherein he carried on the business of a milkman, would yield up possession & occupation of the premises to B., & permit him thenceforth to occupy same, & would assign over to B. all his property in the stock & plant, & deliver same to B., the latter promised to pay A. a certain sum:—**Held:** this was a contract for an interest in or concerning lands, within Stat. Frauds, s. 4.—**SMART v. HARDING** (1855), 15 C. B. 652; 3 C. L. R. 351; 24 L. J. C. P. 76; 1 Jur. N. S. 311; 3 W. R. 245; 139 E. R. 581.

**Annotation:—****Distd.** Lavery v. Turley (1860), 6 H. & N. 239.

**5411. ———.]—**By agreement, not in writing, between *pltf.* & *deft.*, it was agreed that *pltf.* should take possession of a brickyard, which *deft.* was occupying as tenant, & take the plant & bricks there at a valuation; & that *deft.* should pay up all rent then due, & endeavour to induce the landlord to accept *pltf.* as tenant. *Pltf.* took possession of the brickyard, & gave *deft.* a warrant of attorney as security for payment of the sum at which the bricks & plant were valued. A distress was afterwards put in upon the premises, & the plant & bricks sold, for rent due from *deft.* before the agreement; & *pltf.* was turned out of possession by the landlord. In an action by *pltf.* against *deft.*, for the breach of the agreement to pay up the rent:—**Held:** the contract & consideration were each single & entire; the contract, taken in its entirety, was a contract for the sale of an interest in lands, & not being in writing, was voidable under Stat. Frauds, s. 4; & *pltf.*, there-

fore, could not sever & sue upon that part which related to the payment of the rent.—*HODGSON v. JOHNSON* (1858), E. B. & E. 685; 28 L. J. Q. B. 88; 5 Jur. N. S. 290; 120 E. R. 666.

*Annotation*:—*Dbd. Pulbrook v. Lawes* (1876), 1 Q. B. D. 284.

**5412.** ——— **Agreement executed.]**—Pltf. & deft. agreed, by word of mouth, that pltf. should pay £37 for the interest of deft. in premises occupied by him as a slaughter-house, & for the fixtures; deft. to return £10 if pltf. were refused a licence to use the premises as a slaughter-house. The premises & fixtures were transferred to pltf.; & deft. received the £37. Subsequently, this action was brought to recover £10, on an allegation that the licence to use the premises had been refused to pltf. A nonsuit was directed, on the ground that the contract was for an interest in land, & was void under Stat. Frauds, sect. 4. On a rule to set aside the nonsuit:—*Held*: the contract being executed as far as regarded the land, & the promise sued on relating wholly to money, pltf. might recover, though the contract was not in writing.—*GREEN v. SADDINGTON* (1857), 7 E. & B. 503; 29 L. T. O. S. 144; 3 Jur. N. S. 717; 5 W. R. 593; 119 E. R. 1333.

*Annotations*:—*Dbd. & Distd. Hodgson v. Johnson* (1858), E. B. & E. 685. *Refd. Lindley v. Lacey* (1864), 13 W. R. 80. *Mentd. Shadwell v. Shadwell* (1860), 9 W. R. 163.

**5413.** ——— **]**—To an action for goods sold deft. pleaded, that he was possessed of a public-house, & it was agreed that, in consideration that deft. would give up possession of the same, pltf. would pay deft. £100 & discharge deft. from the debt; that pltf. paid the £100, & deft. quitted the house. The agreement was not in writing:—*Held*: having been executed, it was receivable as evidence to prove the plea. *Semble*: the plea, though pleaded as an equitable defence, was a good plea at common law, by way of accord & satisfaction.

The objection is that the agreement is one which, by Stat. Frauds, is required to be in writing; & that would be so if it were sought to enforce it as an agreement. But it is pleaded as a fact that deft. performed the agreement, & pltf. accepted such performance in satisfaction. The objection that the agreement was not in writing is got rid of (*POLLOCK, C.B.*).—*LAVERY v. TURLEY* (1860), 6 H. & N. 239; 30 L. J. Ex. 49; 158 E. R. 98.

*Annotation*:—*Mentd. Re Rowson, Field v. White* (1885), 29 Ch. D. 358.

*See, generally, CONTRACT, Vol. XII., pp. 118 et seq.*

(b) *Requirements as to Memorandum or Note.*

*See, now, Law of Property Act, 1925 (c. 20), s. 40.*

*See CONTRACT, Vol. XII., pp. 120–161.*

(c) *Operation of Statute.*

*See, now, Law of Property Act, 1925 (c. 20), ss. 40, 53–55.*

*See CONTRACT, Vol. XII., pp. 161 et seq.*

**5414. Effect of part performance.]**—A father verbally promised in consideration of his daughter's marriage to give her a house as a wedding present, & immediately after the marriage he put the daughter & her husband into possession. The father was then the owner of the house, which was leasehold & was subject to a charge in favour of a building society, payable by instalments. The father paid the instalments which fell due during his lifetime, & at his death there remained a balance of £110, which fell due shortly afterwards:—*Held*: the verbal promise to give the house

having been established, the possession took the case out of Stat. Frauds.—*UNGLEY v. UNGLEY* (1877), 5 Ch. D. 887; 46 L. J. Ch. 854; 37 L. T. 52; 41 J. P. 628; 25 W. R. 733, C. A.

*Annotations*:—*Consd. Hunt v. Wimbledon L. B.* (1878), 4 C. P. D. 48; *Alderson v. Maddison* (1881), 7 Q. B. D. 174. *Fold. Sharman v. Sharman* (1892), 67 L. T. 834. *Mentd. Goddard v. O'Brien* (1882), *De Colyar's County Court Cases*, 110.

**5415.** ——— **]**—In 1889 deft. was married to pltf.'s son, & pltf. gave to his son as a marriage present, but only by word of mouth, a certain business carried on at a certain house, & also (as deft. contended but pltf. denied) the lease of that house. Directly after the marriage, possession of the house was given up by pltf. & was held by the son, & he carried on the business there for his own benefit till his death, which occurred in Apr. 1891. Soon after that event a family disagreement arose, & pltf. brought an action of ejectment to recover possession of the house:—*Held*: the possession of the house given up to the son, equivalent to part performance, dispensed with the necessity of a writing; & as nothing was said to the contrary, the gift was free from incumbrances.—*SHARMAN v. SHARMAN* (1892), 67 L. T. 833; 9 T. L. R. 101; 37 Sol. Jo. 79; 4 R. 124, C. A.

**5416. Agreement to assign invalid—Whether operates as underlease.]**—*BARRETT v. ROLPH*, No. 5404, ante.

*See, further, SALE OF LAND.*

*B. Necessity for Deed.*

*See, now, Law of Property Act, 1925 (c. 20), s. 52.*

**5417. Effect of Real Property Act, 1845 (c. 106), s. 3.]**—By an indenture of sub-lease dated Dec. 30, 1886, J. demised certain premises to T. for seventy-nine & a half years less ten days from Christmas, 1886. By deed of assignment dated Mar. 30, 1895, T., in consideration of £50, "assigned to S. & C., therein called the purchasers, their & each of their exors., administrators, & assigns, all the hereditaments & premises comprised in & demised by the said deed of Dec. 30, 1886, to hold the said hereditaments & premises unto the purchasers, their & each of their exors., administrators, & assigns for the residue of seventy-nine & a half years less ten days, & the purchasers & each of them for himself & each of them for his heirs, exors., & administrators covenanted with the vendor that they the purchasers & each of them & each of their exors., & administrators would thenceforth pay the rent & perform the covenants & indemnify the vendor, etc." S. & C. thereupon entered into possession of the premises & carried on business therein in co-partnership as partners at will & occupied the premises as part of the partnership property until Oct. 18, 1900, on which date by a memorandum of agreement S. & C., after reciting that they had determined to terminate & dissolve the said partnership as from that date upon the following terms, agreed as follows:—namely: "C. thereby retired from the said partnership & relinquished all his interest in the partnership assets & thereby assigned to S. all his interest in the sub-lease of the premises & other partnership assets, together with the goodwill of the business, & S. thereby undertook to pay, satisfy, & discharge the liabilities of the business & to indemnify C. therefrom as from that date. C. thereby undertook to execute a formal assignment to give effect thereto." No formal assignment was ever executed. S. died on Feb. 21, 1908, leaving defts. his exors. C. was still alive. In an action by pltf. as assignees of the reversion

**Sect. 2.—Mode of assignment: Sub-sect. 1, B.; sub-sect. 2, A., B., C., D., E. & F.]**

against debts. for rent:—*Held*: (1) the effect of the assignment of 1895 was to create a joint tenancy & not a tenancy in common; (2) therefore on the death of S. the legal estate became vested in C. alone & never passed to debts. as S.'s exors.; & (3) there was no privity of estate between plffs. & debts., & consequently the action failed.

Since above Act an assignment of the legal estate unless made by deed is void (JELF, J.).—*GODDARD v. LEWIS* (1909), 101 L. T. 528; 25 T. L. R. 813.

**5418. Effect of manifest intention to assign.]—ROBERTS v. SHALESS, No. 5420, *post*.**

Necessity for writing, *see* Sub-sect. 1, A., *ante*.

**SUB-SECT. 2.—WHAT OPERATES AS ASSIGNMENT.  
A. In General.**

**5419. No reversion left in assignor.]—PALMER v. EDWARDS** (1783), 1 Doug. K. B. 187, n.; 99 E. R. 122.

*Annotations*:—*Refd.* Pluck v. Digges (1831), 5 Bl. N. S. 31; Wollaston v. Hakewill (1841), 3 Scott, N. R. 593; Barrett v. Rolph (1845), 14 M. & W. 348; Pollock v. Stacy (1847), 9 Q. B. 1033. *Mentd.* Twynam v. Pickard (1818), 2 B. & Ald. 105; Whitton v. Lamb (1844), 13 L. J. Ex. 205; South of England Dairies v. Baker, [1906] 2 Ch. 631.

**5420. Intention to assign—Manifested in another instrument.]—Articles of settlement showing an intention to transfer leasehold premises to trustees, held sufficient to transfer such property, although a deed of settlement, which appeared to have been contemplated, had not been executed.**

No deed nor any specific words are necessary to pass leasehold property; it is sufficient if an intention is manifested in the instrument to effect a present conveyance of the property (ERLE, J.).—*ROBERTS v. SHALESS* (1858), 1 F. & F. 139, N. P.

**Deeds construed according to the intentions of parties.]—See DEEDS, Vol. XVII., pp. 249 *et seq*.**

**5421. Consideration for assignment payable by instalments—Right of assignor to enter if default made—Whether assignment.]—An agreement to assign upon payment of £200 by instalments, the assignee to save the assignor harmless from liability to the lessor, & the assignor to re-enter on non-payment of any of the instalments:—*Held*: an agreement for an assignment only, & not an assignment.—*HARTSHORNE v. WATSON* (1839), 5 Bing. N. C. 477; 2 Arn. 70; 7 Scott, 494; 8 L. J. C. P. 299; 132 E. R. 1183.**

**Underlease for whole term—Whether an assignment.]—See Part IV., Sect. 3, *ante*.**

**Agreements to assign.]—See Sect. 5, *post*.**

**B. Underlease for Whole Term.**

*See* Part IV., Sect. 3, *ante*.

**PART XXI. SECT. 2, SUB-SECT. 2.—A.**

**m. Assignment by proposed lessee of his rights—Subsequent taking of lease in his own name.]—PARKINSON v. CLENDINNING** (1856), 13 U. C. R. 150.—*CAN.*

**n. Names of occupying tenants—Alteration in landlord's receipts.]—An alteration in the landlord's receipts for rent of the names of the occupying tenants does not, unless shown to have been assented to by all the parties interested, afford any evidence from which can be inferred either a change of the tenancy or a transfer of the legal rights.—*BOURKE v. BOURKE* (1874), 1 R. 8 O. L. 221.—*IR.***

**o. Substitution of name in lease—Without landlord's knowledge.]—A lease**

having been granted by pltf. to T., debt., before the expiration of the term, without pltf.'s knowledge, struck out T.'s name & put his own opposite to the seal, & entered & paid rent:—*Held*: pltf. could not maintain covenant against debt. on such lease.—*LAFR v. MAY* (1856), 14 U. C. R. 47.—*CAN.*

**p. Sub-demise for longer period than original lease.]—Where a lessee of land for five years demised the land for seven years:—*Held*: the demise in question operated as an assignment of the original term, & conferred upon the original lessor, in respect of the privity of estate thus created, a right of action against the assignee of the term for the arrears of rent due under**

**C. Assignment in Execution.**

*See* EXECUTION, Vol. XXI., pp. 516, 517, Nos. 921-927.

**D. Assignment from Death of Assignor.**

**5422. Whether void.]—POWELL v. MOULTON** (1626), 1 Rep. Ch. 15; 21 E. R. 494.

**5423. —For uncertainty.]—CAPENHURST v. CAPENHURST** (1661), 1 Keb. 183; T. Raym. 27; 83 E. R. 889; *sub nom.* CAPONHURST v. CAPONHURST, 1 Lev. 45.

*Annotations*:—*Mentd.* Aylet v. Williams (1683), 3 Lev. 193; Northcott v. Underhill (1697), 1 Ld. Raym. 388; Johnson v. Wilson (1740), Willes, 248.

**5424. Passes whole interest.]—A termor grants all his term & interest to B., *habendum* to him after his death; the whole interest passes immediately, & the *habendum* is void.—*LILLEY v. WHITNEY* (1568), 3 Dyer, 272 a; 73 E. R. 605.**

*Annotation*:—*Refd.* Corbet's Case (1599), 2 And. 134.

**5425. —.]—A lessee for years granted the lands to R. *habendum* to him & his exors. after the death of K. the lessor & his wife, his whole interest passed.—*GERMAINE v. ORCHARD* (1694), 3 Salk. 222; Holt, K. B. 331; 12 Mod. Rep. 11; 91 E. R. 789; *sub nom.* JERMAN v. ORCHARD, Skin. 528; *affd.*, *sub nom.* JERMYN v. ORCHARD (1695), Show. Parl. Cas. 199, H. L.**

*Annotations*:—*Consd.* Goodtitle d. Dodwell v. Gibbs (1826), 5 B. & C. 709. *Refd.* Boddington v. Robinson (1875), L. R. 10 Exch. 270.

**Assignment delivered as escrow.]—See DEEDS, Vol. XVII., pp. 208, 209, Nos. 197-201.**

**E. Assignment of Personal Property.**

**5426. Grant of chattels in house—Whether leaseholds included.]—Lessee for years of the pawns of the park of H., granted all his goods & chattels movable & immovable within the park:—*Held*: the lease of the pawns passed by these words.**

If a man has a lease for years of a house, & grants all his goods & chattels being in the same house, as well the lease of the house as the goods within it passes by such a grant (DYER, J.).—*ANON.* (1572), 3 Leon. 19; Dal. 82; 74 E. R. 514.

**5427. For benefit of creditors—Whether leaseholds included.]—V., the lessee of a mill & premises at a rack rent, being in insolvent circumstances, executed an assignment, whereby, after reciting his insolvency, & that he had agreed to assign "all his debts, personal estate, & effects of every description, to C. & B., in trust for the benefit of his creditors," he conveyed & assigned to C. & B. all & singular the stock in trade, implements & utensils in trade, corn, grain, hay, horses, carts, & carriages, crops of every kind, as well severed as not, & personal estate whatsoever of him the said V., in, upon, or about the mill & premises now in his use or occupation, or elsewhere, etc., except the wearing apparel of himself & family; & also**

the original lease.—*SELBY v. ROBINSON* (1865), 15 C. P. 370.—*CAN.*

**q. Substitution of assignee for original lessee.]—An assignment of a lease, differing in this respect from a sub-lease, is not complete as such unless it has the effect of substituting the alleged assignee as tenant in lieu of the original lessee.—*GREEN v. GRIFFITHS* (1886), 4 S. C. 346.—*S. AF.***

**r. Whether writing necessary.]—The assignment of a valid & assignable lease, supported by clear & indisputable testimony, is not invalid merely because it is not in writing.—*GREEN v. GRIFFITHS* (1886), 4 S. C. 346.—*S. AF.***

**t. Mere agreement to assign—Insufficient.]—DORAN v. KENNY** (1869), 3 I. R. Eq. 148.—*IR.*

all debts, securities, writings, etc., & all other the personal estate & effects of him, V., whatsoever & wheresoever, or in or to which he is anyway interested or entitled: *habendum*, in trust out of the proceeds, first, to pay the costs of the assignment, etc.; secondly, to pay the rent due & in arrear for the mill & premises, or accruing due until & at & up to Apr. 6 then next; & thirdly, to distribute the residue for the benefit of his creditors:—*Held*: the words of the assignment were large enough to comprehend the lease of the mill; & the jury having found that the assignees had accepted the lease, it passed to them under the assignment.—*RINGER v. CANN* (1838), 3 M. & W. 343; 1 Horn & H. 67; 7 L. J. Ex. 108; 2 Jur. 256; 150 E. R. 1176.

*Annotations*.—*Distd.* Harrison v. Blackburn (1864), 17 C. B. N. S. 678. *Refd.* West v. Steward (1845), 14 M. & W. 47; Spitzer v. Chaffers (1863), 14 C. B. N. S. 686. *Mentd.* Jenner v. Jenner (1866), L. R. 1 Eq. 361.

**5428.** ———.]—By a deed, reciting that A. was indebted to B. in the sum of £60 for goods supplied, A. assigned to B. "all & every the household goods & furniture, stock in trade, & other household effects whatsoever, & all other goods, chattels, & effects now being, or which shall hereafter be, in, upon, or about the messuage or dwelling-house & premises occupied by A., known as the Bull's Head, situate, etc., & all other the personal estate whatsoever of or to which A. is now & from time to time & at all times hereafter (so long as any money shall remain due to B.), & all the estate of A. in, to, or upon the premises hereby assigned or intended so to be," absolutely. Then followed a power to B. to sell & dispose of "the same premises," & out of the proceeds to pay the £60 & expenses, & to render the surplus to A.:—*Held*: notwithstanding the general words, the deed, which was registered under Bills of Sale Act, 1854 (c. 36), did not pass to B. the term which A. had in the Bull's Head.—*HARRISON v. BLACKBURN* (1864), 17 C. B. N. S. 678; 5 New Rep. 90; 34 L. J. C. P. 109; 11 L. T. 453; 10 Jur. N. S. 1131; 13 W. R. 135; 144 E. R. 272.

*Annotations*.—*Distd.* Debenham v. Digby (1873), 28 L. T. 170. *Mentd.* Mitcalfe v. Westaway (1864), 34 L. J. C. P. 113; Wallis v. Hands, [1893] 2 Ch. 75; Hawke v. Dunn, [1897] 1 Q. B. 579.

**5429.** ———.]—By a deed for the benefit of creditors (executed after the repeal of 24 & 25 Vict. (c. 134), debtor assigned to the deft. all his personal estate, & deft. executed the deed, & acted under it. In the personal estate was included a lease as to which deft. did not act specifically accepting it. In an action by the landlord for rent:—*Held*: the lease had passed to deft., & he was therefore liable.—*WHITE v. HUNT* (1870), L. R. 6 Exch. 32; 40 L. J. Ex. 23; 23 L. T. 559.

*Annotations*.—*Consd.* Debenham v. Digby (1873), 28 L. T. 170. *Refd.* *Re* Beachey, Heaton v. Beachey, [1904] 1 Ch. 67.

**5430.** ———.]—*Intention of parties.*—*STOCKS v. HAXLEY* (1855), 24 L. T. O. S. 256.

**5431.** ———.]—*Liability to trustees to enter.*—F., the lessee of a dwelling-house & premises, made an assignment to trustees for the benefit of his creditors, in which, after reciting that he was desirous of satisfying them, "as far as his effects, goods, & chattels would extend," he assigned to them all his stock & stocks, crop & crops of corn, etc., & household furniture, etc., in & about the farm, lands & premises occupied by him, in the parish of M. or elsewhere; & also all debts & securities, goods, chattels, credits, & effects whatsoever & wheresoever, of him, F.; with a covenant, that it should be lawful for the trustees to enter upon the house, farm, & premises

occupied by him, in M. aforesaid or elsewhere, where the said goods, chattels, & effects might be found, & to take away, sell, & dispose thereof":—*Held*: under these words, F.'s term in the dwelling-house & premises passed to the trustees.—*DOE d. FARMER v. HOWE* (1840), 9 L. J. Q. B. 352.

**5432.** *Mortgage of personalty—Power reserved to mortgagee to disclaim lease—Effect of disclaimer.*—A., pltf., who was the owner of a house, granted a lease of same to B., who borrowed on Mar. 11, 1869, a sum of money from deft., & as security mortgaged by deed of assignment all her personal property in the house, & "all the freehold hereditaments, goods, chattels, effects, debts, securities, deeds, documents, vouchers, books of account, fixtures, & personal property of, in or to which the mtgor. was or during this security shall become seised of," etc., "except the necessary wearing apparel of the mtgor., & any leaseholds, or any portion of the term or terms for which such leaseholds are or may be holden, which the mtgee., his solr. or agent, shall at any time, by writing, indorsed thereon, or referring thereto, declare not to be included therein, to have, hold," etc. Deft. had no knowledge of the lease until the following July 8, when he indorsed upon the mtge. deed, "I hereby declare that the lease of the premises, 8, Maida Vale, & the interest of the mtgor. in such premises, are not included herein or accepted by me." A quarter's rent for the premises having become due on Mar. 25, 1869, pltf. sued deft. for the amount as assignee of the lease:—*Held*: he was right in so doing, & the indorsement on the deed by deft. was no answer.—*DEBENHAM v. DIGBY* (1873), 28 L. T. 170; 21 W. R. 359.

*See, further, BILLS OF SALE, Vol. VII., pp. 74-76.*

#### F. Other Cases.

**5433.** *Release by tenant in common—Endorsement on lease.*—*ANON.* (1574), 2 Leon. 220; 74 E. R. 494.

**5434.** *Grant of all interest & estate in messuage.*—If lessee for years of a messuage grants *totum messuagium suum*, the grantee hath but at will; but if he grant all his interest & estate in such a messuage, then the whole lease passeth.—*GRIFFIN'S CASE* (1589), 2 Leon. 78; 74 E. R. 372.

**5435.** *Bargain & sale—Necessity for entry.*—A bargain & sale by tenant for years conveys no possession without actual entry.—*CHALLONER v. DAVIES* (1698), 1 Sd. Raym. 400; 1 Lut. 565; 91 E. R. 1166.

**5436.** *Request to become tenant under same terms as old lease—Acceptance by lessor—Occupation.*—The Company of Proprietors of Drury Lane Theatre, made a corp'n. by 50 Geo. 3, c. ccxiv, in 1836 leased the counters of the saloon of the theatre & the privilege of selling fruit, etc., to Mrs. G. for seven years. She died in 1837, & her son, deft., soon after applied to the committee of the theatre to become tenant on the same terms as the lease, & they accepted him. He occupied down to Jan. 1843, & paid rent down to the latter part of 1841. In an action for use & occupation:—*Held*: (1) it was a question for the jury whether deft. had occupied as assignee of the lease to his mother, or upon a fresh taking upon the same terms as the lease, & if the latter, he was liable in the present action; (2) he would be so liable, although in Apr. 1843, he & his brother had taken out letters of administration to Mrs. G. (therein described as a *feme covert* at the time of her death),

**SECT. 2.—Mode of assignment: Sub-sect. 2, F. Sects. 3, 4, 5, 6, 7, 8, 9 & 10: Sub-sect. 1, A.]**

& also to her husband, who had survived her.—**THEATRE ROYAL DRURY LANE CO. OF PROPRIETORS v. CHAPMAN** (1843), 1 Car. & Kir. 14; 1 L. T. O. S. 312, 359.

**5437. Assignment of lease—Whether sufficient to pass reversion in underlease—Without express words.]—**Where a lessee grants an underlease, reserving a rent which is incident to the reversion on the underlease, the rent, the reversion, & the benefit of the covenants will not pass by a subsequent mere assignment of the term, nor unless expressly assigned.—**FRANKLIN v. HOWES** (1871), 24 L. T. 348; 19 W. R. 581.

**Agreement to assign.]—**See No. 5421, *ante*.

*See, also, FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 232, 233, Nos. 597–601.*

### SECT. 3.—WHAT PASSES ON ASSIGNMENT.

*See COMMONS, Vol. XI., p. 38, No. 530; DEEDS, Vol. XVII., p. 378, Nos. 1873–1876; EASEMENTS, Vol. XIX., pp. 79, 80.*

### SECT. 4.—COVENANTS RUNNING WITH LAND.

*See, generally, Part XI., Sect. 6, ante.*

**Covenant not to assign or underlet.]—**See Nos. 5169–5172, *ante*.

### SECT. 5.—AGREEMENTS TO ASSIGN.

**5438. Purchase money payable by instalments—Right of assignor to re-enter in default—Whether amounts to assignment.]—****HAITSHORNE v. WATSON**, No. 5421, *ante*.

**5439. Property comprising cottages—Right to vacant possession.]—**An agreement in writing entered into for the assignment of a public-house in the occupation of the party himself, together with several cottages in the occupation of tenants, does not necessarily import that actual possession of the cottages is to be given by turning the tenants out. *Semble*: if a party in such a case insists on actual possession being given, he should state such intention early enough to enable the other party to comply with it.—**PALMER v. TEMPLE** (1836), 1 Har. & W. 702; 6 Nev. & M. K. B. 159; 5 L. J. K. B. 92; *subsequent proceedings* (1839), 9 Ad. & El. 508.

**Requirements as to writing—Statute of Frauds.]—**See Sect. 2, sub-sect. 1, A., *ante*.

**Execution before actual assignment.]—**See **EXECUTION, Vol. XXI., p. 491, No. 689.**

*Construction of documents generally, see DEEDS, Vol. XVII., pp. 242 et seq.*

**5440. Vendor in treaty for renewal—Whether bound to renew for benefit of purchaser.]—**The vendor of leaseholds held under an ecclesiastical corp'n. previously to his contract for sale was in treaty with the lessors for a renewal of the lease, & continued such treaty after the contract:—*Held*: this did not throw upon him the obligation of procuring such renewal for the benefit of the purchaser.—**MONRO v. TAYLOR** (1852), 3 Mac. & G.

713; 21 L. J. Ch. 525; 19 L. T. O. S. 97; 42 E. R. 434, L. C.

*Annotation:—Mentd. Abbott v. Calton* (1853), 22 L. J. Ch. 936.

**5441. Duty of assignor to hand over lease.]—**On a contract by a letter of debt, assented to by ptfs., to take a farm off their hands, provided he was accepted by their landlord on the covenants in their lease:—*Held*: they were bound to procure & deliver to him the lease, & it having been deposited as security for a loan, & they not having procured it, ptfs. were nonsuited.—**BURTON v. BANKS** (1860), 2 F. & F. 213.

*See, generally, SALE OF LAND.*

**5442. Agreement subject to landlord's consent—Admissibility of evidence.]—**Where, by a written agreement, debt. agreed to assign to ptff. a farm with immediate possession, upon the same terms as he held of his landlord, but at the time of the making of such agreement an oral agreement was entered into between ptff. & debt. that the written agreement should be void if the landlord refused to consent to the assignment. In an action for non-assignment:—*Held*: the oral agreement was admissible, as it is in analogy with the delivery of a deed as an escrow, & neither varies nor contradicts the writing, but suspends the commencement of the obligation.—**WALLIS v. LITTELL** (1861), 11 C. B. N. S. 369; 31 L. J. C. P. 100; 5 L. T. 489; 8 Jur. N. S. 745; 10 W. R. 192; 142 E. R. 840.

*Annotations:—Refd. Lindley v. Lacey* (1864), 17 C. B. N. S. 578; *Abrey v. Crux* (1869), L. R. 5 C. P. 37. *Mentd. Wake v. Harrop* (1862), 1 H. & C. 202; *Johnson v. Appleby* (1874), 30 L. T. 261; *Hitchings & Coulthurst Co. v. Northern Leather Co. of America & Doushness*, [1914] 3 K. B. 907.

**5443. Duty of vendor pending completion—Maintenance of insurance.]—**A., the lessor, contracted with B., the lessee, for the purchase of B.'s interest in certain premises. B. insured the premises for about half their value. Before the completion of the contract the premises were damaged by fire to about the amount insured, which sum was paid by the insurance co. A. brought his action for damages for breach of the covenant to insure in addition to the sum paid by the insurance co.:—*Held*: A. was not entitled to any sum by way of damages beyond the insurance money paid by the co.—**NEWMAN v. MAXWELL** (1899), 80 L. T. 681; 43 Sol. Jo. 477.

### SECT. 6.—PROOF AND INVESTIGATION OF TITLE.

*See, generally, SALE OF LAND.*

### SECT. 7.—REGISTRATION OF TITLE.

*See SALE OF LAND.*

### SECT. 8.—REGISTRATION OF DEED IN MIDDLESEX AND YORKSHIRE.

*See SALE OF LAND.*

### SECT. 9.—STAMPS.

*See Stamp Act, 1891 (c. 39), ss. 54–61; & generally, REVENUE.*

### PART XXI. SECT. 5.

**a. Purchase-money payable by instalments.]—**O. agreed to sell, to S. certain leasehold property & premises, for £250, to be paid as follows: £50 down,

& the remainder in four equal annual instalments. Then followed a covenant by O. that if S. should duly pay the said sums, & should pay & save O. harmless from the rent due by the leases under which

would assign & convey the leasehold, & the appurtenances thereof, to S.:—*Held*: an agreement to assign only, not an assignment of O.'s interest.—**TAYLOR v. SUTTON** (1859), 18 U. C. R. 615.—CAN.

**5444. Indorsement postponing completion of contract to assign.**—By an indorsement on the agreement the day for delivering the possession was enlarged:—*Held*: such indorsement constituted a fresh agreement. *Qu.*: whether it was of the value of £20, so as to require a stamp.—*BACON v. SIMPSON* (1837), 3 M. & W. 78; *Murp. & H. 309*; 7 L. J. Ex. 34; 150 E. R. 1064.

*Annotations*:—*Reid*. Gwynne v. Davy (1840), 1 Man. & G. 857. *Mentd.* Tharpe v. Stallwood (1843), 7 J. P. 400.

**5445. Agreement to grant a future lease.**—By a written agreement, A. agreed with B. that B. should have his, A.'s, farm for his life for £20 a year rent, & the whole of A.'s keep & maintenance; B. to take off the stock at £75 10s., B. having taken the stock, & had possession of the land for his life:—*Held*: inasmuch as the instrument could operate only as an agreement to grant B. a future lease of the farm for his life, it was properly stamped with a £1 stamp.—*STONE v. ROGERS* (1837), 2 M. & W. 443; *Murp. & H. 146*; 6 L. J. Ex. 145; 1 Jur. 455; 150 E. R. 831.

*Annotation*:—*Mentd.* Irving v. Veitch (1837), 3 M. & W. 90.

**5446. Agreement to assign—With option to purchaser to accept declaration of trust—Whether agreement for sale of equitable estate or interest—Within Stamp Act, 1891 (c. 39), s. 59 (1).**—*WEST LONDON SYNDICATE v. INLAND REVENUE COMRS.*, No. 5447, *post*.

**5447. Lease & goodwill of public-house—Whether subject to ad valorem duty in respect of goodwill.**—(1) A contract for the sale of leasehold premises contained a proviso that in the event of the consent of the landlord to the assignment of the lease not being obtained the vendor should, at the option of the purchaser, execute a declaration of trust of the lease in his favour. Two days afterwards a declaration of trust was executed, by which the equitable interest in the premises vested in the purchaser:—*Held*: the contract being one for the sale of a legal estate, & there being no obligation on the purchaser to accept a declaration of trust, it was not a contract for the sale of an equitable estate or interest in property within Stamp Act, 1891 (c. 39), s. 59 (1).

(2) The goodwill of a public-house is not necessarily a mere enhancement of the value of the licensed premises, & so attached to the possession of the premises as to constitute "land" within Stamp Act, 1891 (c. 39), s. 59 (1). It may, therefore, be "property except lands" within the meaning of the sect.; & upon an agreement for the sale of the lease & goodwill of a public-house the instrument may be chargeable with *ad valorem* duty.—*WEST LONDON SYNDICATE v. INLAND REVENUE COMRS.*, [1898] 2 Q. B. 507; 67 L. J. Q. B. 956; 79 L. T. 289; 47 W. R. 125; 14 T. L. R. 569; 42 Sol. Jo. 714, C. A.

*Annotations*:—*As to* (1) *Reid*. Chesterfield Brewery Co. v. I. R. Comrs., [1899] 2 Q. B. 7. *As to* (2) *Expld.* Muller's Margarine v. I. R. Comrs., [1900] 1 Q. B. 310. *Reid*. Baglioni v. Cavalli (1900), 83 L. T. 500; Danubian Sugar Factories v. I. R. Comrs., [1901] 1 K. B. 245; Maples v. I. R. Comrs., [1914] 3 K. B. 303.

**5448. Calculation of duty—Counterpart of under-lease operating as assignment.**—In support of an issue of assignment, plffs. offered in evidence a deed, executed by deft. only, which when executed was intended by the parties to be the counterpart of a lease, & was stamped with a duty of £1 10s., but, the grantor having thereby parted with all his interest in the premises, the original deed

became by operation of law an assignment:—*Held*: the deed so tendered in evidence was not admissible for the purpose of proving an assignment, the proper stamp being £1 15s., under the general clause in the schedule to Stamp Act, 1815 (c. 184), applicable to "deeds of any kind whatever, not otherwise charged, or expressly exempted from all stamp duty."—*BAKER v. GOSTLING* (1834), 1 Bing. N. C. 246; 1 Scott, 58; 4 L. J. C. P. 31; 131 E. R. 1111.

**5449. Rent apportioned on assignment of part of leaseholds.**—The lessee, for a term of ninety-nine years at a yearly rent, of a piece of land with three houses thereon, assigned & conveyed two of the houses, in consideration of £503 for the residue of the term subject to an apportioned rent representing two-thirds of the rent reserved by the lease. By the deed of assignment the assignee covenanted to pay such apportioned rent, & to keep the assignor indemnified in respect of it, & the assignor covenanted to pay the remaining one-third of the rent reserved by the lease, & to keep the assignee indemnified in respect of it. The three houses were of the same annual value:—*Held*: for the purpose of fixing the *ad valorem* duty chargeable under the heading "Conveyance or transfer on sale of any property" in Stamp Act, 1891 (c. 39), sched. I., the payment of rent by the assignee was not part of the consideration for the assignment, & duty was chargeable upon the £503 only.—*SWAYNE v. INLAND REVENUE COMRS.*, [1900] 1 Q. B. 172; 69 L. J. Q. B. 63; 81 L. T. 623; 48 W. R. 197; 16 T. L. R. 67; 44 Sol. Jo. 99, C. A.

*Annotation*:—*Expld.* Martin v. I. R. Comrs. (1904), 91 L. T. 453.

**Documents insufficiently stamped—Admissibility in evidence.**—*See EVIDENCE*, Vol. XXII., pp. 202 *et seq.*

## SECT. 10.—LIABILITIES OF LESSEE AND ASSIGNEE.

### SUB-SECT. 1.—LIABILITIES OF LESSEE TO LESSOR.

#### A. In General.

**5450. Original lessee continues liable on covenants—Privy of contract remains.**—Debt lies against the original lessee for rent accrued after assignment of his term, for the privy of contract remains notwithstanding the assignment.

There are three manner of privities, privy in respect of estate only, privy in respect of contract only, & privy in respect of estate & contract together; as if the lessor grants over his reversion . . . between the grantee & the lessee is privy of estate only, so between the lessor & the assignee of the lessee, for no contract was made between them. Privy of contract only is personal privy & extends only to the person of the lessor & to the person of the lessee; when the lessee assigned over his interest, notwithstanding his assignment the privy of contract remained between them, although the privy of estate be removed by the act of the lessee himself (*per CUR.*).—*WALKER'S CASE* (1587), 3 Co. Rep. 22 a; 70 E. R. 676; *sub nom.* *WALKER v. HARRIS*, Moore, K. B. 351.

*Annotations*:—*Consd.* Humble v. Glover (1594), Cro. Eliz. 328; Overton v. Sydal (1597), Cro. Eliz. 555. *Dbtd.* Marrow v. Turpin (1599), Cro. Eliz. 715. *Consd.* March v. Brace (1613), 2 Bulst. 151; Hellar v. Casebrooke (1665), 1 Keb. 923. *Reid.* Broom v. Hore (1598), Cro. Eliz. 633; Thursby v. Plant (1669), 1 Saund. 237; Windsor (Dean

## PART XXI. SECT. 10, SUB-SECT. 1.—A.

*b. Liability ended with expiration of lease.*—Where on the assignment by

a lessee of his interest in a lease he agrees with the lessor that his, the assignor's rights under a conditional sale to the new tenant shall not be exercised to the prejudice of the lessor,

such agreement expires with the expiration of the lease.—*BELL & SCHIEBEL v. JACOBSON & WEITZEL*, [1925] 2 D. L. R. 393; 1 W. W. R. 913.—*CAN.*

**Sect. 10.—Liabilities of lessee and assignee: Subsect. 1, A. & B.]**

& Chapter) v. Gover (1671), 2 Saund. 302; Jenkins v. Hermitage (1674), From. K. B. 377; Cook v. Harris (1697), 1 Ld. Raym. 387; *Re Russell Road Purchase Moneys* (1871), L. R. 12 Eq. 78; Swansea Corp'n. v. Thomas (1882), 10 Q. B. D. 48. *Mentd.* Wynne v. Boughay (1666), O. Bridg. 570; Anon. (1675), 2 Mod. Rep. 7; Banker's Case (1695), Skin. 601; Reeve v. Bird (1834), 4 Tyr. 612; Neale v. MacKenzie (1835), 4 L. J. Ex. 185; Morley v. Attenborough (1849), 3 Exch. 500; Elcholtz v. Bannister (1864), 17 C. B. N. S. 708.

**5451.** ———.]—*MARCH v. BRACE* (1614), 2 Bulst. 151; 80 E. R. 1025; *sub nom.* MARSH v. BRACE, Cro. Jac. 334.

*Annotations* :—*Reid.* Thursby v. Plant (1669), 1 Saund. 237; Tovey v. Pitcher (1692), Carth. 177; Wadham v. Marlow (1784), 4 Doug. K. B. 54; Ludford v. Barber (1786), 1 Term Rep. 90. *Mentd.* Davis v. Speed (1692), Carth. 262.

**5452.** ———.]—The bkpcy. of a lessee is no bar to an action of covenant brought against him.

It is extremely clear that a person who enters into an express covenant in a lease continues liable on his covenant notwithstanding the lease be assigned over (LORD KENYON, C.J.).—*AURIOL v. MILLS* (1790), 4 Term Rep. 94; 100 E. R. 912; *affg.*, S. C. *sub nom.* MILLS v. AURIOL, 1 Hy. Bl. 433.

*Annotations* :—*Consd.* Boot v. Wilson (1807), 8 East, 311; Betts v. Price (1924), 40 T. L. R. 589. *Reid.* Onslow v. Corrie (1817), 2 Madd. 330; Randall v. Rigby (1838), 1 Horn & H. 231; Stacey v. Hill, [1901] 1 K. B. 660. *Mentd.* Saunders v. Smith (1838), 7 L. J. Ch. 227; Evans v. Jones (1839), 3 Jur. 705; Thomas v. Sylvester (1873), L. R. 8 Q. B. 368.

**5452a.** ———.]—Why is the assignee liable to the landlord? Because of the privity of estate. The original lessee is liable in respect of the privity of contract. The liability of an assignee of a lease, begins & ends with his character of assignee. In him there is no personal confidence by the lessor. Ever since the case of *Pitcher v. Tovey*, No. 5563, *post*, it has been held that, by an assignment, an assignee exonerates himself from all claims in respect of rent, even though he assigns to a beggar. An assignee may, whenever he pleases, assign again; & the moment he divests himself of the character of assignee, he also shakes off his liability for rent. It is very different as to the original lessee, for he, in all cases before the late Act, remained liable to his covenant to pay the rent, notwithstanding his assignment, & whoever might be the assignee; but an assignee is only liable by privity of estate, which ceases when he ceases to be assignee, & loses that character (PLUMER, V.-C.).—*ONSLow v. CORRIE* (1817), 2 Madd. 330; 56 E. R. 357.

*Annotations* :—*Reid.* Rowley v. Adams (1839), 4 My. & Cr. 534; Hopkinson v. Lovering (1883), 11 Q. B. D. 92.

**5453.** ———.]—In covenant for rent, debt, pleaded that he was undertenant of parcel of certain premises, for the whole of which pltf., his lessor, had covenanted to pay rent to the landlord paramount, & showed that he, debt., paid to the landlord paramount, under threat of distress, more rent than he owed to pltf.; pltf. traversed that any rent was due from himself to the landlord paramount :—*Held* : this replication was not supported, by proving that pltf. had assigned his term in the whole of the premises to K., who assigned them to debt., who covenanted to pay in discharge of pltf. the whole rent reserved to the landlord paramount.

[Pltf.] had contented himself with denying that rent was due from himself; whereas it was most correctly stated to be due (*per Cur.*).—*STURGESS v. FARRINGTON* (1812), 4 Taunt. 614; 128 E. R. 471.

**5454.** ———.]—**Assignment of agreement for a lease.**—An agreement for a lease may be assigned.

A landlord entered into an agreement to lease a farm to B., who assigned the agreement to C. :—*Semble* : the landlord entitled to have the personal liability of B. for the performance of the covenants of the lease to be granted to C. in pursuance of the agreement.—*DOWELL v. DEW* (1843), 12 L. J. Ch. 158; 7 Jur. 117, L. C.

*Annotations* :—*Distd.* Purchase v. Lichfield Brewery Co., [1915] 1 K. B. 184. *Reid.* Buckland v. Papillon (1866), L. R. 1 Eq. 477. *Mentd.* Gregory v. Wilson (1852), 9 Hare, 683; Crofts v. Middleton (1855), 2 K. & J. 194; Gas Light & Coke Co. v. Towse (1887), 35 Ch. D. 519.

**5455.** ———.]—**Liability not terminated by death—Devolves on personal representative.**—An action lies in the *detinet* against an administrator for rent incurred after an assignment of the term; for the privity of contract is not determined by the death of the intestate.—*COGHIL v. FREELOVE* (1690), 3 Mod. Rep. 325; 2 Vent. 209; 87 E. R. 215.

**Acceptance of assignee as tenant.**—*See* Subsect. 1, D., *post*.

**5456.** **Nature of liability—Surety for assignee.**—*WOLVERIDGE v. STEWARD*, No. 5590, *post*.

**5457.** ———.]—The assignee of a lease becomes liable to the lessor for the performance of all the covenants which run with the land, & the lessee is also liable, in the nature of a surety as between himself & the assignee, for the performance of the same covenants, during the continuance of his interest as assignee; the consequence is, that a duty is imposed on the assignee at common law to perform the covenants during that time, for which an action on the case will lie (PARKE, B.).—*HUMBLE v. LANGSTON* (1841), 7 M. & W. 517; 2 Ry. & Can. Cas. 533; H. & W. 72; 10 L. J. Ex. 442; 151 E. R. 871.

*Annotations* :—*Consd.* Moule v. Garrett (1870), L. R. 5 Exch. 132. *Reid.* Moule v. Garrett (1872), L. R. 7 Exch. 101. *Mentd.* Phené v. Gillan (1845), 5 Hare, 1; Shaw v. Fisher (1848), 12 Jur. 152; Bayley v. Wilkins (1849), 7 C. B. 886; Sayles v. Blane (1849), 14 Q. B. 205; *Re Monmouthshire & Glamorganshire Joint Stock Banking Co., Ex p. Cape's Executor* (1852), 22 L. J. Ch. 601; Bargeat v. Shortridge (1855), 25 L. T. O. S. 204; Walker v. Bartlett (1856), 18 C. B. 845; Mathew v. Blackmore (1857), 1 H. & N. 762; R. v. Storke (1857), 5 W. R. 563; Grissell v. Bristowe (1868), L. R. 3 C. P. 112; Maxted v. Paine (1871), L. R. 6 Exch. 132; Kellock v. Enthoven (1874), L. R. 9 Q. B. 241; Spencer v. Ashworth, Partington, [1925] 1 K. B. 589.

**5458.** **Covenant on behalf of "assigns"—Whether underlessee included.**—The lessee of a public-house covenanted with his lessor, pltf., that he, his exors., administrators, or assigns would not wilfully do or suffer any act or thing which might be a breach of the rules & regulations established by law for the conducting of licensed public-houses, or be a reasonable ground for the withdrawing or withholding of all or any of the licenses for the sale of beer & ale, wine, & spirituous liquors therein. The lessee assigned the term to debts., who underlet the premises. The underlessee committed an offence against the licensing laws, the result of which was that the renewal of the licenses was refused. In an action for breach of the covenant :—*Held* : the term "assigns" in the covenant did not include an underlessee, & debts. were not liable for a breach of the covenant in respect of the offence committed by their underlessee.—*BRYANT v. HANCOCK & Co., LTD.*, [1898] 1 Q. B. 716; 67 L. J. Q. B. 507; 78 L. T. 397; 62 J. P. 324; 46 W. R. 386; 14 T. L. R. 320, C. A.; *on appeal*, [1899] A. C. 442, H. L.

*Annotations* :—*Distd.* Mumford v. Walker (1901), 71 L. J. K. B. 19. *Expld.* Holloway v. Hill, [1902] 2 Ch. 612. *Apd.* Villiers v. Oldcorn (1903), 20 T. L. R. 11. *Consd.* Wilson v. Twamley, [1904] 2 K. B. 99. *Distd.* Palethorpe v. Home Brewery Co., [1906] 2 K. B. 5; South of England Dairies v. Baker, [1906] 2 Ch. 631. *Reid.* John, Abergarw Brewery Co. v. Holmes, [1900] 1 Ch. 188; Teape v. Douse (1905), 92 L. T. 319. *Mentd.* Williams v. Lassel & Sharman (1906), 22 T. L. R. 443.

**5459. Effect of bankruptcy—Whether bar to action on covenants.]—**AURIOL *v.* MILLS, No. 5452, *ante*.

*See, further, BANKRUPTCY*, Vol. IV., pp. 258–261.

**Effect of compulsory purchase on lessee's covenants.]—***See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 279.

### *B. Liability for Rent.*

**5460. Whether lessee continues liable.]—**WALKER'S CASE, No. 5450, *ante*.

**5460a. —.]—**ONSLow *v.* CORRIE, No. 5452A, *ante*.

**5461. — Lessor without notice of assignment.]—**Re HASSEL (1627), Litt. 53; 124 E. R. 133.

**5462. — Whether express covenant necessary.]—**ANON. (1670), 1 Sid. 447; 82 E. R. 1209.

*Annotation:—*Refd. Wadham *v.* Marlowe (1785), 8 East, 315, n.

**5463. — Express covenant by lessee for payment.]—**AURIOL *v.* MILLS, No. 5452, *ante*.

**5464. — Assignment not assented to.]—**Deft., in 1799, agreed to take the premises for seventeen years at a yearly rent, & entered. In 1813, pltf. contracted to sell the fee to A., who thereupon bought from deft. the residue of his term, & without the assent of pltf., put in a new tenant, who occupied for two years. The contract for sale of the fee was then rescinded:—*Held*: pltf. were entitled to recover from deft., in an action for use & occupation, the rent from 1813 to the end of the original term, as there had been no surrender in writing of his interest, & as pltf. had not assented to the change of tenancy.—MATTHEWS *v.* SAWELL (1818), 8 Taunt. 270; 2 Moore, C. P. 262; 129 E. R. 387.

*Annotation:—*Refd. Nickolls *v.* Atherstone (1847), 10 Q. B. 944.

**5465. — Demise by parol—Subsequent assignment of reversion.]—**S. made a parol demise of a tenement to M. from year to year at a rent. M. by deed assigned all his estate, interest, & term in the tenement to a third party, but S. refused to accept the third party as his tenant. Afterwards S. assigned his reversion to pltf., who never accepted the third party as their tenant, & brought an action against M. for rent in arrear:—*Held*: (1) as no estate remained in M. after his assignment of his yearly tenancy, 4 & 5 Ann. c. 3, s. 9, did not apply; & (2) there was no privity of estate or of contract between pltf.'s & M., & therefore the action could not be maintained.

A tenant from year to year may make a valid assignment of his interest, if not at common law, at any rate by virtue of Real Property Act, 1845 (c. 106), & after such assignment no estate or interest in the premises remains in him.—ALLCOCK *v.* MOORHOUSE (1882), 9 Q. B. D. 366; 47 L. T. 404; 47 J. P. 85; 30 W. R. 871, C. A.

**5466. Liability on assignment of agreement for lease.]—**Pltf. agreed in writing to let certain premises to deft. for seven years. Deft. entered into possession, but subsequently, with the consent of pltf., assigned his interest in the agreement & premises. No lease of the premises was ever granted. Shortly before the expiration of the term pltf. commenced an action against deft. for three quarters' rent, but this action was heard after the expiration of the seven years:—*Held*: specific performance of the agreement would have been granted, & the action was maintainable.—GILBEY *v.* COSSEY (1912), 106 L. T. 607; 56 Sol. Jo. 363, D. C.

**5467. —.]—**Deft., by an agreement in writing but not under seal, leased certain premises from pltf., as tenant from year to year. The agreement contained an express agreement to pay rent at certain specific times. Subsequently pltf. permitted deft. to assign the lease on condition that their rights as to rent, etc., against deft. were not interfered with:—*Held*: in an action for rent against deft., as the original tenant, the mere fact that the original lease was not under seal did not prevent pltf. from recovering the rent from deft.—BETTS (J.) & SONS, LTD. *v.* PRICE (1924), 40 T. L. R. 589.

**5468. Liability for whole rent—Assignment of part of premises.]—**If a lessee assign part of the land demised, a grantee of the reversion shall have debt against him for the whole rent.—BROOM *v.* HORE (1598), Cro. Eliz. 633; cited in 3 Co. Rep. p. 24 a; 78 E. R. 873.

**5469. — — By joint lessee.]—**If one of two lessees assign his interest, & the other die before the rent becomes due, an action of debt in the *debit et delinet* will lie against the assignee & extrix. of the deceased lessee, for the whole rent.

Severance of the land shall not make a severance of the action of pltf., if it should, great inconvenience would follow, by the several assignments of undertenants among themselves of which the lessor might not have notice & therefore he may at all times resort for his rent to his first lessee (CROKE, J.).—IPSWICH CORPN. *v.* MARTIN & PARKER (1616), Cro. Jac. 411; 3 Bulst. 211; 70 E. R. 351.

*Annotations:—*Mentd. Lyn *v.* Wyn (1665), O. Bridg. 122; Sackville *v.* Evans (1674), Freem. K. B. 171.

**5470. — — —.]—**WALDRON *v.* VICARS (1622), Palm. 283; 81 E. R. 1084.

**5471. Effect of subsequent surrender of part by assignee.]—**Pltf. demised premises to deft. for a term of years by deed containing a covenant by deft. for the payment of the rent reserved. Deft. assigned the term, & his assignee surrendered a portion of the premises to pltf. In an action on the covenant pltf. claimed to recover the amount of the apportioned rent for the part of the premises not surrendered:—*Held*: the liability of deft. on the covenant was not extinguished by the surrender of part of the demised premises, but he still remained liable thereon at any rate to the amount claimed. *Qu.*: whether he remained liable to the extent of the whole of the rent originally reserved.—BAYNTON *v.* MORGAN (1888), 22 Q. B. D. 74; 58 L. J. Q. B. 139; 53 J. P. 166; 37 W. R. 148; 5 T. L. R. 99, C. A.

*Annotation:—*Refd. Matthey *v.* Corling, [1922] 2 A. C. 180.

**5472. Effect of notice of assignment—Lessor may elect to sue lessee or assignee.]—**DEVEREUX *v.* BARLOW, No. 5553, *post*.

**5473. — Rent not accepted from assignee.]—**A common assignment by a lessee, without acceptance of rent from the assignee by the lessor, or some other evidence of his assent, is not sufficient, though the lessor have notice, to discharge the lessee from an action of debt.—WADHAM *v.* MARLOW (1784), 4 Doug. K. B. 54; 8 East, 315, n.; 99 E. R. 764; *sub nom.* WOODHAM *v.* MARLOW, 1 Hy. Bl. 437, n.

*Annotations:—*Expld. Boot *v.* Wilson (1807), 8 East, 311. *Consd.* Betts *v.* Price (1924), 40 T. L. R. 589. *Refd.* Auriol *v.* Mills (1790), 4 Term Rep. 94; ONSLOW *v.* CORRIE (1817), 2 Madd. 329; Copeland *v.* Stephens (1818), 1 B. & Ald. 593; Slipper *v.* Tottenham & Hampstead Ry. (1867), L. R. 4 Eq. 112; Allcock *v.* Moorhouse (1882), 47 L. T. 404. *Mentd.* Bally *v.* De Crespigny (1869), 38 L. J. Q. B. 98.

### PART XXI. SECT. 10, SUB-SECT. 1.—B.

**5480 I. Whether lessee continues liable.]—**MONTGOMERY *v.* SPENCE (1863), 23 U. C. R. 39.—CAN.

**Sect. 10.—Liabilities of lessee and assignee: Sub-sect. 1, B., C. & D.; sub-sects. 2 & 3, A. (a), (b) & (c).]**

**5474.** ——— **Though tendered.**—A lessee cannot plead to covenant for rent, an assignment, & tender by the unaccepted assignee.—**ORGILL v. KEMSHEAD** (1812), 4 Taunt. 642; 128 E. R. 407.

— **Rent accepted from assignee.**—*See* Sect. 10, sub-sect. 1, D., *post*.

**5475.** ——— **]**—**SWANSEA CORPN. v. THOMAS**, No. 5744, *post*.

**5476.** ——— **Rights of lessor expressly reserved.**—**BETTS (J.) & SONS, LTD. v. PRICE**, No. 5467, *ante*. *See, also*, Nos. 5461, 5464, *ante*.

**5477.** **Effect of subsequent grant of reversion.**—Covenant for rent lies against a lessee after assignment of the term by grantee of the reversion.—**EDWARDS v. MORGAN** (1685), 3 Lev. 233; 83 E. R. 666.

*Annotation*:—**Reid. Tovey v. Pitcher** (1692), Carth. 177.

**5478.** ——— **]**—**ALLCOCK v. MOORHOUSE**, No. 5465, *ante*.

**5479.** ——— **Part of reversion—Whether rent apportioned.**—**SWANSEA CORPN. v. THOMAS**, No. 5744, *post*.

**Bankruptcy of assignor—Effect of adoption by trustee.**—*See* **BANKRUPTCY**, Vol. V., p. 938, Nos. 7684, 7685.

**Bankruptcy of assignee—Effect of disclaimer by trustee.**—*See* **BANKRUPTCY**, Vol. V., p. 950, Nos. 7783–7786.

#### C. Liability on Covenant to Repair.

*See, generally*, Part XVIII., Sect. 3, sub-sect. 2, F. (a) ii., *ante*.

**5480.** **Lessee continues liable.**—**ANON.** (1533), Bro. N. C. 18; 73 E. R. 854.

**5481.** ——— **]**—Covenant lies by the assignee of a reversion against the first lessee after assignment of the term.—**MATURES v. WESTWOOD** (1598), (Cro. Eliz. 617; Gouldsb. 175; 78 E. R. 858).

*Annotation*:—**Consd. Wright v. Burroughes** (1846), 3 C. B. 685.

**5482.** **Effect of grant of reversion—Before breach.**—32 Hen. 8, c. 34, applying only to a demise by deed, the lessor, where the demise is not under seal, may, notwithstanding he has assigned his reversion, sue the lessee on his contract to repair for a breach committed during the tenancy, but subsequent to such assignment.

The declaration was in *assumpsit* for breach of a promise by defts. to keep in repair during their tenancy certain premises demised to them by pltf. Plea, that before the breach, pltf. by due course of law conveyed, assigned, granted, & assured all his estate, right, title, & interest of & in the said demised premises, & of & in the reversion expectant upon the determination of the tenancy to B., & pltf. thenceforward ceased to have anything in the demised premises, & defts. then ceased to be, & never since have been, tenants thereof to pltf.:—*Held*: a bad plea; between lessor & lessee privity of contract exists for ever.

There is no reason, in point of law, why, if the right to sue for a breach did not pass with the reversion, it should not remain in pltf. The privity of estate was destroyed by the conveyance of the reversion, but the privity of contract was not. That, it is plain, would not have passed with the reversion before the statute [32 Hen. 8, c. 34]; & the statute has no operation where the convey-

ance is not by deed (**WILDE, C.J.**).—**BICKFORD v. PARSON** (1848), 5 C. B. 920; 17 L. J. C. P. 192; 11 L. T. O. S. 126; 12 Jur. 377; 136 E. R. 1141.

*Annotations*:—**Consd. Manchester Brewery Co. v. Coombs**, [1901] 2 Ch. 608. **Reid. Arden v. Sullivan** (1850), 19 L. J. Q. B. 268; **Phillips v. Miller** (1876), L. R. 10 C. P. 420; **Wedd v. Porter**, [1916] 2 K. B. 91.

**Liability when assignee accepted as tenant.**—*See* Sub-sect. 1, D., *post*.

#### D. Liability when Assignee accepted as Tenant.

**5483.** **Lessee liable—Rent accepted from assignee.**—Covenant will lie against a lessee on an express covenant notwithstanding he has assigned the term, & the lessor has accepted rent from the assignee.—**BARNARD v. GODSCALL** (1612), Cro. Jac. 309; 79 E. R. 264.

*Annotations*:—**Reid. Hornby v. Houlditch** (1737), Andr. 40; **Ludford v. Barber** (1786), 1 Term Rep. 90.

**5484.** ——— **]**—An action will lie against a lessee for the breach of an "express covenant" by his assignee of the term, although the lessor has acknowledged the assignee as his tenant by accepting rent from him.—**BACHELOUR v. GAGE** (1630), Cro. Car. 188; W. Jo. 223; 79 E. R. 765.

*Annotations*:—**Consd. Thursby v. Plant** (1669), 1 Saund. 237. **Apud. Edwards v. Morgan** (1685), 3 Lev. 233. **Reid. Jodderell v. Cowell** (1736), Lee temp. Hard. 343; **Minshull v. Oakes** (1858), 2 H. & N. 793; **Smith v. Scott** (1859), 6 C. B. N. S. 771.

**5485.** ——— **]**—Covenant lies by a lessor against his lessee for a breach committed after an assignment of the term, & after acceptance of rent from the assignee.—**NORTON v. ACKLANE** (1640), Cro. Car. 579; 79 E. R. 1097.

**5486.** ——— **]**—If lessee for years assign over his term the lessor having notice thereof, & he accept the rent from the assignee, he cannot demand the rent of the lessee afterwards, yet he may sue other covenants contained in the lease against him, as for reparations or the like (**JERMAN, J.**).—**WHITWAY v. PINSENT** (1651), Sty. 300; 82 E. R. 726.

**5487.** ——— **]**—Acceptance of rent may be pleaded in bar of debt, but not of covenant.—**ARTHUR v. VANDERPLANK** (1734), Kel. W. 167; 7 Mod. Rep. 198; 2 Barn. K. B. 372; **Ridg. temp. H. 40**; 25 E. R. 550.

**5488.** ——— **]**—Lessee in an action of covenant for rent pleaded, that with the consent of the lessor, he assigned the premises to another, who entered & paid him the rent:—*Held*: bad on demurrer.—**JODDERELL v. COWELL** (1736), Lee temp. Hard. 343; 95 E. R. 222.

**5489.** ——— **]**—**AURIOL v. MILLS**, No. 5452, *ante*.

**5490.** ——— **Bankruptcy of lessee—Liability for rent during occupation by trustee.**—*Assumpsit* lies against a lessee from year to year upon his agreement to pay rent during the tenancy, notwithstanding his bkpcy., & the occupation of his assignees during part of the time for which the rent accrued; which were pleaded in bar.—**BOOT v. WILSON** (1807), 8 East, 311; 103 E. R. 360.

*Annotations*:—**Consd. Onslow v. Corrie** (1817), 2 Madd. 330. **Apud. Betts v. Price** (1924), 40 T. L. R. 589.

**5491.** **Assignment by administrator of lessee.**—If the administrator of a lessee assign the term, the lessor, after receiving rent from the assignee, cannot bring debt against the assignor for arrears of rent after the assignment.—**MARROW v. TURPIN** (1599), Cro. Eliz. 715; **Moore, K. B.** 600; 78 E. R. 949.

*Annotations*:—**Consd. Heliar v. Casebrooke** (1665), 1 Keb. 839; **Coghill v. Freelove** (1690), 2 Vent. 209.

#### PART XXI. SECT. 10, SUB-SECT. 1.—D.

c. **Lessee liable—Though special arrangement between lessor & assignee—Not in terms of lease.**—**CRISTALL v. MCKERNAN** (Alta.), [1917] 2 W. W. R. 1063; 33 D. L. R. 452.—**CAN.**

## SUB-SECT. 2.—LIABILITIES OF LESSEE TO THIRD PARTIES.

**5492. Two joint lessees assigning to third joint lessee—Third assignee not accepted as tenant—Stranger's goods distrained for rent—Liability of all joint lessees to stranger.**—Where there are three joint lessees, & two of them assign their interest to the third, but the landlord has not consented to accept his sole liability, the goods of pltf. being put on the premises by the permission of such third lessee, & distrained by the landlord for rent, & he having paid it, the three lessees are liable to him for money paid to their use.—*EXALL v. PARTRIDGE* (1799), 8 Term Rep. 308; 3 Esp. 8; 101 E. R. 1405.

*Annotations*:—*Reid*, *Moore v. Pyrke* (1809), 11 East, 52; *Asprey v. Levy* (1847), 16 M. & W. 851; *Griffinhoote v. Daubuz* (1855), 5 E. & B. 746; *England v. Marsden* (1866), L. R. 1 C. P. 529; *Fell v. Whitaker* (1871), L. R. 7 Q. B. 120; *O'Donoghue v. Coalbrook & Broadouk Co.* (1872), 26 L. T. 806; *Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc.*, [1899] 1 Q. B. 161. *Mentd. Cumming v. Forester* (1813), 1 M. & S. 494; *Jones v. Nanney* (1824), M'Cle. 25; *Pownall v. Ferrand* (1827), 6 B. & C. 439; *Pawle v. Gumm* (1838), 7 L. J. C. P. 206; *Rogers v. Maw* (1846), 15 M. & W. 444; *Lewis v. Campbell* (1849), 8 C. B. 541; *Edmunds v. Wallingford* (1885), 14 Q. B. D. 811; *Re Button, Ex p. Haviside*, [1907] 2 K. B. 180; *Re Nott & Cardiff Corpn.*, [1918] 2 K. B. 146.

## SUB-SECT. 3.—LIABILITIES OF ASSIGNEE TO LESSOR.

## A. Who are liable as Assignees.

## (a) In General.

**5493. Liability dependent upon privity of estate or privity of contract.**—*WALKER'S CASE*, No. 5450, *ante*.

**5493a.** —. —.]—*ONSTLOW v. CORRIE*, No. 5452A, *ante*.

**5493b.** —. —.]—*PURCHASE v. LICHFIELD BREWERY CO.*, No. 5539, *post*.

**5494.** —. —.]—**Whether party gaining title by adverse possession—Effect of Real Property Limitation Act, 1833 (c. 27), s. 34.**—The effect of above sect. is merely to extinguish the title of the prior rightful owner, & not to transfer that title to the person in possession.

Pltf. granted a lease of certain premises, the lease containing the usual covenant by the lessee & his assigns to repair. Def't. took possession during the term without any assignment from the lessee & remained in possession for more than twenty years, paying the rent to pltf. In an action at the expiration of the term for breach of the covenant to repair:—*Held*: def't. was not liable on the covenants in the lease.—*TICHBORNE v. WEIR* (1892), 67 L. T. 735; 8 T. L. R. 713; 4 R. 28, C. A.

*Annotations*:—*Consd. Re Nisbet & Potts' Contract*, [1905] 1 Ch. 391. *Reid. Re Jolly, Gathercole v. Norfolk*, [1900] 1 Ch. 292; *Re Atkinson & Horsell's Contract*, [1912] 2 Ch. 1.

**5495.** —. —.]—**Whether party accepting assignment but not executing—& not entering into possession.**—*PURCHASE v. LICHFIELD BREWERY CO.*, No. 5539, *post*.

## (b) Assignee of Whole Term.

**5496. Mortgagee without possession.**—Lessee for years of a brewhouse, with covenants to repair, assigns it by way of mtge. to B. B. was never in possession; brewhouse much out of repair, the mtgee., though it was his folly to take an assign-

ment & not an underlease; yet equity will not compel him to repair.

It was the mtgee.'s folly to take an assignment of the whole term, whereby to subject himself to the covenants in the original lease, & not to take a derivative lease of all the term, but a month, or week, or a day, as he might have done; yet inasmuch as he is only a mtgee., who never was in possession, we will not assist pltf. to charge him, or decree him to perform the covenants in *specie*, but leave pltf. to recover at law as well as he can (*per CUR.*).—*SPARKES v. SMITH* (1692), 2 Vern. 275; 23 E. R. 778.

*Annotations*:—*Consd. Eaton v. Jaques* (1780), 2 Doug. K. B. 455; *Williams v. Bosanquet* (1819), 1 Brod. & Bing. 238; *Jenkins v. Portman* (1836), 1 Keen, 435.

**5497. Equitable tenant for life with remainder over.**—A bill for an account of dilapidations was filed by the reversioner of a lease against the personal representatives of a person whose interest in the lease appeared to be that of equitable tenant for life with remainders over, alleging that such person in his lifetime was in possession, during which time the dilapidations accrued, that he paid rent & was liable to the covenants in the lease, & that on his death def't. entered into possession as his administrator, paid rent & became liable under the covenants:—*Held*: there was not a sufficient allegation of debt to support the bill.

How was he liable under the covenant? You do not allege that he was assignee of the whole lease, but only that he was equitable tenant for life, with remainders over (*KNIGHT-BRUCK, V.-C.*).—*ARKWRIGHT v. COLT* (1842), 2 Y. & C. Ch. Cas. 4; 6 Jur. 941; 63 E. R. 2.

**5498. Person entering into possession without formal assignment.**—*WEST v. DOBB*, No. 5187, *ante*.

**Underlease for whole term—As equivalent to assignment.**—*See Part IV., Sect. 3, ante*.

## (c) Assignee of Part of Premises.

**5499. Liability passes to assignee of part—Repairs.**—On a demise to A. of several parcels of land with a covenant on the part of the lessee to repair; if the lessee assign all his estate in parcel of the land demised, & the assignee do not repair the part to him assigned, the original lessor may bring an action on the covenant against the assignee of the assignee. Covenant will lie against an assignee of part of the thing demised.—*CONGHAM v. KING* (1631), Cro. Car. 221; 79 E. R. 704.

*Annotations*:—*Consd. Bally v. Wells* (1769), Wilm. 341. *Folld. Stevenson v. Lambard* (1802), 2 East, 575. *Apid. Twynam v. Pickard* (1818), 2 B. & Ald. 105. *Consd. United Dairies v. Public Trustee*, [1923] 1 K. B. 469.

**5500.** —. —.]—(*CONAN v. KEMISE* (1631), W. Jo. 245; 82 E. R. 129.

*Annotation*:—*Consd. Bally v. Wells* (1769), Wilm. 341.

**5501.** —. —.]—**Assignee of moiety—Liable for moiety of rent.**—The assignee having the entire estate in one moiety of the land, he has the privity of estate sufficient to be charged by the lessor for the moiety of the rent if he will (*per CUR.*).—*GAMON v. VERNON* (1678), 2 Lev. 231; 83 E. R. 532; *sub nom. GAMMON v. VERNON*, T. Jo. 104.

*Annotations*:—*Consd. Mercer v. Dowson* (1826), 5 B. & C. 479; *Norval v. Pascoe* (1864), 4 New Rep. 390; *United Dairies v. Public Trustee*, [1923] 1 K. B. 469.

**5502. Extent of liability—Whether confined to extent of assignment.**—(1) The assignee of part of leasehold premises is not liable to the covenants in the lease, except in respect of the part which is

**Sect. 10.—Liabilities of lessee and assignee: Sub-sect. 3, A. (c), (d), (e) & (f).]**

assigned to him. But the lessor may, in the first instance, sue such an assignee in respect of the whole; & the assignee must, by his plea, show that his liability is confined to the particular part.

(2) If, as to that part, he is joint tenant with others, who are not joined in the action, he cannot avail himself of that non-joinder, except by plea in abatement.

[The plea] should have been that deft. was not liable to the whole burthen in the manner charged. He should have pointed out the other persons liable, & then pltf. might have been compelled to include them in his declaration (BAYLEY, J.).—*MERCERON v. DOWSON* (1826), 5 B. & C. 479; 8 Dow. & Ry. K. B. 264; 4 L. J. O. S. K. B. 211; 108 E. R. 179.

*Annotations:—*Consd. *Norval v. Pascoe* (1864), 4 New Rep. 390; *United Dairies v. Public Trustee*, [1923] 1 K. B. 469. *Reid. Heap v. Livingston* (1843), 11 M. & W. 896.

**5503.** ———. [In debt for rent against an assignee, deft. traversed an averment in the declaration, that all the estate in the premises had vested in him. Issue having been joined, & deft. having proved that he was assignee of part only of the premises:—*Held*: the verdict on such issue must be entered for deft.

[The lessor] may undoubtedly, after an assignment of part, distrain upon that part for the rent which accrues due for the whole; because the rent for the whole becomes due out of each & every part of the land. . . . The remedy by distress does not . . . afford any authority for the remedy by a direct action of debt against the assignee (TINDAL, C.J.).—*CURTIS v. SPITTY* (1835), 1 Bing. N. C. 750; 1 Hodg. 153; 1 Scott, 737; 4 L. J. C. P. 236; 131 E. R. 1309.

*Annotations:—*Consd. *Heap v. Livingston* (1843), 1 Dow. & L. 334; *United Dairies v. Public Trustee*, [1923] 1 K. B. 469. *Reid. Evans & Thomas v. Evans* (1835), 1 Har. & W. 239; *Muskett v. Hill* (1839), 5 Bing. N. C. 694.

**5504.** ———. **Part assigned affected by covenant running with land.**—As to the assignment being of part of the premises only & not of the whole, we see no objection on that ground; for the assignee of part is liable to an action on every covenant running with the land & affecting such part (TINDAL, C.J.).—*WOLLASTON v. HAKEWILL* (1841), 3 Man. & G. 297; 3 Scott, N. R. 593; 10 L. J. C. P. 303; 133 E. R. 1157.

*Annotations:—*Consd. *Beardman v. Wilson* (1868), L. R. 4 C. P. 57; *Tindall v. Andrew* (1892), 61 L. J. Q. B. 630.

**(d) Co-Owners.**

**5505. Joint tenants—Assignee liable for whole—Pleading.**—*MERCERON v. DOWSON*, No. 5502, *ante*.

**5506.** ———. **Joint & several covenant.**—

(1) The grantees of a licence to work certain mines covenanted to pay to the grantor a certain sum per acre in respect of all lands which should be rendered permanently useless, by deposit of spoil thereon:—*Held*: to be a covenant running with the land, & the assignee of the grantees was liable upon the covenant.

(2) The covenant of the licencees was joint & several, & two of them assigned to a third party:—*Held*: the assignee was liable for the whole amount due for compensation.—*NORVAL v. PASCOE* (1864), 4 New Rep. 390; 34 L. J. Ch. 82; 10 L. T. 809; 28 J. P. 548; 10 Jur. N. S. 792; 12 W. R. 973.

*Annotations:—*Consd. *United Dairies v. Public Trustee*, [1923] 1 K. B. 469. *Reid. Hastings v. N. E. Ry.*, [1898] 2 Ch. 674; *Hubbard v. Weldon* (1909), 25 T. L. R. 356.

**5507. Tenants in common—Either assignee liable for whole.**—A lease containing a covenant to repair became, by assignment, vested in two

tenants in common:—*Held*: the lessor was entitled to recover from either of the two tenants in common the full amount of the damages that might be found due for a breach of the covenant.—

*UNITED DAIRIES, LTD. v. PUBLIC TRUSTEE*, [1923] 1 K. B. 469; 92 L. J. K. B. 326; 128 L. T. 768; 39 T. L. R. 125; 67 Sol. Jo. 199.

**5508. Assignee & lessor becoming tenants in common—Assignee still liable to co-tenant lessor.**

—One tenant in common is not entitled to recover from his co-tenant contribution in respect of repairs done to the common property, although such repairs may have been reasonable & necessary. The proper remedy is by a partition suit, in which the ct. will take into account all proper expenditure upon the property.

Deft. was assignee of a lease granted by pltf. to one P. of an undivided three-fourths of certain premises to which pltf. was entitle as tenant in common with another. During the lease deft. purchased the one-fourth interest of pltf.'s co-tenant. On the expiration of the lease, deft. continued in occupation of the above three-fourths as tenant at sufferance to pltf.:—*Held*: notwithstanding the tenancy in common, pltf. was entitled to recover in respect of the use & occupation by deft. of the undivided three-fourths.—*LEIGH v. DICKESON* (1884), 15 Q. B. D. 60; 54 L. J. Q. B. 18; 52 L. T. 790; 33 W. R. 538, C. A.

*Annotations:—*Consd. *Re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461. *Reid. Re Cook's Mortgage, Lawlodge v. Tyndall* (1896), 65 L. J. Ch. 654; *Hill v. Hickin*, [1897] 2 Ch. 579; *Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc.*, [1899] 1 Q. B. 161; *Re Coulson's Trusts, Prichard v. Coulson* (1907), 97 L. T. 754. *Mentd. Kenrick v. Mountstevon* (1899), 48 W. R. 141.

**Apportionment of rent.**—*See* Part XV., Sect. 9, *ante*.

**(e) Underlessee.**

**5509. Covenant for "assigns"—Whether sub-lessee included.**—A lease contained a covenant by the lessee that he, his exors., administrators, & assigns, would not at any time during the term exercise or carry on, in, or upon the demised premises, or permit or suffer any part thereof to be occupied by any person or persons who should use, occupy, or carry on therein any noisome or offensive business or employment, without the consent in writing of the lessor. E. purchased an underlease of the premises, & had notice of this covenant. E. sub-let the house to M., the demise containing a covenant by M. in similar terms. M. afterwards commenced to carry on an offensive business in the house. The original lessor then commenced this action, claiming an injunction, to restrain E. & M. from breaking the covenant in the original lease. There was no evidence that E. had authorised or sanctioned the carrying on of the offensive business by M.:—*Held*: E., not being an assign, was not bound at law by the covenant, & the ct. would not compel him to take legal proceedings against M.—*HALL v. EWIN* (1887), 37 Ch. D. 74; 57 L. J. Ch. 95; 57 L. T. 831; 36 W. R. 84; 4 T. L. R. 40, C. A.

*Annotations:—*Consd. *Wilson v. Twamley* (1903), 88 L. T. 803; *Teape v. Douse* (1905), 92 L. T. 319; *Powell v. Hemsley*, [1909] 2 Ch. 252; *Atkin v. Rose*, [1923] 1 Ch. 522. *Reid. Clegg v. Hands* (1889), 44 Ch. D. 503; *Abergaw Brewery Co. v. Holmes*, [1900] 1 Ch. 188; *Jaeger v. Mansions Consolidated* (1902), 87 L. T. 690; *Berton v. Alliance Economic Investment Co.*, [1922] 1 K. B. 742. *Mentd. Re Nisbet & Potts' Contract*, [1906] 1 Ch. 386.

**Liability of mortgagee by sub-demise.**—*See* Sub-sect. 3, A. (j), *post*.

**Liability of lessee for breaches of underlessee.**—*See* No. 5458, *ante*.

Underleases, generally, *see* Part IV., *ante*.

(f) *Equitable Assignee.*

**5510. Whether liable—In absence of conduct raising equity.**—The question is, whether, when an equitable interest has been acquired in leasehold property by a contract in the nature of an assignment, the landlord has a right, without more, to proceed in this ct. against the assignee, as if he were his tenant. I am not aware of any principle of this ct. which enables him to do this. In the present case, there is no circumstances either of conduct or contract, as between the owner of the fee & the party having the equitable interest in the lease, which could give the former a right to hold the latter liable to him in respect of the covenants in the lease. One may certainly imagine a case, in which a party having the equitable interest in a lease may so conduct himself as to raise an equity against him, as between himself & the landlord. But that is not so here (SHADWELL, V.-C.).—ROBINSON v. ROSHER (1841), 1 Y. & C. Ch. Cas. 7; 5 Jur. 1006; 62 E. R. 767.

*Annotation*.—**Mentd.** Sutton Harbour Improvement Co. v. Hitchens (1852), 15 Reav. 161.

**5511. — Although assignee in possession.**—The equitable assignee of a lease who has omitted to perfect his title by a legal assignment, although in possession of the premises & paying the rent reserved by the lease, is not entitled to the benefit of an option to purchase given to the lessee, his exors., administrators & assigns.

In a covenant giving an option to purchase, the word "assigns" means the person entitled to the term as between them & the lessor, & to the benefit of the covenants entered into by the lessor & lessee respectively which run with the land demised.

Pltfs., though in possession, could not have been sued at law by the lessor on the lessee's covenants, nor could pltfs. have sued the lessor's assigns on his covenants in the lease. Nor would the lessor or his assigns have any right in equity to sue pltfs. on the lessee's covenants by reason of pltfs. being equitable assigns of the lessee's term & in possession (ROMER, J.).—FRIARY HOLROYD & HEALEY'S BREWERIES, LTD. v. SINGLETON, [1899] 1 Ch. 86; 68 L. J. Ch. 13; 79 L. T. 465; 47 W. R. 93; 15 T. L. R. 23; 43 Sol. Jo. 43; *reversd.* on other grounds, [1899] 2 Ch. 201, C. A.

*Annotations*.—**Consd.** Manchester Brewery Co. v. Coombs, [1901] 2 Ch. 608. **Mentd.** Woodall v. Clifton, [1905] 2 Ch. 257.

**5512. To whom liability extends—Equitable mortgagee by deposit—In possession.**—LUCAS v. COMMERFORD (1790), 3 Bro. C. C. 166; 8 Sim. 499; 1 Ves. 235; 8 L. J. Ch. 131; 29 E. R. 469, L. C.

*Annotations*.—**Consd.** Wilkins v. Fry (1816), 1 Mer. 244; Casbard v. A.-G. (1819), 6 Price, 411. **Appld.** Flight v. Bentley (1835), 7 Sim. 149. **Consd.** Jenkins v. Portman (1836), 1 Keen, 435; Moores v. Choat (1839), 8 Sim. 508. **N.F.** Moore v. Greg (1848), 2 Ph. 717. **Consd.** Cox v. Bishop (1857), 8 De G. M. & G. 815. **Refd.** Williams v. Bosanquet (1819), 1 Brod. & Bing. 238; Robinson v. Roshier (1841), 1 Y. & C. Ch. Cas. 7; Arkwright v. Colt (1842), 2 Y. & C. Ch. Cas. 4; Powell v. Aiken (1858), 4 K. & J. 343; Friary Holroyd & Healey's Breweries v. Singleton, [1899] 1 Ch. 86. **Mentd.** Bracebridge v. Buckley (1816), 2 Price, 200; South Wales Ry. v. Wythes (1854), 24 L. J. Ch. 1; M'Cright v. Foster (1870), 5 Ch. App. 607, n.

**5513. —**—[An equitable mtgee. of leasehold property must satisfy a distress for rent out of the proceeds of the sale, & can only prove for the deficiency, although occasioned by the payment of the rent.—*Re Cross, Ex p. Cocks* (1833), 3 Deac. & Ch. 8.

**5514. — After expiration of period of deposit.**—The depositary of a lease to secure advances to the extent of £200 during a period of two years, after the expiration of the period:—**Held**: liable to the rent reserved upon it & not allowed to abandon.—FLIGHT v. BENTLEY (1835), 7 Sim. 149; 4 L. J. Ch. 262; 58 E. R. 793.

*Annotations*.—**Consd.** Jenkins v. Portman (1836), 1 Keen, 435. **Dtd.** Moores v. Choat (1839), 8 Sim. 508. **Consd.** Moore v. Greg (1848), 2 Ph. 717; Cox v. Bishop (1857), 8 De G. M. & G. 815. **Refd.** Robinson v. Roshier (1841), 1 Y. & C. Ch. Cas. 7; Dale v. Hatfield Chase Corp., [1922] 2 K. B. 282.

**5515. —**—[A deposit of a lease by way of equitable mtgee. does not render the depositary liable for the rent & covenants.—MOORES v. CHOAT (1839), 8 Sim. 508; 8 L. J. Ch. 128; 3 Jur. 220; 59 E. R. 202.

*Annotations*.—**Consd.** Moore v. Greg (1848), 2 Ph. 717; Cox v. Bishop (1857), 8 De G. M. & G. 815. **Refd.** Robinson v. Roshier (1841), 1 Y. & C. Ch. Cas. 7. **Mentd.** Faulkner v. Daniel (1843), 3 Harc. 199; M'Cright v. Foster (1870), 5 Ch. App. 607, n.

**5516. — Accepted as tenant.**—The equitable mtgee. of a leasehold estate by deposit of the title deeds is not liable to the covenants of the lease, even though he pay the rents reserved thereby.

A lessee of a factory deposited the lease by way of equitable mtgee., & upon the landlords distraining for rent in arrear, the depositors of the lease paid the rent in arrear to the landlords, entered into possession of the factory, sold some of the machinery, including some fixed to the freehold, & otherwise acted as owners of the lease, & were accepted by the landlords as such owners:—**Held**: the landlords had no equity to compel them to take a legal assignment of the lease.—MOORE v. GREG (1848), 2 Ph. 717; 18 L. J. Ch. 15; 12 L. T. O. S. 169; 12 Jur. 952; 41 E. R. 1120, L. C.

*Annotations*.—**Refd.** Cox v. Bishop (1857), 28 L. T. O. S. 391; Powell v. Aiken (1858), 4 K. & J. 343; Friary Holroyd & Healey's Breweries v. Singleton, [1899] 1 Ch. 86; Kamaga v. Womack, [1900] 1 Q. B. 116; Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co., [1902] 1 Ch. 146. **Mentd.** M'Cright v. Foster (1870), 39 L. J. Ch. 228.

**5517. — Devisee of equity of redemption.**—The devisee of the equity of redemption, the legal fee being in a mtgee., is not liable in covenant, as assignee of all the estate, right, title, & interest, of the original covenantor.—CARLISLE CORPN. v. BLAMIRE (1807), 8 East, 487; 103 E. R. 430.

**5518. — Equitable assignee of underlease—Though original lessor.**—The equitable assignee of an underlease is clothed with the obligation to perform the covenants in the underlease, though he is himself the original lessor, & cannot set up the non-performance of those covenants against his lessee as a ground for refusing the performance of a covenant in the original lease.—JENKINS v. PORTMAN (1836), 1 Keen, 435; 5 L. J. Ch. 313; 48 E. R. 374.

*Annotations*.—**Refd.** Moores v. Choat (1839), 8 Sim. 508; Nokes v. Gibbon (1856), 3 Drew. 681.

**5519. — Equitable assignee in possession—Agreement to take assignment.**—An agreement to take an assignment of a lease followed by possession on the part of the equitable assignee is not sufficient to give the lessor any right to sue the equitable assignee in equity on the covenants in the lease.—COX v. BISHOP (1857), 8 De G. M. & G. 815; 26 L. J. Ch. 389; 29 L. T. O. S. 44; 3 Jur. N. S. 499; 5 W. R. 437; 44 E. R. 604, L. J.

*Annotations*.—**Appld.** Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co., [1902] 1 Ch. 146. **Refd.** Torrington v. Lowe (1868), L. R. 4 C. P. 26; Wright v. Pitt (1870),

## PART XXI. SECT. 10, SUB-SECT. 3.—A. (f).

• *To whom liability extends—Equitable assignee in possession.*—PETERBOROUGH HYDRAULIC POWER CO. v. McALLISTER (1908), 12 O. W. R. 364; 17 O. L. R. 145.—CAN.

**Sect. 10.—Liabilities of lessee and assignee: Sub-sect. 3, A. (f), (g), (h), (i), (j) & (k).]**

L. R. 12 Eq. 408; Friary Holroyd & Healey's Breweries v. Singleton, [1899] 1 Ch. 86; Ramage v. Womack, [1900] 1 Q. B. 116; Hand v. Blow, [1901] 2 Ch. 721. **Mentd.** Haywood v. Brunswick Bldg. Soc. (1881), 8 Q. B. D. 403; Re Nisbet & Potts' Contract, [1905] 1 Ch. 391.

**5520. Nature of liability—Simple contract—Operation of Statute of Limitations.]**—The liability of an equitable assignee of leaseholds is that of simple contract, & Stat. Limitations limits his liability to six years after the cause of suit.—**SANDERS v. BENSON** (1841), 4 Beav. 350; 49 E. R. 374.

**Annotations:—****Reid.** Cox v. Bishop (1857), 8 De G. M. & G. 815. **Mentd.** Hollingsworth v. Shakeshaft (1851), 14 Beav. 492.

**Liability to assignor—Apart from covenant.]**—See No. 5084, *ante*; No. 5596, *post*.

**(g) Assignee by Estoppel.**

**5521. Person in possession—Payment of rent.]**—The lease was produced & was at once admitted by deft.'s counsel. The lease comes out of the custody of the lessor of pltf., & was executed by the original tenant; & the admission by deft. shows that he was cognisant of it. Deft. was in possession of the premises, & it turns out that he was in the habit of paying the rent reserved by the lease. I am of opinion, then, that there were circumstances which made out a *prima facie* case of privity (**BAYLEY, B.**).—**DON d. HEMMINGS v. DURNFORD** (1832), 2 Cr. & J. 667; 1 L. J. Ex. 251; 149 E. R. 280.

**5522. ——— Though lease void.]**—Defts. having for several years as assignees under a void lease, paid the rent reserved, & not having re-assigned:—**Held:** liable to repair to the end of the term according to the covenant in the lease.—**BEALE v. SANDERS** (1837), 3 Bing. N. C. 850; 3 Hodg. 147; 5 Scott, 58; 6 L. J. C. P. 283; 132 E. R. 638.

**Annotations:—****Distd.** Napier v. Williams, [1911] 1 Ch. 361. **Mentd.** Martin v. Smith (1874), 30 L. T. 268.

**5523. ——— Receiving rent from subtenants—Whether liable as executor de son tort—Rent appropriated to own use.]**—In 1810 a lease for sixty-one & a quarter years was granted by the predecessors in title of pltf. to one "H. his exors., administrators & assigns." In 1814 H. died intestate. His widow administered to his effects & remained possessed of the lease till her death in 1843. After her death G., father of deft., who had married a daughter of H., without any administration took possession of the premises & received the rent, paying the ground rent; & he continued to do so until his death, in 1856. After the death of G., the deft. received the rent of the premises, & after paying the ground rent, handed over the balance to his mother, conceiving her to be entitled to it. He also from time to time let the premises. After the death of his mother deft. continued to receive the rent of the premises, paying the ground rent, & dividing the balance between his two sisters & himself, no further administration having been taken out. He continued to do this down to the expiration of the lease, when he delivered up the premises to pltf. out of repair:—**Semble:** deft. was exor. *de son tort* of the term; but:—**Held:** beyond all doubt, he had estopped himself from denying that he was assignee.—**WILLIAMS v. HEALES** (1874), L. R. 9 C. P. 177; 43 L. J. C. P. 80; 30 L. T. 20; 22 W. R. 317.

**Annotations:—****Distd.** Stratford-upon-Avon Corp'n. v. Parker, [1914] 2 K. B. 562. **Reid.** Justice v. James (1898), 14 T. L. R. 385.

**5524. ——— Rent appropriated to use of persons entitled.]**—The assignee of a lease granted by pltf. died intestate, leaving no estate other than the lease. Deft., her son, who had collected the rents of the demised premises on his mother's behalf during her lifetime, continued to collect them after her death, & after paying the ground rent in her name to pltf., he handed the balance to his sister. After his sister's death deft. still continued to collect the rents & to pay the ground rent in his mother's name to pltf., retaining the surplus for such person or persons as might in law be found entitled thereto. Shortly after deft.'s sister's death pltf. became aware for the first time of the death of deft.'s mother, the assignee of the lease, & after some correspondence with deft. they entered into possession of the premises & sought to make him personally liable for breach of the repairing covenant contained in the lease on the ground that he had intermeddled with the lease & had become an exor. *de son tort*:—**Held:** deft. was not liable by privity of estate as the lease was never vested in him, & he had not so acted as to make himself liable by estoppel.—**STRATFORD-UPON-AVON CORPN. v. PARKER**, [1914] 2 K. B. 562; 83 L. J. K. B. 1309; 110 L. T. 1004; 58 Sol. Jo. 473.

**Liability of representatives of lessee & assignee.]**—See **EXECUTORS**, Vol. XXIV., pp. 638 *et seq.*

**(h) Assignee before Entry.**

**Mortgagee not entering into possession.]**—See Nos. 5533, 5535–5538, *post*.

**Personal representative before entry.]**—See **EXECUTORS**, Vol. XXIV., pp. 638–641, Nos. 6638–6674.

**(i) Trustee.**

**5525. Leases assigned to trustees to secure annuity.]**—A trustee, to whom two leases were assigned in trust for securing an annuity, having said to the occupier of one of the demised houses, "You must pay the rent to me, I am become landlord for my client, who has the annuity, & you must pay the ground rents for me":—**Held:** the trustee was liable in covenant to the lessor as assignee of both leases, for non-payment of rent & not repairing.—**GRETTON v. DIGGLES** (1813), 4 Taunt. 766; 128 E. R. 532.

**5526. Trustee becoming bankrupt—Trust property reassigned to him after discharge—Whether bankruptcy a defence.]**—Where a trustee who holds property to secure his own right of indemnity in priority to all claims of his *cestui que trust* becomes bkpt., & the retention of such property, e.g., leaseholds with onerous covenants, is necessary to give full effect to such right, the legal estate in the property & right to possession vest in the trustee in bkpcy. to the extent to which they were vested in bkpt.

In 1894 R. was the assignee of leaseholds with onerous covenants as trustee for his wife; in 1895 R. was adjudicated bkpt.; in 1896 the trustee in bkpcy. assigned the leaseholds back again to R. as trustee for his wife, & R. obtained his discharge. In 1908 the lessors, who had had no notice of the fact that R. was a trustee, or of his bkpcy., brought an action against R. for arrears of rent & for damages for breach of covenant to repair. R. pleaded the bkpcy. proceedings as a defence:—**Held:** the leaseholds vested in the trustee in bkpcy., who held them, subject to satisfying his own lien & right of indemnity, for R.'s wife; the leaseholds passed back again to R. by the assignment of 1896; & the bkpcy. was no

defence to the action, & R. was liable as assignee.—**ST. THOMAS'S HOSPITAL (GOVERNORS) v. RICHARDSON**, [1910] 1 K. B. 271; 79 L. J. K. B. 488; 101 L. T. 771; 17 Mans. 120, C. A.

*Annotation*.—**Reid**. *Re Caine's Mortgage Trusts*, [1918-19] B. & C. R. 297.

See No. 5527, *post*.

See, further, TRUSTS & TRUSTEES.

(j) *Cestui que trust*.

**5527. Liability to landlord—Lessee a bare trustee.**—The object of the present bill is to give to the landlord an additional remedy in case the legal lessee is a mere trustee for other who have, in fact, occupied the land, to enable the landlord in such a case to treat the *cestuis que trust* as equitable debtors for the amount of the rent. But I can discover no principle to warrant such a proposition. The relation between the owner of land & those who occupy it is of a purely legal character. The circumstance that there is a relation of an equitable character subsisting between the lessee & the actual occupier cannot give any equitable rights to one who claims by a title paramount both to the trustee & the *cestuis que trust*. Whatever be the relation between the lessee & the occupier the landlord's rights are unaffected. He has his legal remedy by distress, or he may bring his action against the lessee. If the *cestuis que trust* should, as they certainly might, call on the lessee to assign the legal interest to them, the landlord would have a legal remedy by action against them as assignees. It surely could not be contended that in such a case the landlord could sue in equity as well as at law, & yet if before the assignment he has an equitable right against the occupier, how could the occupier destroy that equitable right by an act to which the landlord was no party? It can make no difference in principle that the lease is not executed by the persons to whom the demise is made, except that in such a case the landlord may not be able to maintain an action of covenant (**CRANWORTH, L.C.**).—**WALTERS v. NORTHERN COAL MINING CO.** (1855), 5 De G. M. & G. 629; 25 L. J. Ch. 633; 26 L. T. O. S. 167; 2 Jur. N. S. 1; 4 W. R. 140; 43 E. R. 1015, L. C.

*Annotations*.—**Consd.** *Cox v. Bishop* (1857), 8 De G. M. & G. 815. **Reid**. *De Brasse v. Martyn* (1863), 2 New Rep. 512; *Wright v. Pitt* (1870), L. R. 12 Eq. 408; *Ranage v. Womack*, [1900] 1 Q. B. 116; *Gilbert v. Cossey* (1912), 56 Sol. Jo. 363. **Mentd.** *Re Royal British Bank, Ex p. Walton, Ex p. Hue* (1857), 26 L. J. Ch. 645.

**5528.** ———.]—A lease of a house contained a covenant by the lessee for himself & his assigns to repair, & also a declaration that the lessee held the premises in trust for deft. Deft. occupied the premises during the whole of the term, as it was intended by the parties that she should do & he paid the rent. Upon the expiry of the term the premises were out of repair.—**Held**: the fact of deft. having the beneficial interest in the lease did not either by itself or coupled with the fact of occupation by her create any equitable liability in her for the breach of the lessee's covenant.—**RAMAGE v. WOMACK**, [1900] 1 Q. B. 116; 69 L. J. Q. B. 40; 81 L. T. 526; 16 T. L. R. 63.

*Annotation*.—**Reid**. *Hand v. Blow*, [1901] 2 Ch. 721.

(k) *Mortgagee*.

See, now, Law of Property Act, 1925 (c. 20), s. 86 (i); & generally, MORTGAGE.

**5529. Mortgage by assignment—Whether an absolute assignment—On which mortgagee liable.**—**EATON v. JAKES**, No. 5535, *post*.

**5530.** ———.]—**WALKER v. REEVE**, No. 5564, *post*.

**5531.** ———.]—When a party takes an assignment of lease by way of mtge. as a security for money lent, the whole interest passes to him, & he becomes liable on the covenant for payment of rent, though he has never occupied, or become possessed, in fact.—**WILLIAMS v. BOSANQUET** (1819), 1 Brod. & Bing. 238; 3 Moore, C. P. 500; 129 E. R. 714.

*Annotations*.—**Distd.** *Purchase v. Lichfield Brewery Co.*, [1915] 1 K. B. 184. **Reid**. *Copeland v. Stephens* (1818), 1 B. & Ald. 593; *Lindsay v. Limbert* (1827), 12 Moore, C. P. 209; *Burton v. Barclay* (1831), 7 Bing. 745; *Jenkins v. Portman* (1836), 1 Keen, 435; *Wollaston v. Hakewill* (1841), 3 Man. & G. 297; *Whitaker v. Richards* (1846), 7 L. T. O. S. 224; *Ryan v. Clark* (1849), 14 Q. B. 65; *Galbraith v. Cooper* (1860), 8 H. L. Cas. 316; *Hogan v. Hand* (1861), 14 Moo. P. C. C. 310; *Harrison v. Blackburn* (1864), 17 C. B. N. S. 678; *Rendall v. Andrew* (1892), 61 L. J. Q. B. 630. **Mentd.** *Doe d. Wyatt v. Byron* (1845), 1 C. B. 623; *A.-G. v. Radloff* (1854), 23 L. T. O. S. 191; *Siggers v. Evans* (1855), 5 E. & B. 367.

**5532. Liability of mortgagee by assignment—Whether entry condition precedent.**—**SPARKES v. SMITH**, No. 5496, *ante*.

**5533.** ———.]—Lease for years subject to a ground rent, was assigned over by way of mtge. to S. for £100. The mtgee. never entered, & lost the £100 mtge. money, & was sued by the lessor for the ground rent.—**Held**: no relief, it being his own fault, to take the mtge. by way of assignment, & not by way of underlease.—**PILKINGTON v. SHALLER & JEFFERIES** (1700), 2 Vern. 374; 23 E. R. 836.

*Annotations*.—**Distd.** *Eaton v. Jakes* (1780), 2 Doug. K. B. 455. **Consd.** *Williams v. Bosanquet* (1819), 1 Brod. & Bing. 238. **Reid**. *Copeland v. Stephens* (1818), 1 B. & Ald. 593; *Jenkins v. Portman* (1836), 1 Keen, 435.

**5534.** ———.]—**Possession obtained by ejectment.**—A mtgee. of a leasehold estate, getting possession by ejectment, is liable to the lessor for all arrears of the reserved rent; & where, to exonerate himself, he prevails with the lessor to distrain upon the goods of the lessee, which are already taken in execution by a judgment creditor; he shall pay to such creditor, so much as he has been obliged to pay to the lessor, with damages & costs.—**TRAHERNE v. SADLER** (1705), 5 Bro. Parl. Cas. 179; 2 E. R. 611.

**5535.** ———.]—If a term is assigned by way of mtge., with a clause of redemption, the lessor cannot sue the mtgee. as assignee of all the estate, right, title, interest, etc., of the mtgor., even after the mtge. has been forfeited, unless the mtgee. has taken actual possession.

What is the effect of this instrument between the parties. The lessor is a stranger to it. He shall not be injured, but he is not entitled to any benefit under it. Can we shut our eyes & say it was an absolute conveyance? It was a mere security & it was not, nor ever is, meant, that possession should be taken till default of payment & the money has been demanded. . . . It was not an assignment of all the mtgors.' estate right, title, etc. (**LORD MANSFIELD, C.J.**).—**EATON v. JAKES** (1780), 2 Doug. K. B. 455; 99 E. R. 290.

*Annotations*.—**Distd.** *Stone v. Evans* (1796), Peake, Add. Cas. 94. **Overd.** *Williams v. Bosanquet* (1819), 1 Brod. & Bing. 238. **Reid**. *Walker v. Reeves* (1782), 2 Doug. K. B. 461, n.; *Carlisle Corpn. v. Blamire* (1807), 8 East, 487; *Jenkins v. Portman* (1836), 1 Keen, 435; *Harrison v.*

PART XXI. SECT. 10, SUB-SECT. 3.—  
A. (k).

**55321. Liability of mortgagee by assignment—Whether entry condition**

*precedent.*—On the facts.—**Held**: deft., as assignee of the term by way of mtge., was liable on the covenant for rent, though he had never entered.—**CAMERON v. TODD** (1863), 22 U. C. R.

390.—CAN.

f. ———.]—*On all covenants.*—**MAGRATH v. TODD** (1866), 26 U. C. R. 87.—CAN.

**Sect. 10.—Liabilities of lessee and assignee: Subsect. 3, A. (k), (l), (m) & (n), & B. (a) & (b).]**

Blackburn (1864), 13 W. R. 135; Lock v. Furze (1865), 6 New Rep. 340; Rendall v. Andrew (1892), 61 L. J. Q. B. 630. **Mentd.** Jackson v. Vernon (1789), 1 Hy. Bl. 114; Levi v. Ayres (1878), 27 W. R. 79.

**5536.** ———.]—A mtgee. of a term is liable to the ground rent though he does not take possession. If the original lessee is obliged to pay ground rent he may recover it from the assignee in possession.—STONE v. EVANS (1796), Peake, Add. Cas. 94.

**Annotations:—****Refd.** Copeland v. Stephens (1818), 1 B. & Ald. 593; Williams v. Bosanquet (1819), 1 Brod. & Bing. 238.

**5537.** ———.]—WILLIAMS v. BOSANQUET, No. 5531, *ante*.

**5538.** ———. **Though mortgage money not due.**]—The assignee, by way of mtge. of a lease, who retains the lease & assignment, is liable to the rents & covenants in the lease.

Where L., tenant in fee, leases for years to B., who underleases for a portion of his term to M., & then assigns to L., his lessor, for such portion of the term as is leased to M., & L. mortgages in fee by lease & release in the usual form, containing the words " & reversion & all the estate, etc.," to pltf.; & M. mortgages by assignment his underlease to defts., who keep the underlease & mtge. deed, pltf. can, as assignee of a portion of the reversion, maintain covenant on such underlease, & defts. are liable as assignees of the lease, although their mtge. money has not become due, & they have never actually entered.—BURTON v. BARCLAY (1831), 7 Bing. 745; Moo. & P. 785; 9 L. J. O. S. C. P. 231; 131 E. R. 288.

**5539.** ———. **Assignment never executed.**]—Where there is neither privity of contract nor privity of estate between a lessor & an assignee of the lessee, the assignee is not liable to the lessor for rent of the demised premises.

A lessor, by an agreement in writing not under seal, agreed to let certain premises to tenant for a term of fifteen years. The tenant assigned the term by deed to mtgees. who accepted the assignment, but never executed the deed nor took possession of the premises:—**Held:** they were not liable.—PURCHASE v. LIGHTFIELD BREWERY CO., [1915] 1 K. B. 184; 84 L. J. K. B. 742; 111 L. T. 1105, D. C.

**5540.** ———. **On covenant to build.**]—ANON. (1701), Freem. Ch. 253; 22 E. R. 1192.

**5541.** ———. **On all covenants in absence of special provisions to contrary.**]—If a leasehold interest is assigned by way of mtge. the assignee, unless there is a special provision to the contrary, takes the interest, subject to all the covenants & obligations of the original lessee.—HAIG v. HOMAN (1830), 4 Bl. N. S. 380; 5 E. R. 136, H. L.

**5542. Mortgage by sub-demise—No privity of estate with head lessor—Liability of mortgagee.**]—Since a mtgee. of leaseholds by sub-demise in the usual form is, through absence of privity of estate, not himself liable to the head lessor for rent or other outgoings, whether he is in possession or not, it follows that a receiver appointed by the ct. in an action by the mtgee. against the mtgor. to enforce the security is also under no such liability, his appointment being in right of the mtgee. Hence the head lessor cannot require the receiver to pay, out of moneys coming to his hands while in the use or occupation of the mtgd. premises as receiver, any rent or other outgoings in respect of such use or occupation. There is no equity

entitling the head lessor to claim payment from the receiver by reason of the latter having been put into use or occupation as an officer of the ct., even though he has, by the direction of the ct. sold off the mtgor.'s goods on the premises, & so deprived the head lessor of his landlord's remedy by distress.

In a debenture holder's action against the trustees of the trust deed who were mtgees. from the co. by sub-demise of premises, of which the co. were lessees, a claim by the head lessor against the receiver appointed by the ct. to payment, out of the proceeds of the co.'s goods sold by the receiver while in occupation of the premises, of rent in respect of the occupation & of damages for the breach of the co.'s covenant in the head lease to repair, disallowed.—HAND v. BLOW, [1901] 2 Ch. 721; 70 L. J. Ch. 687; 85 L. T. 156; 50 W. R. 5; 17 T. L. R. 635; 45 Sol. Jo. 639; 9 Mans. 156, C. A.; *affg.*, 82 L. T. 750.

**Annotations:—****Apld.** *Re* Abbott, Abbott v. Abbott (1913), 30 T. L. R. 13. **Refd.** *Re* British Fullers' Earth Co., Gibbs v. British Fullers' Earth Co. (1901), 17 T. L. R. 232; *Re* Westminster Motor Garage Co., Boyers v. The Co. (1914), 84 L. J. Ch. 753; *Re* Levi, [1919] 1 Ch. 416. **Mentd.** *Re* Griffiths Cycle Corp., Dunlop Pneumatic Tyre Co. v. Griffiths Cycle Corp. (1901), 85 L. T. 675.

**5543.** ———. **Position of receiver of mortgagee.**]—HAND v. BLOW, No. 5542, *ante*.

**Receiver for debenture-holders.**]—*See* COMPANIES, Vol. X., p. 797, Nos. 5037, 5038.

**Liability of equitable mortgagee.**]—*See* No. 5512, 5514–5516, *ante*.

(l) *Trustee in Bankruptcy.*

**Adoption & disclaimer of leases by trustee.**]—*See* BANKRUPTCY, Vol. V., pp. 935–937, 938, 940, Nos. 7646–7658, 7663–7667, 7684–7689, 7691–7693.

(m) *Personal Representative.*

*See, generally,* EXECUTORS, Vol. XXIII., pp. 302–305.

(n) *Other Cases.*

**5544. Devisee of lessee—Necessity for showing mode of entry.**]—In debt for rent against the devisee of the lessee, pltf. must show that debt entered by the assent of the exor., or *virtute legationis*.—BUFKYN v. EDMUNDS (1596), Cro. Eliz. 535; 78 E. R. 782.

**5545. Assignment by executor de son tort—Assignment not in writing—Whether assignee liable.**]—Where a lessee died intestate during the term, & his widow entered & paid rent, & afterwards deft., her son-in-law, took the premises, with the assent of the landlord, & paid rent & continued to occupy during the remainder of the term:—**Held:** (1) there being no assignment in writing, he was not chargeable as assignee in fact; & (2) he could not be considered assignee in law, for, though the widow might have been chargeable as *extrix de son tort*, deft. had not made himself exor. *de son tort* by taking the premises after her.—PAULL v. SIMPSON (1846), 9 Q. B. 365; 15 L. J. Q. B. 382; 11 Jur. 13; 115 E. R. 1313.

**Annotations:—***As to* (1) **Distd.** Williams v. Heales (1874), L. R. 9 C. P. 177. *As to* (2) **Refd.** Lysley v. Clarke (1851), 18 L. T. O. S. 141; Hill v. Curtis (1865), L. R. 1 Eq. 90; Hursell v. Bird (1891), 65 L. T. 709; A.-G. v. New York Breweries Co., [1898] 1 Q. B. 205.

**5546. Assignee holding over.**]—BROMFIELD v. WILLIAMSON (1654), Sty. 407; 82 E. R. 817.

**Annotation:—****Consd.** Pluck v. Digges (1831), 5 Bl. N. S. 31.

**55421. Mortgage by sub-demise—No privity of estate with head lessor—Liability of mortgagee.**]—A mortgagee

with possession from the lessee is not liable to the lessor for rent as there is neither privity of estate nor of contract

between them.—THRETHALAN v. ERAL-PAD RAJAH CALICUT (1917), 1 L. R. 40 Mad. 1111.—**IND.**

**5547. Assignee of building agreement—Money paid not as rent but as collateral to agreement.]—**

By indenture, A. covenanted with B., that in consideration of the expense which B. would be at in erecting on the ground therein described & agreed to be demised, & also in consideration of the yearly rents, covenants, & agreements therein reserved, etc., on the part of B., A. would from time to time, when & so soon as B., his exors., etc., or assigns, should have erected one or more of the messuages therein covenanted to be built, demise & lease unto B., his exors., administrators, nominees, or assigns, the whole, or such part whereon the said messuages should be built, of all the ground, etc., therein described & agreed to be demised, for ninety-eight years, yielding & paying the rent or sum of £35 for & during the first year, & so on till the fifth year, when £285 was to be paid, & the same for each remaining year of the term. Proviso, that if the yearly rent or rents, to be reserved by the lease or leases to be granted of any part of the ground agreed to be demised, should amount to the full yearly rent to be reserved, then from time to time the remainder of such ground should be leased, together with the buildings on it, at a yearly peppercorn rent. Covenant by B., for himself, his exors., & administrators, to pay the several yearly rents thereby agreed to be reserved, & all rates, etc., & to complete the buildings therein described, & to accept leases; & that in the meantime, until the granting of such lease or leases, he would perform all the covenants, etc., as if such lease or leases had been granted; with a proviso for re-entry in case of non-payment of the said rents, etc., to be reserved, etc., or on breach of covenant. By indenture, of later date, between B. & C., reciting the above agreement, B. assigned to C. the said recited articles of agreement, & all the right, title, etc., which B. had, etc., by virtue of the said indenture, subject to the performance by C., etc., of the covenants therein; & B. appointed C. to be his attorney to demand the said leases, etc.; & C. covenanted to perform the covenants of the said articles of agreement, & to indemnify B., as assignee of the said articles. C. erected buildings on a part of the ground, & obtained leases of them from A., & paid A. the stipulated sums, in respect of the portion of the ground of which leases had not been granted, up to the quarter-day previous to May 23, 1857, when he assigned to another person:—*Held*: the first-mentioned articles of agreement did not amount to a demise to B. of the land; B. was not a tenant from year to year to A.; C. paid the stipulated sums as assignee of B., & as bound by his covenant with him, & was not liable for it to A., & was not a tenant from year to year to A., nor liable to pay rent at all to him; & B. was tenant at will to A., but was so on the terms, not of paying the sums due from him as & for a rent, but as a stipulated or collateral payment, handed over by him, in respect of his liability to his assignor.—**CAMDEN (MARQUIS) v. BATTERBURY** (1860), 7 C. B. N. S. 864; 28 L. J. C. P. 335; 23 J. P. 821; 7 W. R. 616; 141 E. R. 1055; *sub nom.* **BATTERBURY v. CAMDEN (MARQUIS)**, 5 Jur. N. S. 1405, Ex. Ch.

*Annotations*:—**Consd.** **A.-G. v. De Keyser's Royal Hotel**, [1920] A. C. 508. **Reid.** **Elliott v. Johnson** (1866), L. R. 2 Q. B. 120; **Adams v. Harger** (1879), 4 Q. B. D. 480.

**Mentd.** **Howlett v. Tarte** (1861), 10 C. B. N. S. 813; **Hayne v. Cummings** (1864), 16 C. B. N. S. 421; **Holland v. Kensington Vestry** (1867), L. R. 2 C. P. 565.

**B. Extent of Liability.****(a) In Covenant.**

See Part XI., Sect. 6, *ante*.

**(b) For Rent Reserved.**

**5548. General rule—Liability passes by assignment—From assignee to assignee.]—**The assignee of a rent reserved upon the assignment of a term may bring debt against the assignee of the assignee of the term.—**BROWNLOW v. HEWLEY** (1806), 1 Ld. Raym. 82; 1 Lut. 364; 91 E. R. 951.

*Annotation*:—**Mentd.** **Rowe v. Young** (1820), 2 Bl. 391.

**5549. — — — Penalty for arrears.]—**If a tenant who is chargeable with the rent assign over his interest in the land, the assignee is chargeable with the penalty for arrears incurred in his own time.—**THINN v. CHOMLEY** (1595), Cro. Eliz. 383; 78 E. R. 629; *sub nom.* **THYNN v. CHOLMELEY**, Gouldsb. 129, 186; Moore, K. B. 357.

**5550. — — — — —]**—Equity will decree an assignee of a lease to pay the rent become due, since his assignment, & which shall become due, whilst he continues in the possession, but not during the continuance of the lease; for he may, if he can, get rid of the lease by assigning it to another.—**LONDON (CITY) v. RICHMOND** (1701), Prec. Ch. 156; 2 Vern. 421; 2 Eq. Cas. Abr. 86; 23 E. R. 870; *affd. sub nom.* **RICHMOND v. LONDON (CITY)** (1702), 1 Bro. Parl. Cas. 516, II. 1.

*Annotations*:—**Reid.** **Bally v. Wells** (1769), Wilms. 341. **Mentd.** **Meux v. Maltby** (1818), 2 Swan. 277; **Small v. Atwood** (1832), You. 407.

**5551. Whether assignee solely liable.]—**If a lease for twenty years is made & the lessee grants over his estate & afterwards the rent is in arrear, the lessor has an action of debt against the grantee & not against the lessee because this contract goes with the land.—**ANON.** (1553), Dal. 16; 123 E. R. 237.

**5552. — — — Landlord's right to elect between lessee & assignee.]—**An assignee of a reversion who has accepted rent from the assignee of the term, may maintain covenant against the exor. of the lessee, or the assignee of the term, for a breach of covenant running with the land, committed after the assignment of the reversion & the term; but he can have only one satisfaction.—**BRETT v. CUMBERLAND** (1619), Cro. Jac. 521; 3 Bulst. 163; Godb. 276; Poph. 136; 1 Roll. Rep. 359; 2 Roll. Rep. 63; 70 E. R. 446.

*Annotations*:—**Consd.** **Thursby v. Plant** (1669), 1 Wms. Saund. 230. **Reid.** **Norton v. Acklane** (1640), Cro. Car. 579; **Jenkins v. Hermitage** (1674), Freem. K. B. 377; **Glover v. Cope** (1691), 1 Show. 284; **Bally v. Wells** (1769), 3 Wils. 25. **Mentd.** **Hollar v. Caseborough** (1665), 1 Keb. 839; **London City v. Vanacre** (1699), 12 Mod. Rep. 270; **Rumsey v. George** (1813), 1 M. & S. 176; **McNellage v. Holloway** (1818), 1 B. & Ald. 218; **Lyme Regis Corp'n. v. Henley** (1834), 1 Bing. N. C. 222; **Nicholl v. Allen** (1862), 1 B. & S. 934.

**5553. — — — — —]**—Lessor refuses to accept an assignee for his tenant, & gives his receipts in lessee's name, & after brings debt against the assignee for rent:—*Held*: good; for he may refuse him when he will & accept him when he will, & may sue either the lessee or assignee for the

**PART XXI. SECT. 10, SUB-SECT. 3.—B. (b).**

**g. General rule—Liability passes by assignment.]—**The effect of R. S. O., c. 170, s. 34, is to place the assignee who has elected by notice in writing under his hand to retain the premises

occupied by the assignor at the time of the assignment, for the unexpired term of the lease, in the same position as respects the lease as the assignor would have been in had the assignment not been made; & the landlord in such cases being entitled to the full amount of

the rent reserved by the lease, but to nothing more.—**KENNEDY v. MACDONELL** (1901), 21 C. L. T. 233; 1 O. L. R. 250.—**CAN.**

**h. — — — — —]**—**DOMINION BANK v. WALKER (ALTA)**, [1923] 2 D. L. 11. 1043; 2 W. W. R. 696.—**CAN.**

**Sect. 10.—Liabilities of lessee and assignee: Sub-sect. 3, B. (b), (c) & (d) i.]**

rent at his election.—*DEVEREUX v. BARLOW* (1670), 2 Wms. Saund. 181; 85 E. R. 946.

*Annotation:—Refd. Wadham v. Marlow* (1785), 8 East, 314, n.

**Rent generally.]—See Part XV., ante.**

**(c) For Breach before Assignment.**

**5554. Assignee not liable—Covenant not running with land.]—**The assignee of a term is not liable for a breach of covenant which happened previous to the assignment, provided the covenant does not run with the land.—*HYDE v. WINDSOR (DEAN & CHAPTER)* (1597), Cro. Eliz. 457\*, 552; 78 E. R. 710, 798; *sub nom. Hyde v. Windsor (Dean & Canons)*, Moore, K. B. 399.

*Annotations:—Refd. Rally v. Wells* (1769), Wilm. 341. *Mentd. Adams v. Gibney* (1830), 6 Bing. 656; *Tremere v. Morrison* (1834), 3 L. J. C. P. 260; *Penfold v. Abbott* (1862), 32 L. J. Q. B. 67; *Taylor v. Caldwell* (1863), 3 B. & S. 826.

**5555. —.]—**Assignee of a lease after a breach of covenant by the lessee, not liable for the breach.—*ST. SAVIOUR'S, SOUTHWARK (CHURCHWARDENS) v. SMITH* (1762), 3 Burr. 1271; 1 Wm. Bl. 351; 97 E. R. 827.

**5556. —.** Though smaller price given on account of breaches.]—A. agreed to take an assignment of a lease of a house, which was out of repair, from B., & by the agreement it was stipulated, that all outgoing should be paid by B. up to Apr. 23; &, by an assignment indorsed on the lease, executed by B. but not by A., B. assigned the residue of the term, subject to the performance of all the covenants of the lease, which, from Apr. 22, ought to be observed on the part of the tenant. The lease contained a covenant to keep the premises in repair, & so to deliver them up; &, after the assignment, the reversioner sued B. & recovered for dilapidations which occurred before Apr. 22:—*Held: B.* could not maintain an action on the case against A. for these dilapidations, even though it could be proved that A. gave a smaller price, because the premises were out of repair.—*HAWKINS v. SHERMAN* (1828), 3 C. & P. 459, N. P.

*Annotations:—Refd. Gooch v. Clutterbuck* (1899), 68 L. J. Q. B. 808. *Mentd. Richardson v. Jenkins* (1853), 1 Drew. 477.

**5557. Covenant with time limit for performance—Time expiring before assignment—Whether assignee bound to perform.]—**A lessee covenanted for him & his assigns to rebuild a house within such a time; after the time expired, he assigned over, etc., the house not built:—*Held: the assignee was not bound, as the breach of the covenant was before the assignment.*—*GRESCOT v. GREEN* (1700), Holt, K. B. 177; 1 Salk. 199; 90 E. R. 996.

*Annotation:—Apld. St. Saviour's, Southwark v. Smith* (1762), 3 Burr. 1271.

**(d) For Breach after Assignment.**

**i. In General.**

**5557a. Whether liability of mesne assignee discharged.]—***ONSLOW v. CORRIE*, No. 5452A, ante.

**PART XXI. SECT. 10, SUB-SECT. 3.—B. (c).**

**5555 i. Assignee not liable.]—**A lease for seven years from Aug. 13, 1901, contained a covenant by the lessee, his exors. administrators or permitted assigns to paint the premises in the third & sixth years of the term. There was a breach of this covenant by the lessee &, in Oct. 1905, the term was assigned:—*Held: the assignee was not liable in damages to the lessor for such breach.*—*RENSHAW v. MAHER*, [1907] V. L. R. 520.—*AUS.*

**5555 ii. —.]—**The assignee of a lease of a store & premises & of certain personal property, enumerated in a schedule annexed to the lease, which contained covenants not to assign without the consent of the lessor & at the expiration of the term to yield up the premises & return the articles mentioned in the schedule, who got the lessor to sign an assent to the assignment, containing a proviso that it was subject to the payment of the rent & the performance of the covenants in the lease reserved, is not liable, in an

**5558. — Assignment by executor of lessee—Executor as assign in law.]—**A prebend cannot bring an action of debt against the exor. of the lessee of his predecessor for rent due after an assignment of the term.

The exor. here is not chargeable by the contract but by the privity in law, viz. that he has the term, which being removed the action against him fails; for there is not any cause of action between them but by reason of the term which is in him & his interest therein (*GAWDY, J.*).—*OVERTON v. SYDAL* (1597), Cro. Eliz. 555; Poph. 120; 78 E. R. 801.

*Annotations:—Consd. Helier v. Casebrooke* (1665), 1 Keb. 839, 923. *M.F. Coghill v. Freelove* (1690), 3 Mod. Rep. 325. *POPHAM*, in reporting that case, held that the action did not lie. But the same case reported by others is said not to be adjudged, for the ct. was divided in opinion (*per Cur.*). *Folld. Pitcher v. Tovey* (1691), 1 Show. 340. *Refd. Iremonger v. Newsam* (1628), Lat. 260. *Mentd. Mirehouse v. Rennell* (1832), 8 Bing. 490.

**5559. — Assignment by administrator of lessee.]—***MARROW v. TURPIN*, No. 5491, ante.

Position of executors of lessee, see, generally, Sect. 1, sub-sect. 2, E., ante.

**5560. — Rent—Lessor accepting rent from assignee.]—***KIGHTLY v. BULKLY* (1667), 1 Sid. 338; 82 E. R. 1143; *sub nom. KEIGHTLY v. BUCKLY*, 1 Lev. 215.

*Annotations:—Refd. Pitcher v. Tovey* (1691), 4 Mod. Rep. 71; *Bright v. Beard* (1843), Dav. & Mer. 35.

**5561. —.]—***MARROW v. TURPIN*, No. 5491, ante.

**5562. — Confined to period of occupation.]—**Assignee of a lease rendering rent assigns over, he shall be liable in equity for the rent during the time he enjoyed the land.—*TREACKLE v. COKE* (1683), 1 Vern. 165; 23 E. R. 389.

*Annotations:—Refd. Philpot v. Hoare & Robertson* (1741), Amb. 480; *Valliant v. Dodemede* (1742), 2 Atk. 546; *Onslow v. Corrie* (1817), 2 Madd. 330.

**5563. — No notice of assignment to lessor.]—**Lessee assigns to A., A. assigns to B. without notice to the lessor; lessor cannot have covenant against A. for arrears of rent incurred after the assignment to B.—*PITCHER v. TOVEY* (1692), 4 Mod. Rep. 71; 1 Salk. 81; Holt, K. B. 73; 1 Show. 340; 87 E. R. 208; *sub nom. TOVEY v. PITCHER*, Carth. 177; 2 Vent. 234; *sub nom. TONGUE v. PITCHER*, 3 Lev. 295; *sub nom. RICHARDS v. TURVY*, Comb. 192; Holt, K. B. 73.

*Annotations:—Refd. Cook v. Harris* (1697), 1 Ld. Raym. 367; *Onslow v. Corrie* (1817), 2 Madd. 330.

**5564. — Before entry of assignee.]—**The assignee of a lease for years, who has assigned over, is discharged from the covenant to pay rent, before the entry of his assignee.

The last assignment in this case was only as a mtge. security. Therefore if pltf., instead of replying that R. did not take possession, had traversed, by this replication the allegation of the plea, that deft. had assigned all his estate, title & interest, etc., & upon issue being joined, it had appeared on the trial that the assignment contained a proviso of redemption he would have been entitled to a verdict (*per Cur.*).—*WALKER v.*

action on the covenant to return the goods, for a breach committed by the original lessee.—*GOGGIN v. WHITTAKER* (1908), 38 N. B. R. 415; 4 E. L. R. 543.—*CAN.*

**PART XXI. SECT. 10, SUB-SECT. 3.—B. (d) i.**

**k. Duration of liability.]—**The assignees of a lease are only liable so long as they continue in possession of the demised premises.—*DAMBRILL v. DUNSCOMBE & Co.* (1818), 1 Nfld. L. R. 76.—*NFLD.*

*Annotations:—***Conad.** Williams v. Bosanquet (1819), 1 Brod. & Bing. 238. **Refd.** Copeland v. Stephens (1818), 1 B. & Ald. 593; Locke v. Furze (1865), 13 W. R. 971; Rendall v. Andrews (1892), 61 L. J. Q. B. 630. **Mentd.** Jackson v. Vernon (1789), 1 Hy. Bl. 114.

Ptfr. seems to me to have decided against himself, for he has stated this as an assignment. If he had meant to avail himself of it as a contract between deft. & himself he should have stated it according to the legal operation & as a demise from pltf. to deft. (ASHHURST, J.).—CHANCELLOR v. POOLE (1781), 2 Doug. K. B. 764 ; 99 E. R. 488.

5566. ——— Lease sold by auction—Assignment executed but not delivered to assignee.]—A. being assignee of a lease, puts it up to auction; B. becomes the purchaser, pays a deposit, & orders an assignment to him to be prepared by A.'s solr.; which is accordingly prepared & executed by A.; but instead of being delivered to B. it remains in the possession of the solr., who claims a lien for the expense of preparing it:—*Held*: to an action against A. as assignee of the term for rent accruing due after he had executed the assignment, these facts were sufficient to support a plea, that before the rent became due, he had assigned to B.—*ODELL v. WAKE* (1813), 3 Camp. 394. N. P.

*Annotation*:—As to (2) **Refd.** *Hopkinson v. Lovering* (1883),  
11 Q. B. D. 92.

A lessee covenanted with his lessor that neither he himself, his exors., administrators, or assigns, nor any person who might thereafter claim any estate in the premises, would assign without licence. On the bkpcy. of the lessee his trustee assigned the lease. The lessor claimed as against the trustee the rent due :—*Held* : as the trustee's liability was based on privity of estate, he ceased on the assignment over to be liable for rent accrued due after the date of the assignment.—*Re*

The declaration reciting a lease, which contained covenants to repair, alleged breaches of such covenants "on divers days & times." Plea: that deft., being the assignee of such lease before the breaches, or any part thereof, assigned over the lease to another person:—*Held*: the plea was divisible, & would protect deft. from the breaches which occurred after, but not from those which were committed before the assignment.—*HOULE v. PENNING* (1850), 16 L. T. O. S. 87.

**5571. — Breach during possession—Action begun after reassignment.]**—The assignee of a lease is liable for the breach of a covenant running with the land, incurred in his own time, though the action is not commenced till after he has assigned the premises.—**HARLEY v. KING** (1835), 2 Cr. M. & R. 18 ; 1 Gale, 100 ; 5 Tyr. 692 ; 4 L. J. Ex. 144 ; 150 E. R. 8.

They [assignees in bkpcy.] take it [the property of bkpt.] by the operation of law, & enter into no covenant to indemnify bkpt. against the covenants in his leases. They may waive his leases, & so not become liable to the landlord at all; they may take to them subject only to such liabilities as attaches upon all assigns, that is, a liability to be sued on such covenants as bind assigns during the time they retain that character; but when they cease to retain it their liability ceases, the privity of estate which alone makes them liable to be sued being determined (GRANT, M.R.).—WILKINS v. FRY (1816), 1 Mer. 244; 2 Rose, 371; 35 E. R. 665.

5573. ——— Fraudulent reassignment by trustee.]—*PHILPOT v. HOARE & ROBERTSON, No. 5373, ante.*

5574. Whether assignee estopped from setting up assignment—Covenant not to assign without licence.]—PAUL v. NURSE, No. 5567, *ante*.

**Restraint on assignment.]—See Sect. 1, ante.**  
**5575. Mode of pleading—Must show time of reassignment—After alleged assignment.]—In an action against the assignee of a term the plea of an assignment over ought to show that such assignment over was made after the assignment stated in the declaration. But if it does not, no objection can be made against it after a replication that such**

**Sect. 10.—Liabilities of lessee and assignee: Sub-sect. 3, B. (d) i. & ii.; sub-sect. 4, A. (a) & (b) i.]**

assignment over was fraudulent.—*COOK v. HARRIS* (1698), 1 Ld. Raym. 367; 91 E. R. 1142.

**Annotations:—***Refd.* Copeland v. Stephens (1818), 1 B. & Ald. 593; Williams v. Bosanquet (1819), 1 Brod. & Bing. 238; Rendall v. Andraee (1892), 61 L. J. Q. B. 630.

**Effect on liability to assignee—Assignee's right to indemnity.]—***See* Nos. 5606–5610, 5621, *post*.

## ii. Assignment to escape Liability.

**5576. Whether impeachable for fraud.]—**In debt for rent against assignee of lessee, deft. pleads an assignment over: pltf. may reply fraud & covin.—*Knight v. P'eachee* (1679), *Freem.* K. B. 465; *T. Raym.* 303; 1 Vent. 329; 89 E. R. 347; *sub nom.* ANON., *T. Jo.* 109; 1 Vent. 331.

**Annotation:—***Refd.* Tovey v. Pitcher (1692), *Carth.* 177.

**5577. — Assignor deriving no benefit from premises.]—**There is no fraud in the assignee of a term assigning over his interest, to whom he pleases, with a view to get rid of a lease, although such person neither takes actual possession, nor receives the lease. *Qu.*: if the replication *per fraudem* by the lessor to a plea of assignment in such a case, can ever be good. Certainly not, where the party assigning derives no benefit from the premises.—*Taylor v. Shum* (1797), 1 Bos. & P. 21; 126 E. R. 755.

**Annotations:—***Consd.* Onslow v. Corrie (1817), 2 Madd. 330. *Refd.* Hopkinson v. Lovering (1883), 11 Q. B. D. 92.

**5578. — Effect of motive when assignment real.]—**(1) Assignment by the assignees of an equitable term to a person in poor circumstances:—*Held*: valid, although it was made in order to avoid payment of a sum of money chargeable on the lessee under the original agreement, which agreement the assignee had adopted in all its parts.

(2) The motive which induces the assignee of a lease to assign over his interest has no bearing upon the question whether the assignment is fraudulent or not, provided the assignment is real, & intended to operate as it appears to operate.—*Fagg v. Dobie* (1838), 3 Y. & C. Ex. 96; 2 Jur. 681; 160 E. R. 629.

**Annotation:—***As to (2)* *Refd.* *Re* Smith, *Ex p.* Hepburn (1890), 25 Q. B. D. 536.

**5579. — Assignee not entering—Nor receiving lease.]—***Taylor v. Shum*, No. 5577, *ante*.

**5580. Assignee of no substance.]—**Fraud cannot be gone into on a general replication of *non assignavit*, & an assignment by a former assignee to a beggar is not fraudulent.—*Lekeux v. Nash* (1745), 2 Stra. 1221; 93 E. R. 1142.

**Annotations:—***Refd.* Onslow v. Corrie (1817), 2 Madd. 330; Hopkinson v. Lovering (1883), 11 Q. B. D. 92.

**5581. — Feme covert.]—**In covenant for rent against an assignee, an assignment to a *feme covert* before the rent accrued, is a good plea in bar.—*Barnfather v. Jordan* (1780), 2 Doug. K. B. 452; 99 E. R. 288.

**Annotation:—***Mentd.* Jones v. Davies (1861), 7 H. & N. 507.

**5581a. —.]—***ONSLOW v. CORRIE*, No. 5452A, *ante*.

**5582. —.]—***FAGG v. DOBIE*, No. 5578, *ante*.

**5583. —.]—**A lessee covenanted to build thirty-four additional houses on the demised property within five years, to keep in repair the houses built & to be built, & at the end of the term to deliver them up to the lessor; & there was a

proviso for re-entry on non-performance of the covenants. The additional houses were not built, but for forty-six years the lessor received the rent, & thus waived the obligation to build. The leasehold interest being sold:—*Held*: (1) the covenant to deliver up extended to the additional houses, as well as to the houses built at the date of the demise; (2) the title was bad, notwithstanding the purchaser might retain possession until the last day of the term, & then escape liability by transferring that day to a pauper; & (3) the purchaser was not bound to accept either a compensation or indemnity.—*NOUAILLE v. FLIGHT* (1844), 7 Beav. 521; 13 L. J. Ch. 414; 8 Jur. 838; 49 E. R. 1168.

**Annotation:—***As to (1)* *Refd.* Hume v. Bentley (1852), 5 De G. & Sm. 520.

**5584. — Knowledge of assignor.]—**Although a trustee in bkpcy., who has taken actual possession of leasehold property of bkpt., receives notice from the landlord to disclaim the lease under Bkpcy. Act, 1869 (c. 71), but does not disclaim, he may nevertheless relieve himself of liability to the landlord by assigning the lease, even without having previously offered to surrender it, & the mere fact that the trustee knows the assignee to be a pauper will not invalidate such assignment.—*Hopkinson v. Lovering* (1883), 11 Q. B. D. 92; 52 L. J. Q. B. 391; 47 J. P. 519.

—*See, also*, BANKRUPTCY, Vol. V., p. 953, Nos. 7806, 7807.

**5585. Assignment without consent—Whether assignor estopped from setting up assignment.]—**An assignment is not good against the lessor without assent, & want of assent is a good replication to a plea of assignment.—*Thompson v. Thompson* (1821), 9 Price, 464; 147 E. R. 152.

**Annotations:—***Mentd.* Clough v. French (1845), 2 Coll. 277; Talbot v. Shrewsbury (1873), L. R. 16 Eq. 26; *Re* Hayward, Tweedie v. Hayward. [1901] 1 Ch. 221.

**5586. Effect of assignment in equity.]—**As at law an assignee of a term may assign, & thereby get rid of his subsequent rent, & the covenants which run with the land, *a fortiori* he may do it in equity.—*Valliant v. Dodemede* (1742), 2 Atk. 546; 26 E. R. 754, L. C.

**Annotations:—***Consd.* Onslow v. Corrie (1817), 2 Madd. 330. *Refd.* Harley v. King (1835), 2 Cr. M. & R. 18.

## SUB-SECT. 4.—ASSIGNOR'S RIGHT OF INDEMNITY AGAINST ASSIGNEE.

### A. Apart from Covenant.

#### (a) In General.

**5587. General rule—Ultimate assignee must indemnify previous holders—For breaches during his possession.]—**An assignee of a lease by mesne assignments is under an obligation to indemnify the original lessee against breaches of covenant in the lease, committed during the continuance of his own tenancy; & that obligation is not affected by the covenants which the assignee may have made with his immediate assignor.

Pltf. was lessee of certain premises under a lease containing a covenant to keep in repair. He assigned the lease to B., who assigned it to defts. The assignment from pltf. to B. & from B. to defts., contained express covenants with the immediate assignors respectively, to indemnify them against all subsequent breaches. Whilst defts. were in

## PART XXI. SECT. 10, SUB-SECT. 4.—A. (a).

**5587i. General rule—Ultimate assignee must indemnify previous holders—**

*For breaches during his possession.]—*A lessee assigns his interest, & the assignee of the assignee neglecting to pay rent & to keep the premises in repair, the lessee is sued by the lessor, &, upon

being compelled to pay the rent & damages, sues the assignee of the assignee in a special action on the case for the damage he has sustained:—*Held*: he is entitled to recover for the

possession they committed breaches of the covenant to keep in repair, in respect of which the lessor recovered damages from pltf. In an action to recover over these damages against defts.:—*Held*: pltf. was entitled to succeed.—*MOULE v. GARRETT* (1872), L. R. 7 Exch. 101; 41 L. J. Ex. 62; 26 L. T. 367; 20 W. R. 416, Ex. Ch.

*Annotations*:—*Distd.* Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc., [1899] 1 Q. B. 161. *Consd.* Johns v. Pink, [1900] 1 Ch. 296; Rendall v. Morphew (1914), 84 L. J. Ch. 517. *Refd.* Roberts v. Crowe (1872), L. R. 7 C. P. 629; Whitaker v. Forbes (1875), 45 L. J. Q. B. 140; Soaward v. Drow & Farmer (1898), 67 L. J. Q. B. 322; Compania Naviera Vasconzada v. Churchhill & Sim, Same v. Burton, [1906] 1 K. B. 237; Matthey v. Curling, [1922] 2 A. C. 180.

**5588.** ——— **Effect of express covenants to indemnify between assignor & immediate assignee.]—***MOULE v. GARRETT*, No. 5587, *ante*.

**5589.** ——— **Implication of law.]—**In the case of an assignment of a lease the assignee, if in possession, is liable under the covenants in the lease by reason of privity of estate, & he may also be liable by contract with his assignor. . . . In either case the common law would only imply an obligation to indemnify the vendor (*VAUGHAN WILLIAMS, L.J.*).—*Re POOLE & CLARKE'S CONTRACT*, [1904] 2 Ch. 173; 73 L. J. Ch. 612; 91 L. T. 275; 53 W. R. 122; 20 T. L. R. 604; 48 Sol. Jo. 588, C. A.

*Annotations*:—*Appl.* Harris v. Boots Cash Chemists (Southern), [1904] 2 Ch. 376. *Consd.* Rockitt v. Cody, [1920] 2 Ch. 452.

**5590. Nature of assignee's liability—Suretyship.]—**

(1) An assignee who takes from a lessee leasehold premises by indenture indorsed on the lease, subject to the payment of the rent & the performance of the covenants & agreements reserved & contained in the lease, is not liable in covenant to the lessee for rent which the lessee has been called on by the lessor to pay after the assignee has assigned over.

(2) This duty [indemnity], we think, would arise from the mere relation between the parties, without any such words as those now under consideration; for the effect of the assignment is that the lessee becomes a surety to the lessor for the assignee, who, as between himself & the lessor is the principal, bound, whilst he is assignee to pay the rent & to perform the covenants running with the estate; & the surety after paying the debt or discharging the obligation to which he is liable, has his remedy against the principal (*DENMAN, C.J.*).—*WOLVERIDGE v. STEWARD* (1833), 1 Cr. & M. 644; 3 Moo. & S. 561; 3 Tyr. 637; 3 L. J. Ex. 360; 149 E. R. 557, Ex. Ch.

*Annotations*:—*As to* (1) *Consd.* Smith v. Lovell (1850), 10 C. B. 6. *Refd.* Smith v. Peat (1853), 9 Exch. 161. *As to* (2) *Folld.* Rowley v. Adams (1839), 4 My. & Cr. 534. *Consd.* Crouch v. Tregonning (1872), L. R. 7 Exch. 88. *Refd.* Humble v. Langston (1841), 7 M. & W. 517; Magnay v. Edwards (1853), 1 C. L. R. 141; Moule v. Garrett (1872), L. R. 7 Exch. 101; Charrington v. Wooder, [1914] A. C. 71. *Generally, Mentd.* Smith v. Neale (1857), 2 C. B. N. S. 67; Roberts v. Crowe (1872), L. R. 7 C. P. 629; Westacott v. Hahn, [1917] 1 K. B. 605; Kelantan Government v. Duff Development Co., [1923] A. C. 395.

**5591.** ——— **—HUMBLE v. LANGSTON**, No. 5457, *ante*.

**5592. Remedies of lessee—Action for damages for breach—Damages incurred by failure of assignee**

**to perform covenants.]—**Lessee, by deed-poll, assigned his interest in the demised premises to A., subject to the payment of the rent & the performance of the covenants contained in the lease. A. took possession, & occupied the premises under this assignment, & before the expiration of the term assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time that A. continued assignee of the premises, & recovered damages against the lessee:—*Held*: (1) the lessee might maintain an action upon the case founded in tort against A. for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage.

(2) That duty appears to me to be very accurately stated in the declaration, when it is described as commensurate with the time during which the assignee had an interest in the premises (*BAYLEY, J.*).—*BURNETT v. LYNCH* (1826), 5 B. & C. 589; 8 Dow. & Ry. K. B. 308; 4 L. J. O. S. K. B. 274; 108 E. R. 220.

*Annotations*:—*As to* (1) *Consd.* Wolveridge v. Steward (1833), 1 Cr. & M. 644; Humble v. Langston (1841), 7 M. & W. 517; Walker v. Bartlett (1856), 18 C. B. 845; Moule v. Garrett (1872), L. R. 7 Exch. 101. *Refd.* Walker v. Moore (1829), 8 L. J. O. S. K. B. 159; Marzetti v. Williams (1830), 1 B. & Ad. 415; Hancock v. Caffyn (1832), 8 Bing. 358; Edwards v. Bates (1844), 7 Man. & G. 590; Rolin v. Steward (1854), 14 C. B. 595; Dutton v. Powles (1861), 2 B. & S. 174; Maughan v. Sharpe (1864), 17 C. B. N. S. 443; Grissell v. Bristowe (1868), L. R. 3 C. P. 112; Rudge v. Bowman (1868), L. R. 3 Q. B. 689; Sheppard v. Murphy (1868), 18 W. R. 948; Kollock v. Enthoven (1874), L. R. 9 Q. B. 241; Whitaker v. Forbes (1875), 45 L. J. Q. B. 140; Woodhouse v. Walker (1880), 5 Q. B. D. 404. *As to* (2) *Refd.* Wolveridge v. Steward (1833), 1 Cr. & M. 644; Magnay v. Edwards (1853), 17 Jur. 839. *Generally, Refd.* Smith v. Peat (1853), 9 Exch. 161; Nokes v. Fish (1857), 3 Drow. 735. *Mentd.* Wright v. Doe d. Tatham (1834), 1 Ad. & El. 3; Yates v. Aston (1843), 4 Q. B. 182; Matthey v. Blackmore (1857), 1 B. & N. 762; Baynes v. Lloyd, [1895] 2 Q. B. 610.

**5593.** ——— **—**In a suit by the assignor of a lease claiming from his assignee indemnity in respect of breaches of the covenants in the lease, the ct. will direct merely payment on account of breaches of covenant already committed & will not make a general declaration of the assignor's right to indemnity, giving liberty to apply from time to time in case of future breach.—*LLOYD v. DIMMACK* (1877), 7 Ch. D. 398; 47 L. J. Ch. 308; 38 L. T. 173; 26 W. R. 458.

*Annotations*:—*Refd.* Hughes-Hallett v. Indian Mammoth Gold Mines (1882), 31 W. R. 285; Wolmershausen v. Gullick, [1893] 2 Ch. 514.

**5594.** ——— **Declaration of right to indemnity.]—***LLOYD v. DIMMACK*, No. 5593, *ante*.

— **Against underlessee.]—***See* Part IV., Sect. 11, sub-sect. 2, *ante*.

(b) *By and against Whom Enforceable.*

i. *By Whom.*

**5595. Original lessee.]—***STONE v. EVANS*, No. 5536, *ante*.

**5596.** ——— **No party to assignment—Equitable assignee.]—**Equitable assignee of leaseholds held liable at the suit of the lessee, after the expiration of the term, of the breaches of covenant committed during his possession, although such lessee was no party to the contract for purchase, & it

rent & damages he has been obliged to pay the lessor.—*ASHFORD v. HACK* (1849), 6 U. C. R. 541.—*CAN.*

1. ——— **Ultimate assignee a pauper.]—***MAGILL v. YOUNG* (1853), 10 U. C. R. 301.—*CAN.*

**5590.1. Nature of assignee's liability—Suretyship.]—**The Land Transfer Act, 1870, s. 69, does not make the assignee of a lease liable to indemnify the original

lessee against rent accrued due, nor against breaches of covenant occurring after he has assigned to some one else.

—*WILSON & KING v. BRIGHTLING* (1885), 4 N. Z. L. R. C. A. 4.—*N.Z.*

**5592.1. Remedies of lessee—Action for damages for breach—Damages incurred by failure of assignee to perform covenants.]—**The assignee of a lease is bound, as between himself & the

original lessee, to perform a covenant to repair contained in the lease whilst he remains the holder of the lease, although he has not expressly covenanted to do so, & to indemnify the original lessee against the result of any breaches of the covenant committed by him whilst the holder of the lease.—*TATTLE v. MCKERROW* (1901), 20 N. Z. L. R. 524.—*N.Z.*

**Sect. 10.—Liabilities of lessee and assignee: Sub-sect. 4, A. (b) i. & ii., & (c), B. (a) & (b).]**

was stipulated that the purchaser should not be entitled to an assignment.

It was agreed that deft. was not to have the legal interest, & the consequence was that there was no liability at law under the covenants (LORD LANGDALE, M.R.).—CLOSE v. WILBERFORCE (1838), 1 Beav. 112; 8 L. J. Ch. 101; 3 Jur. 35; 48 E. R. 881.

*Annotations:—*Consd. Nokes v. Fish (1837), 3 Drew. 735. Distd. Moore v. Greg (1848), 2 Ph. 717. Consd. Cox v. Bishop (1857), 28 L. T. O. S. 301. Rejd. Harding v. Met. Ry. (1871), 7 Ch. App. 156, n.

**5597. — Assignee covenanting to indemnify.]—**MOULE v. GARRETT, No. 5587, *ante*.

**Enforcement under express covenant.]—**See Sub-sect. 4, B. (d) i., *post*.

**ii. Against Whom.**

**5598. Assignee in possession.]—**STONE v. EVANS, No. 5536, *ante*.

**5599. — By mesne assignments—Effect of covenant to indemnify immediate assignor.]—**MOULE v. GARRETT, No. 5587, *ante*.

**5600. Joint tenants assigning—Assignee not accepted as tenant.]—**EXALL v. PARTRIDGE, No. 5492, *ante*.

**5601. Assignee parting with possession—For breaches during his occupation.]—**Covenant by lessee against an assignee for damages occasioned by the non-repair of premises by the assignees whilst he was such pursuant to his covenant. It appeared that in 1840 pltf. assigned the lease to deft., that in Oct. 1851, deft. assigned to one T.; that in June, 1852, T. assigned the lease to H., who, in Aug. 1852, surrendered it to the ground landlord. Evidence was given for pltf., that when H. held the lease the premises were out of repair, & T. stated that he put the premises in no better state than when he received them from deft. No further evidence was given, & deft. was not called as a witness:—*Held*: the judge was right in directing the jury to give substantial damages; & the jury were warranted in presuming that the dilapidations took place during the time deft. held the lease.—SMITH v. PEAT (1853), 9 Exch. 161; 2 C. L. R. 424; 23 L. J. Ex. 84; 22 L. T. O. S. 106; 156 E. R. 60.

*Annotations:—*Rejd. Davis v. Underwood (1857), 22 J. P. 8; Joyner v. Weeks, [1891] 2 Q. B. 31; Gooch v. Clutterbuck & Davis (1899), 68 L. J. Q. B. 808.

**5602. Equitable assignee.]—**CLOSE v. WILBERFORCE, No. 5596, *ante*.

*See, also*, Sub-sect. 3, A. (f), *ante*.

**5603. Assignee accepting benefit of assignment—Assignment not executed.]—**Assignee of leaseholds accepting the benefit of an assignment:—*Held*: in equity, liable to the covenants on his part contained in the assignment, though he did not execute it.—WILSON v. LEONARD (1840), 3 Beav. 373; 49 E. R. 146.

*Annotations:—*Rejd. Nokes v. Fish (1837), 3 Drew. 735. Mentd. Coope v. Crosswell (1866), 14 L. T. 262.

**5604. Sub-lessee—Mortgagee by sub-demise.]—**An underlessee, who is a mtgee. by way of demise from an assignee of a lease, & who is in possession of the demised premises, is not liable to indemnify the lessee in respect of rent which such lessee has been compelled to pay to the lessor under a covenant to pay the rent reserved by the lease.—BONNER v. TOTTENHAM & EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY, [1899] 1 Q. B. 161; 68 L. J. Q. B. 114; 79 L. T. 611; 47 W. R. 161; 15 T. L. R. 76; 43 Sol. Jo. 95, C. A.

*Annotation:—*Mentd. Moxham v. Grant, [1900] 1 Q. B. 88.

*See, also*, Sub-sect. 3, A. (k), *ante*.

**5605. Execution creditor of lessee—Effect of appointment of receiver by lessee's mortgagee.]—**

C., who was lessee of land for a term of years, mortgaged the same to pltf. by way of sub-demise, less the last three days of the term, & covenanted to pay the rent & perform the covenants in the lease. Deft., who was the owner of the demised property subject to C.'s term, recovered judgment against her for two quarters' rent, & sued out a writ of *elegit* under which the sheriff, after inquisition, delivered the property to him. After the inquisition pltf. appointed a receiver under their mtge. Deft. recovered nothing under his judgment & took no further steps under the *elegit*, but afterwards distrained on the property for a further half-year's rent. In an action to restrain the distress:—*Held*: (1) assuming deft. was by virtue of the *elegit* an assignee of C.'s term, he only took it for a limited purpose, & could not be treated as surety for her & bound to indemnify her against the payment of the rent; & (2) the property was delivered to deft., not in respect of the mere reversion expectant on the determination of the subdemise, but to the extent of C.'s interest as mtgor. in possession; that interest was determined by the appointment of the receiver, & consequently the title of deft. as tenant by *elegit* had either been extinguished or suspended; therefore, deft. was entitled to distrain.—JOHNS v. PINK, [1900] 1 Ch. 296; 69 L. J. Ch. 98; 81 L. T. 712; 48 W. R. 247; 16 T. J. R. 70.

*See, also*, DISTRESS, Vol. XXI., pp. 573, 574.

**Estate of bankrupt assignee.]—**See BANKRUPTCY, Vol. IV., p. 200, Nos. 2461, 2462.

**Liability under express covenant.]—**See Sub-sect. 4, B. (d) ii., *post*.

**Liability as between tenant for life & remainderman.]—**See SETTLEMENTS.

**(c) Extent of Liability.**

**5606. Limited to assignee's tenancy.]—**ANON. (1577), 4 Leon. 17; 74 E. R. 698.

**5607. —.]—**BURNETT v. LYNCH, No. 5592, *ante*.

**5608. —.]—**WOLVERIDGE v. STEWARD, No. 5590, *ante*.

**5609. —.]—**MOULE v. GARRETT, No. 5587, *ante*.

**5610. —.]—**Pltf. was tenant to L. of a farm from Michaelmas, 1858, for seven, fourteen, or twenty-one years at tenant's option, at a rent of £80 a year, payable quarterly. In Mar. 1869, he purported, by an agreement not under seal, to assign the residue of his interest to deft., who entered & occupied the farm; but L. withholding his licence, which was necessary under pltf.'s lease, no actual legal assignment was ever executed. At Michaelmas, 1870, deft. quitted the farm, having given L. a notice of his intention to do so. He might have continued to occupy if he had thought proper, but in fact the property stood empty after Michaelmas. Deft., whilst in occupation, paid rent to L. for pltf. He never was accepted as tenant by L. In Mar. 1871, pltf. paid L., in respect of rent due from Sept. previous, the sum of £40, which he now sought to recover from deft., either upon an implied indemnity, or by way of rent, or for use & occupation:—*Held*: he was not entitled to recover, there not having been under the circumstances any promise to indemnify pltf. against rent accruing after deft.'s actual occupation had ceased, nor any such relation of landlord & tenant existing between the parties as would entitle pltf. to the repayment by deft., either as

**Annotation:—***Reid*. Dawes v. Dowling (1874). 31 L. T. 65.

**Effect of reassignment.—Liability under express covenant.]—See No. 5621, *post*.**

— **Liability to lessor.**—*See* Sub-sect. 3, B. (d), *ante*.

*Annotations*:—**Reid**. *Henn v. Hanson* (1663), 1 Sid. 141;  
*Cartright v. Pingree* (1675), Freem. K. B. 398.

5612. Dilapidations before assignment.]—HAWKINS v. SHERMAN, No. 5556, *ante*.

*B. Under Express Covenant.*

**5614. What amounts to covenant to indemnify—Assignment subject to payment of rent & performance of covenants.]**—Specific performance decreed, after a trial at law of a parol undertaking by the assignee of a lease, to indemnify the original lessee, the vendor, against the rent & covenants; a presumption arising from the nature of the transaction; the assignment being "subject to the rents & covenants on the part of the lessee," although the conditions under which the lease was sold by auction expressed no such engagement.—**PEMBER v. MATHERS** (1779), 1 Bro. C. C. 52; 28 E. R. 979. L. C.

**Annotations:—**Consd. *Clarke v. Grant* (1807), 14 Ves. 519.  
**Refd.** A.-G. *v. Jackson* (1846), 5 Hare, 355. **Mentd.**  
*Gordon v. Hertford* (1817), 2 Madd. 106.

**5615.** ———.]—**MILLS v. HARRIS** (1820), cited 1 Cr. & M. 659; 149 E. R. 563.

*Annotation* :—**Folld.** *Wolveridge v. Steward* (1833), 1 Cr. & M. 644.

5618. — Parol undertaking to indemnify—  
Whether enforceable.]—PEMBER v. MATHERS, No.  
5614. *ante*.

5617. — Assignment accepted but not executed.]—MILLS v. HARRIS (1820), cited 1 Cr. & M. 659; 149 E. R. 563.

*Annotation*:—**Folld.** *Wolveridge v. Steward* (1833), 1 Cr. & M. 614.

**5618. Forfeiture of bond to indemnify—Bankruptcy of assignee—Right to sue on bond—Lessee having made no payment before bankruptcy.]—**A., the original lessee of a term of years, assigned the residue to B. & C. B., on the assignment gave a bond to A. conditioned for the payment of the rent to the lessor, & the performance of the other covenants in the lease, & for indemnifying A. against the non-performance of the covenants. B. & C. having become bkpt., & the bond being forfeited before their bkpcy., A. brought an action against B. on the bond, & assigned for breaches, non-payment of rent by B. & C.; & that an action

**Annotations.**—*Reid*. Manning v. Flight (1832), 3 B. & Ad. 211; *Lyde*. v. Myynn (1833), 1 My. & K. 683; *Re Colnaghi*, *Ex p.* Marks (1838), 3 Deac. 133; *Lane*. v. Burghart (1841), 3 Man. & G. 597; *Amott*. v. Holder (1852), 17 Jur. 318; *Betteley*. v. Stainsby (1862), 12 C. B. N. S. 477; *Marchman*. v. Brookes & Hughes (1864), 2 H. & C. 908.

*See, further, BONDS, Vol. VII., p. 206, Nos. 478-481.*

5619. Contract of indemnity only.]—*Re POOLE & CLARKE'S CONTRACT, No. 5589, ante.*

5620. — Whether assignor entitled to specific performance of covenants in lease.]—The true object of the covenant by the assignee usually inserted in the assignment of leaseholds is merely to indemnify & protect the lessee against breach of covenants contained in the lease, & consequently a lessee is not entitled to enforce by injunction the specific performance by his assignee of the negative covenants contained in the original lease by means of the covenant "to perform & observe" the covenants & conditions contained in the lease, & to indemnify the assignor from & against all claims & demands on account of the same. *Semble*: a covenant to perform & observe the negative covenants in a lease is not of itself a negative covenant within the rule which binds the ct. to grant an injunction on evidence of its breach.—*HARRIS v. BOOTS, CASII CHEMISTS (SOUTHERN), LTD.*, [1904] 2 Ch. 376; 73 L. J. Ch. 708; 52 W. R. 668; 20 T. L. R. 623; 48 Sol. Jo. 622.

**Annotations:—****Apld.** *Reckitt v. Cody*, [1920] 2 Ch. 452.  
**Mentd.** *Pulleyne v. France* (No. 1) (1912), 57 Sol. Jo. 173.

**5621. Covenant at all times to indemnify—**  
**Whether liability discharged by assignment.]—**  
 The declaration stated that pltf. being lessee of certain coal mines, by indenture, assigned his interest in them to deft., who covenanted with pltf. to pay the rents, galleages, etc., as reserved by the original indenture of lease, so long as he, deft., should be in possession or receipt of the rents, produce, & profits of the mines, etc., & at all times thereafter effectually to indemnify & keep harmless pltf. from & against all the rents, covenants, etc., of the original lease, & against all litigation in respect thereof :—*Held* : the restrictive words in the first covenant “so long as deft. shall be in possession or receipt of the rents, produce, or profits,” etc., did not apply to the covenant to indemnify.—**CROSSFIELD v. MORRISON** (1849), 7 C. B. 286; 6 Dow. & L. 608; 18 L. J. C. P. 135; 13 L. T. O. S. 161; 13 Jur. 565; 137 E. R. 114.

*Annotation* :—**Mentd.** *Rutland v. Bagshaw* (1850), 14 Q. B. 869.

5822. Covenant to "keep assignor indemnified"—Breach before assignment—Continuing after assignment.—A lease, the reversion on which

**56141.** *What amounts to covenant to indemnify—Assignment subject to payment of rent & performance of covenants.*—**O'LOUGHLIN v. DWYER** (1884), 13 L. R. Ir. 75.—**IR.**

**Sect. 10.—Liabilities of lessee and assignee: Subsect. 4, B. (b), (c), (d) i. & ii., & (e).]**

was vested in pltf. contained a covenant by the lessee to repair & keep in repair the demised premises. By virtue of divers mesne assignments & other acts in the law the term had become vested in defts., the exors. of a deceased assignee of the lease. They, as "trustees," assigned the premises, which were then out of repair, for the residue of the term to an assignee, who covenanted with them thenceforth to pay the rent reserved by the lease, & perform the lessee's covenants therein contained, & to keep them indemnified from the payment & performance thereof respectively. The premises remaining out of repair, pltf. subsequently brought an action against defts. for breach of the covenant to repair, & they brought in their assignee as third party. Pltf. having recovered damages against defts. in the action:—*Held*: the third party was liable under his covenant to indemnify them against those damages recovered by pltf. against them for breaches of the covenant in the lease prior to the assignment.—*GOOCH v. CLUTTERBUCK*, [1899] 2 Q. B. 148; 68 L. J. Q. B. 808; 81 L. T. 9; 47 W. R. 609; 15 T. L. R. 432; 43 Sol. Jo. 602, C. A.

**Effect of reassignment—Liability apart from covenant.]—***See* Nos. 5606-5610, *ante*.

**Liability of assignee to lessor.]—***See* Subsect. 3, B. (d), *ante*.

**(c) Right to Require Covenant.**

**5623. General rule.]—**Under a contract for the assignment of a term, whether from the original lessee, or a mesne assignee, the purchaser must covenant for indemnity against payment of rent & performance of covenants; though he cannot have a covenant for the title from the assignor; as being an exor.; & also by express stipulation.—*STAINES v. MORRIS* (1812), 1 Ves. & B. 8; 35 E. R. 4, L. C.

*Annotations:—Apld.* *Wilkins v. Fry* (1816), 1 Mer. 244. *Reid.* *Steward v. Wolveridge* (1832), 9 Blug. 60.

**5624. Whether right of assignor affected—By his refusal to give covenant for title.]—***STAINES v. MORRIS*, No. 5623, *ante*.

**(d) By and against Whom Enforceable.**

**i. By Whom.**

**5625. Mesne assignee of underlease—Having indemnified his assignor—Effect of surrender & regrant of lease.]—**4 Geo. 2, c. 28, s. 6, while it gives a lessee the right to surrender notwithstanding his contracts with his underlessee, leaves untouched the sub-interest, though it be merely an agreement for an underlease; & the effect of a new demise after the surrender for the residue of the original term is to make the new lessee the assignee of the reversion of the term created by the surrenderor.

S. surrendered his lease to W., his lessor, after making an agreement, containing a stipulation to pay rent & repair, for an underlease to E., who entered & afterwards assigned his interest to pltf., & who gave an indemnification to him, & assigned it over to deft.'s testator, who covenanted to indemnify pltf.; after the surrender W. granted a new lease for the remainder of S.'s term to H.:—*Held*: H. was in exactly the same position as S., & F. having had to pay to H. money for rent & non-repair, in consequence of the default of deft.'s testator, & pltf. having repaid F., pltf. was entitled to recover such moneys from deft.—

*COUSINS v. PHILLIPS* (1865), 3 H. & C. 892; 35 L. J. Ex. 84; 30 J. P. 199; 159 E. R. 786.

*Annotation:—Refd.* *Plummer & John v. David*, [1920] 1 K. B. 326.

**5626. Sub-lessee acquiring leasehold reversion after assignment—Covenants with assignor of reversion—Whether bar to indemnity for rent already paid.]—**On the dissolution of a partnership between H. & R., H. assigned to R. all his interest in two houses belonging to the partnership held under sub-leases from C. & D., & R. covenanted to pay the rents & observe the covenants & keep H. indemnified against them. R.'s exors. sold the houses to B., & B. to a co. which went into liquidation. The landlords C. & D. thereupon sued H. for the rent, & he paid it for the whole of the year 1882. D. also made a large demand against H. for breaches of covenants to repair, but H. made no payment. On Mar. 15, 1883, D. assigned his reversion to H., & in May, 1883, H. acquired C.'s reversion. In June, 1883, H. bought the leasehold interest in both houses from the liquidators of the co., & covenanted thenceforth to pay the rent & observe the covenants. H. sought to prove against the estate of R. for the sums paid for rent, for the rent payable at Lady Day, 1883, on D.'s house, & for the amount of the dilapidations in that house:—*Held*: (1) the right of H., under R.'s covenant of indemnity, to prove for the rents which he had paid, was not taken away by his covenant in the assignment by the liquidators, which could not be extended to rents already due & paid; (2) this right was not defeated on the ground that the right of R.'s representatives, if they paid rent, to recover it from the owner of the lease for the time being, was interfered with by the assignment from the liquidators to H., for that this assignment could not take away any right of action which R.'s exors. might have against the persons entitled to the houses at the end of 1882, & an assignor who pays rent has no lien on the term, & so cannot be prejudiced by its subsequent assignment; (3) the right was not defeated on the ground that H. on paying the rent became entitled to a right of distress from the reversioners, which he had destroyed by taking an assignment of the leases, & had therefore discharged the estate of R. by releasing a remedy to the benefit of which R. as a surety was entitled, for that a right of distress is not a security or remedy to the benefit of which a surety paying rent is entitled under Mercantile Law Amendment Act, 1856 (c. 97), s. 5; (4) H. was entitled to prove against R.'s estate for the rent paid in 1882 on both houses, & to prove for the Lady Day rent on D.'s house; & (5) H. was not entitled to prove for the amount of dilapidations, for that he had sustained no damage by reason of them, inasmuch as he bought the leases from the liquidators at a less price in consequence of the breaches of the covenant to repair nor for the Lady Day rent of C.'s house.—*Re RUSSELL, RUSSELL v. SHOOLBRED* (1885), 29 Ch. D. 254; 53 L. T. 365, C. A.

**5627. — Extinguishment of assignee's right of distress—Whether bar to indemnity.]—***Re RUSSELL, RUSSELL v. SHOOLBRED*, No. 5626, *ante*.

**5628. Assignor acquiring lease & reversion—Through interference with right of assignee to indemnity.]—***Re RUSSELL, RUSSELL v. SHOOLBRED*, No. 5626, *ante*.

**5629. Assignor paying rent—Effect of subsequent assignments.]—***Re RUSSELL, RUSSELL v. SHOOLBRED*, No. 5626, *ante*.

**Apart from covenant.]—***See* No. 5526, *ante*.

**Underleases, generally.]—***See* Part IV. *ante*.

ii. *Against Whom.*

**5630. Assignee—For breaches prior to assignment.]**—GOOCH v. CLUTTERBUCK, No. 5622, *ante*.

**5631. Assignee of sub-lease—Assignor acquiring reversion & covenanting to pay rent—Rent paid before acquisition of reversion.]**—*Re* RUSSELL, RUSSELL v. SHOOLBRED, No. 5626, *ante*.

**5632. Mesne assignee—Effect of reassignment of lease to assignor.]**—*Re* RUSSELL, RUSSELL v. SHOOLBRED, No. 5626, *ante*.

**5633. — Entitled to right of distress—Right destroyed by reassignment of lease to assignor.]**—*Re* RUSSELL, RUSSELL v. SHOOLBRED, No. 5626, *ante*.

Rights of assignees of reversion generally, see Part XXII., Sect. 3, *post*.

**5634. Company in liquidation—Joint Stock Companies Arrangement Act, 1870 (c. 104)—Appropriation of sum to meet contingent liabilities.]**—The lessee of certain mines assigned his leases to a co. which covenanted to indemnify him against liability thereunder. The co. went into liquidation, & a scheme of arrangement under above Act was adopted & approved by the ct. for forming a new co. which should take over the assets & liabilities of the old co., & should pay or satisfy the unsecured creditors of the old co. within three months of the approval of the scheme by the ct. After the new co. was incorporated the lessee applied in the liquidation to have a sum provided to meet his contingent liability for rents, royalties, & breaches of covenant:—*Held*: above Act applied to every person having a pecuniary claim against a co., whether actual or contingent, & the lessee was bound by the scheme, the application failed. *Semble*: the lessee could compel the new co. to indemnify him from time to time as he should be called upon to pay under the leases. *Qu.*: whether the lessee would have been entitled, apart from the scheme, to have assets of the old co. impounded to meet his contingent liability under the leases.—*Re* MIDLAND COAL, COKE & IRON CO., CRAIG'S CLAIM, [1895] 1 Ch. 267; 64 L. J. Ch. 279; 71 L. T. 705; 43 W. R. 244; 11 T. L. R. 100; 39 Sol. Jo. 112; 2 Mans. 75; 12 R. 62, C. A.; *on appeal, sub nom.* CRAIG v. MIDLAND COAL & IRON CO. (1896), 74 L. T. 744, H. L.

*Annotations:—Re*ld. *Re* Panther Lead Co., [1896] 1 Ch. 978. *Mentd.* *Re* New Oriental Bank Corp'n. (No. 2), [1895] 1 Ch. 753; *Nepean v. Marten* (1895), 11 T. L. R. 256; *Curtis v. B. U. R. T. Co.* (1912), 28 T. L. R. 353; *Re* Law Car & General Insee. Corp'n., *King's Case*, *Old Silkstone Collieries' Case*, [1913] 2 Ch. 103.

**5635. Reconstructed company—Taking place of company in liquidation—Liability to indemnify lessee as occasion arose.]**—*Re* MIDLAND COAL, COKE & IRON CO., CRAIG'S CLAIM, No. 5634, *ante*.

**5636. Bankruptcy of assignee—Lease assigned by trustee—Lessee acquiring bankrupt's right of indemnity.]**—A lessee assigned the lease to assignee, A., who assigned it to assignee B., each assignment containing a covenant by the assignee to pay the rent, & keep his assignor indemnified against the covenants in the lease. A. became bkpt., B. died, & the lessee, who had been called upon to pay the rent, bought from the bkpt's trustee, & took an assignment of the bkpt's right to indemnity, withdrawing a proof he, the lessee, had carried in, & releasing the estate of the bkpt.:—*Held*: (1) the right of the trustee in bkpcy. of A. to sue the exors. of B. upon his covenant to indemnify was "property" within Bankruptcy Act, 1883 (c. 52), s. 168, & assignable by the trustee; & damages in an action by the trustee against the exors. would not be confined to the dividend pay-

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able to the lessee in respect of his proof against the estate of A., but extended to the whole amount of the obligation under the covenants to pay & indemnify entered into by such assignee; & (2) upon the construction of the deed of assignment & release, the lessee had acquired the right of the trustee to sue the exors. of B., & the release did not extend to all the estate of the bkpt., but the asset assigned to the lessee must be excluded from it.—*Re* PERKINS, POYSER v. BEYFUS, [1898] 2 Ch. 182; 67 L. J. Ch. 454; 78 L. T. 666; 46 W. R. 595; 14 T. L. R. 464; 42 Sol. Jo. 591; 5 Mans. 193, C. A.

*Annotations:—As to* (1) *Consol. British Union & National Insee. v. Rawson*, [1916] 2 Ch. 476. *Re*ld. *Re* Law Guarantee Trust & Accident Soc., *Liverpool Mortgage Insee. Case*, [1914] 2 Ch. 617; *Ellis v. Torrington* (1919), 89 L. J. K. B. 369.

— **Right of lessee to prove for indemnity.]**—*See* BANKRUPTCY, Vol. IV., p. 200, Nos. 2462–2464.

**Apart from covenant.]**—*See* Sub-sect. 4, A. (b) ii., *ante*.

(e) *What may be Recovered.*

**5637. General rule—All necessary & reasonable charges incurred.]**—B. & P. being the owners of an unexpired term of seventy-two years in a certain house & premises, let them to one G. for twenty-one years, under the usual covenants, to pay rent & to keep the house in repair; & afterwards they assigned the reversion to D. G. had previously assigned the residue of his term of twenty-one years to pltf., with the usual covenants. Pltf. afterwards assigned the term to deft., with similar covenants, to pay the rent & to keep the premises in repair, & with a covenant that deft. would observe & fulfil all the covenants of the former lease; & that he would, from time to time & at all times, save harmless & indemnify pltf. from all costs, damages, & expenses, which might be incurred by reason of any delay, breach, or default in payment or performance thereof. On the rent becoming due & unpaid, & the premises falling out of repair, D. brought an action against G. who suffered judgment by default. G. afterwards brought an action to recover the amount so paid by him, & his costs. Pltf. defended the action unsuccessfully, & he became liable to pay to G. the amount of the judgment by default, & also of the costs of that action. Pltf. then sued deft., not having paid that amount to G., & judgment not having been signed in the action against him:—*Held*: pltf. was entitled to recover from deft. the amount of the rent & repairs, & the costs of the action in which G. had suffered judgment by default, but he was not entitled to the costs of the action brought against him by G.

There is no doubt that at one time very wild notions were entertained with respect to the contract of indemnity; but these notions are now exploded, & it is now considered, that, by a contract of indemnity, is meant that the party indemnified may recover all such charges as necessarily & reasonably arise out of the circumstances under which the party charged became responsible (POLLOCK, J.).—SMITH v. HOWELL (1851), 6 Exch. 730; 20 L. J. Ex. 377; 17 L. T. O. S. 188; 155 E. R. 739.

**5638. Whether costs recoverable—When reasonably incurred—Action against lessee—Judgment suffered by default.]**—SMITH v. HOWELL, No. 5637, *ante*.

**5639. — — — Action against mesne assignee—Unnecessary defence.]**—SMITH v. HOWELL, No. 5637, *ante*.

**Sect. 10.—Liabilities of lessee and assignee: Sub-sect. 4, B. (e); sub-sect. 5, A., B. & C.]**

**5640.** — [Under a covenant to indemnify against all actions & claims in respect of the covenants of a lease, costs properly incurred in reasonably defending an action brought for a breach of one of the covenants, are recoverable as damages.—*MURRELL v. FYSH* (1883), Cab. & El. 80.

**5641. What costs recoverable.**—[In an action by a lessee against the assignee of the lease for breach of a contract by the assignee to indemnify the lessee against a failure to perform the covenants contained in the lease, pltf. sought to recover, among other heads of damage, the whole costs, as well those paid by him on taxation as extra costs paid by him to his own attorney incurred in unsuccessfully defending an action brought against him by the lessor for breach of one of the covenants in the lease committed after the assignment:—*Held*: the lessee was entitled to recover both the extra costs paid by him to his attorney & the taxed costs.—*HOWARD v. LOVEGROVE* (1870), L. R. 6 Exch. 43; 40 L. J. Ex. 13; 23 L. T. 390; 19 W. R. 188.

**5642. Value of goods distrained—Assignor's chattels left on premises—Distress by landlord for non-payment of rent by assignee.**—[Upon an agreement to assign the lease of certain premises, deft. agreed to pay the rent, etc., which might become due on the original lease, & to indemnify pltf. from all loss which he might incur by reason of the non-payment of such rent. Deft. entered upon the premises, & certain of pltf.'s goods left upon the premises were distrained for rent. In an action for breach of the indemnity, the declaration stated that "divers goods of pltf. were upon the premises, with the leave & licence of deft. & were lawfully seized as distresses for rent." The plea traversed this allegation in terms. The jury found that the goods were lawfully seized, but that they were not on the premises with the leave & licence of deft. Verdict for deft. It did not sufficiently appear that pltf. had parted with his legal interest in the premises:—*Held*: under these circumstances the question of leave & licence was immaterial, & as the goods in question were seized there ought to have been a verdict for pltf.

If therefore pltf.'s goods were rightfully there & were distrained, I cannot entertain a doubt that he has been damaged, so as to make deft. liable under his agreement of indemnity (*MAULE, J.*).—*GROOM v. BLUCK* (1841), 2 Man. & G. 567; *Drinkwater*, 103; 2 Scott, N. R. 665; 10 L. J. C. P. 105; 5 Jur. 532; 133 E. R. 873.

**5643. Amount of dilapidations—No damage suffered by assignor—Lease reassigned to assignor for small sum on account of dilapidations.**—[*Re RUSSELL, RUSSELL v. SHOOLBRED*, No. 5626, *ante*.

**5644. Rent paid—Premises used for immoral purposes—Knowledge that assignee would pay out of profits of immorality.**—[The lessee of a house which had been notoriously used for many years as a brothel, assigned his term absolutely to a purchaser for value, knowing that the rent &

premium would be paid out of the profits of the immoral trade carried on there. Among the lessee's covenants contained in the original lease was a covenant to deliver up the premises in good repair at the expiration of the term, & also not to permit the same to be used as a brothel. At the termination of the lease the lessor compelled the lessee to pay a sum of £65 for dilapidations & certain arrears of rent. The lessee submitted to the payment, & claimed over against the estate of his assignee under a covenant contained in the assignment for indemnity in respect of all lessee's covenants:—*Held*: the assignor was not entitled to recover, the whole transaction & every obligation arising out of it being tainted with immorality.—*SMITH v. WHITE* (1866), L. R. 1 Eq. 626; 35 L. J. Ch. 454; 14 L. T. 350; 30 J. P. 452; 14 W. R. 510.

*Annotation*:—*Refd. Upfill v. Wright*, [1911] 1 K. B. 506.

**5645.** — **Assignor covenanting to pay rent on reassignment to him—Rent due before reassignment.**—[*Re RUSSELL, RUSSELL v. SHOOLBRED*, No. 5626, *ante*.

**SUB-SECT. 5.—LIABILITY OF LESSEE TO ASSIGNEE.**

**A. Covenantants for Title.**

*See, generally, SALE OF LAND.*

**5646. General covenants for title—Whether affected by limiting covenants—Covenants providing against assignor's own acts.**—[The assignor in a deed of assignment of a lease, after reciting the original lease granted to another for the term of ten years, which by mesne assignments had vested in him, & that pltf. had contracted for the absolute purchase of the premises, bargained, sold, assigned, transferred, & set over the same to pltf., for & during all the rest, etc., of the said term of ten years, in as ample manner as the assignor might have held the same, subject to the payment of rent & performance of covenants; & then covenanted that it was a good & subsisting lease, valid in law, in & for the said premises thereby assigned, & not forfeited, etc., or otherwise determined, or become void or voidable:—*Held*: the generality of this covenant for title, which was supported by the recital of the bargain for an absolute term of ten years, was not restrained by other covenants which went only to provide for or against the acts of the assignor himself, or those who claimed under him; such as a covenant against incumbrances, except an underlease of part by the assignor for three years; for quiet enjoyment; for further assurance; & therefore where it appeared that the original lease was for ten years, determinable on a life in being, which dropped before the ten years expired, though not till after the covenant of the assignor, & the assignee might assign a breach upon the absolute covenant for title.—*BARTON v. FITZGERALD* (1812), 15 East, 530; 104 E. R. 944.

*Annotations*:—*Refd. Foord v. Wilson* (1818), 8 Taunt. 543; *Nind v. Marshall* (1819), 1 Brod. & Bing. 319; *Line v. Stephenson* (1838), 4 Bing. N. C. 678. *Mentd.* *S.S. Magnhild v. McIntyre*, [1920] 3 K. B. 321.

**PART XXI. SECT. 10, SUB-SECT. 4.—B. (e).**

**5640 i. Whether costs recoverable—When reasonably incurred.**—[Deft. took an assignment of a lease from pltf., covenanting to perform all the covenants in it on pltf.'s part, & to indemnify him against them. The lessor sued pltf. for breach of the covenants to repair, etc., & recovered, deft. having notice of the action, &

according to some of the witnesses, having sanctioned the defence:—*Held*: under deft.'s covenant pltf. was entitled to recover the damages & costs in that suit, but not interest.—*SPENCE v. HECTOR* (1866), 24 U. C. R. 277.—*CAN.*

*m. Assignment without consent of lessors—Where covenant requiring such consent.*—[Where a lease, containing a covenant against assignment without

the consent of the lessors, is so assigned, the assignment containing a covenant by the assignee to pay the rent & indemnify the assignor, & the assignee goes into possession of the demised premises, he is liable, although the consent of the lessors may not have been procured, to repay to the assignor rent accruing due after the assignment which the latter has been obliged to pay.—*BROWN v. LENNOX* (1895), 22 A. R. 442.—*CAN.*

**5647.** — — — — —.]—The assignor of a term covenanted that he had not at any time done or suffered any act or thing whereby the premises intended to be assigned could be impeached or affected in title or estate; & that for & notwithstanding any such act, etc., the lease was a good, valid, & subsisting lease, & not forfeited, surrendered or become void; & that he had in himself good right, full power, & authority to grant, assign, transfer, & set over the same, to the assignee in manner aforesaid; then followed a covenant for further assurance by the assignor & all persons claiming under him:—*Held*: the general words that the assignor had full power to grant, assign, & set over, were restrained by the preceding part of the covenant, & therefore such covenant was confined to the act of the assignor alone.—**FOORD v. WILSON** (1818), 8 Taunt. 543; 2 Moore, C. P. 592; 129 E. R. 494.

*Annotation*:—**Consd.** *Nind v. Marshall* (1819), 1 Brod. & Bing. 319.

**5648.** Covenant for quiet enjoyment by lessee—Ultimate assignee ejected for breach by lessee—Right of ultimate assignee to sue lessee—Privity of estate.]—Where A. being possessed of certain premises for a term of years, assigned part of them over to B. for the residue of his term, with a covenant for quiet enjoyment, & B. afterwards assigned them over to C.:—*Held*: C. having been evicted by S., the lessor of A., for a breach of covenant committed by A. previously to the assignment to B., might maintain an action against A. upon the covenant for quiet enjoyment, on the ground that there was a privity of estate between A. & C.—**CAMPBELL v. LEWIS** (1820), 3 B. & Ald. 392; 106 E. R. 706; *affg.* *S. C. sub nom. LEWIS v. CAMPBELL* (1819), 8 Taunt. 715.

*Annotations*:—**Expld.** *Dowar v. Goodman*, [1908] 1 K. B. 94. **Refd.** *Ireland v. Bicham* (1835), 4 L. J. C. P. 305; *David v. Sablu*, [1893] 1 Ch. 523.

**5649.** What amounts to breach—Assignment for absolute term of ten years—Lease determinable upon dropping of a life.]—**BARTON v. FITZGERALD**, No. 5646, *ante*.

**5650.** Assignment as “beneficial owner”—Assignee damaged because legal estate outstanding—Agreement that lessee should not get in legal estate.]—A lessee & an intending sub-assignee of the lease executed an agreement for sale by which it was recited that the legal interest in the lease was outstanding in a third party. The agreement provided that the lessee should not be required to get it in, nor to obtain the consent of the third party to the assignment. The lessee assigned “as beneficial owner” to the sub-assignee. The sub-assignee having been prevented from availing himself of one of the conditions in the lease, through not having the legal estate, & having been obliged to indemnify the lessee against the rent & covenants in the lease, claimed damages from the lessee for breach of the covenants for title implied under Conveyancing & Law of Property Act, 1881 (c. 41), s. 7 (1) (a):—*Held*: in view of the agreement between the parties, the lessee was entitled to have the assignment rectified by inserting a proviso that his covenants for title should not be deemed to imply that he had power to assign the outstanding legal estate in the term or to render him liable by reason of the fact that the said legal estate was not effectually assigned.—**STAIT v. FENNER, FENNER v. McNAB**, [1912] 2 Ch. 504; 81 L. J. Ch. 710; 107 L. T. 120; 56 Sol. Jo. 609.

*Annotation*:—**Mentd.** *Burch v. Farrows Bank*, [1917] 1 Ch. 606.

#### B. Payment of Rent up to Assignment.

**5651.** Covenant to pay—Implied from word “grant”—No specific covenant to indemnify against rent.]—Where a lessee assigns & grants over his lease by deed, not containing a covenant for quiet enjoyment, or for indemnity against demands of rent due to the superior landlord before assignment, the assignee, if distrained upon for such rent, may bring an action of covenant against the assignor, founded on the word “grant” in the deed. Consequently, if, upon such distress, he has paid the rent to release his own goods, he cannot sue the assignor in *assumpsit* for the amount paid. Although the assignor, after such distress & payment, has promised *pltf.* to repay him the amount; at least if there be not a new consideration for such promise; as forbearance.—**BABER v. HARRIS** (1839), 9 Ad. & El. 532; 1 Per. & Dav. 300; 2 Will. Woll. & H. 1; 8 L. J. Q. B. 153; 112 E. R. 1313.

*Annotation*:—**Mentd.** *Yates v. Aston* (1813), 4 Q. B. 182.

**5652.** — Whether *assumpsit* lies in implied covenant.]—**BABER v. HARRIS**, No. 5651, *ante*.

**5653.** “All rent due being paid”—Assignee let into possession before assignment—Whether entitled to sue assignor on covenant.]—**GREGORY v. STANWAY** (1860), 2 F. & F. 309, N. P.

**5654.** Verbal undertaking—Part of indivisible contract for an interest in land—Statute of Frauds, 1677 (c. 3), s. 4.]—**HODGSON v. JOHNSON**, No. 5411, *ante*.

—.]—*See* **CONTRACTS**, Vol. XII., pp. 125–128, Nos. 820–851.

#### C. Other Cases.

**5655.** Covenant that rates paid up to assignment—Action by assignee for indemnity—Whether assignor entitled to set-off value of fixtures.]—**AUBER v. LEWIS** (1818), *Manning's Nisi Prius Digest*, 2nd ed. 251.

*Annotations*:—**Refd.** *Hardecastle v. Netherwood* (1821), 5 B. & Ald. 93. **Mentd.** *Brown v. Tibbits* (1862), 11 C. B. N. S. 855.

**5656.** Covenant as to repairs by lessee & mesne assignee—Action by subsequent assignee against mesne assignee—Whether lessee liable for whole damages—Part attributable to assignee.]—*Pltf.* declared in covenant, reciting that P. had leased a house to deft., & deft. had by the lease covenanted to repair; that deft. had assigned to *pltf.*, with covenant that deft. had repaired according to the terms of the lease; breach, non-repair, alleging, by way of aggravation, that *pltf.* had assigned to C. with a covenant that the covenants in the lease had been performed; that C. had sued *pltf.* for the non-performance of the covenants in the lease, whereby *pltf.* had to pay C. £120 to settle the action, besides the expenses of defending it. *Plea*, payment of £5 into ct., & no damages *ultra*. *Replication*, damages *ultra*. *Verdict* for £45 damages, beyond the £5. On motion by deft. for a new trial, on the ground that *pltf.* was not liable to C. except for his own acts, & therefore could not charge deft. with the £120 or £119, the ct. refused a rule, the verdict being general, & not showing that the jury had allowed damages in respect of C.'s action, & it being deft.'s duty to point out at the trial the limitation contended for. The ct. also refused to increase the damages by £119, which was proved to have been expended in defending the action against C. since the damages recovered by C. exceeded the sum given in the present action, & must therefore in part have been attributable to

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n. Covenant as to renewal by lessee.]—**QUONG v. PONG**, [1925] 2 D. L. R. 1192; 56 O. L. R. 616.—**OAN.**

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pltf.'s own acts; so that the costs of defence did not appear to be the necessary consequence of deft.'s breach of covenant.—**SHORT v. KALLOWAY** (1839), 11 Ad. & El. 28; 113 E. R. 322.

**Annotations:—***Refd.* Bramley v. Chesterton (1857), 2 C. B. N. S. 592; Broom v. Hall (1859), 7 C. B. N. S. 503. *Mentd.* Tindal v. Bell (1843), 12 L. J. Ex. 160; Mors-Le-Blanch v. Wilson (1873), L. R. 8 C. P. 227; The Wallsend, [1907] P. 302.

**5657. — — — Liability of lessee for costs.]—****SHORT v. KALLOWAY**, No. 5656, *ante*.

## SECT. 11.—ON DEATH OF TENANT.

### SUB-SECT. 1.—RIGHTS OR LIABILITIES OF PERSONAL REPRESENTATIVE.

**NOTE.—***The references in this section are to pages & numbers in Volumes XXIII. & XXIV., which deal with the title Executors & Administrators.*

**Nature of interest in leaseholds.]—***See* pp. 302–305.

**Right to grant underleases.]—***See* p. 568.

**Right to indemnity—From legatee.]—***See* p. 478, Nos. 5469–5472.

**—For liabilities not presently due.]—***See* pp. 606–610, Nos. 6370–6377, 6382, 6384–6411.

**Liabilities—As assignee.]—***See* p. 284, Nos. 3503–3505.

**—On settled leaseholds.]—***See* pp. 635, 636.

**—Before entry.]—***See* pp. 638–641.

**—After entry.]—***See* pp. 641–644.

**Personal liability—For breach of testator's covenants.]—***See* pp. 743, 744, Nos. 7720–7726.

**Duty to discharge liabilities—Not presently due.]—***See* pp. 369, 370.

**Defence of plene administravit.]—***See* pp. 79, 734, Nos. 673, 7629.

**Executor de son tort—Rights.]—***See* p. 76, No. 616.

**—Liability for waste.]—***See* p. 73, No. 577.

**—Defence of plene administravit.]—***See* p. 79, No. 673.

### SUB-SECT. 2.—WHEN DECEASED ENTITLED CONCURRENTLY WITH OTHER TENANTS.

**5658. Lease to two tenants—Lease to be void on death of lessees—Executors of deceased lessee entitled for life of survivor.]—****FARINGTON'S CASE** (1549), 1 Dyer, 67 a; 73 E. R. 141.

**Annotations:—***Refd.* Anon. (1549), Dal. 2; Cowper v. Cowper (1734), 2 P. Wms. 720.

**5659. Joint tenants—Survivor entitled.]—****JEFFEREYS v. SMALL** (1683), 1 Vern. 217; 23 E. R. 424.

**Annotations:—***Refd.* Jackson v. Jackson (1804), 9 Ves. 591; Dale v. Hamilton (1846), 5 Hare, 369; Buckley v. Barber (1851), 6 Exch. 164.

**5660. — — — No provision against survivorship—Whether devise of share amounts to severance.]—***Pltf.'s* husband & deft. had enjoyed a church lease in moieties, under an agreement that there should be no benefit of survivorship. Upon the last renewal the lease was taken in both their names, & no express agreement against survivorship. *Pltf.'s* husband being sick, by deed assigned his moiety of the lease to his wife; & by his will devised it to her. The grant to the wife is void, & the devise will not sever the joint tenancy.—**MOYSE v. GYLES** (1700), 2 Vern. 385; Prec. Ch. 124; 23 E. R. 846.

**Annotations:—***Refd.* Partriche v. Powlet (1740), 2 Atk. 54; Baddeley v. Baddeley (1878), 38 L. T. 906; *Re* Wilks, Child v. Bulmer, [1891] 3 Ch. 59. *Mentd.* Phillips v. Barnett (1876), 45 L. J. Q. B. 277.

**5661. — — — Effect of unexecuted agreement to assign interest of surviving tenant.]—****GODDARD v. LEWIS**, No. 5417, *ante*.

**5662. — — — Liability of representatives of deceased tenant—Joint & several covenants.]—***Covenant* by two joint lessees, if it be joint & several, shall bind the exors. of the deceased lessee.—**ENYS v. DONNITHORNE** (1761), 2 Burr. 1190; 97 E. R. 782.

**5663. — — — Bankruptcy of survivor.]—***A* mineral lease for thirty-one years was granted to L. & M. " & the survivor of them but expressly excluding assigns, & sub-tenants, whether legal or conventional." By the lease L. & M. bound themselves & their respective heirs, exors., & successors, all conjunctly & severally renouncing the benefit of discussion, to pay the rent. The lease also provided that if L. or M. became bkpt. it should, in the option of the lessor, become void. Shortly after the commencement of the lease L. became bkpt., & M. died, but the lessor never exercised his option to determine the lease:—*Held*: by the terms of the clause of obligation the lessees were conjunctly & severally liable for rent irrespective of their interest, & after M.'s death, his representatives, though they had no interest as tenants, remained liable for rent during the currency of the lease.—**BURNS v. BRYAN** (OR **MARTIN**) (1887), 12 App. Cas. 184, H. L.

**5664. — — — Joint covenants.]—****JACKSON v. TURNLEY**, No. 5665, *post*.

**5665. — — — Construction of joint covenants in equity.]—***A* lease was granted to J. & K. jointly, & all the covenants are in form joint. Of course, any right of action on these covenants would be against the surviving covenantor alone, & legally, the representatives of J. could not be held liable; & the equity is said to be this, that although the covenant is joint, yet a ct. of equity will, under certain circumstances, treat it as joint & several. If it had been joint & several, then the question would arise, whether the right to sue the exors. of the deceased partner, is a right which is dependent, upon the surviving partner having a right as against the exors. of the deceased partner. The demurrer might have been argued on that ground; but, as that has been waived, I must assume that there might be an equity for the lessors against the exors. of the deceased lessee (**KINDERSLEY, V.-C.**).—**JACKSON v. TURNLEY** (1853), 1 Drew. 617; 1 Eq. Rep. 328; 22 L. J. Ch. 949; 21 L. T. O. S. 216; 17 Jur. 643; 1 W. R. 461; 61 E. R. 587.

**Annotations:—***Mentd.* Rooke v. Kensington (1856), 2 K. & J. 753; Barraclough v. Brown, [1897] A. C. 615.

**5666. — — — Effect of executors of deceased partner carrying on business.]—***Premises* were demised to A. & B., who were co-partners, upon which they carried on their partnership business. A. died during the lease, & after his death his exors. carried on the business in co-partnership with B. on the premises:—*Held*: the covenants in the lease, which were joint only, were not to be considered as several as well as joint, so as to make A.'s estate liable for breaches of the covenants which occurred after his death.—**CLARKE v. BICKERS** (1845), 14 Sim. 639; 9 Jur. 678; 60 E. R. 506.

**Annotations:—***Refd.* Beresford v. Browning, Browning v. Beresford (1875), L. R. 20 Eq. 564.

**5667. Death of surviving co-trustee—Petition for vesting order—Whether served on lessor.]—***Where* leasehold estates were vested in trustees all of whom were dead, & the survivor had died intestate, & no administration had been taken out, & there being no clause in the lease whereby, the

property was held to prevent assignment, the ct. appointed a new trustee & made a vesting order without the lessor being served with the petition.—*Re MATTHEW'S SETTLEMENT* (1853), 22 L. T. O. S. 211; 2 W. R. 85.

*Annotation:—Held. Re Robinson's Will* (1863), 2 New Rep. 504.

*See, generally, REAL PROPERTY.*

## SECT. 12.—BANKRUPTCY OR INSOLVENCY OF TENANT.

**NOTE.**—*The references in this section are to pages & numbers in Volumes IV. & V., which deal with the title Bankruptcy & Insolvency.*

**Claims under leases—By landlord.**—*See* pp. 258–260, 334, Nos. 2448–2459, 3135.

**Preferential claims.**—*See* p. 478, Nos. 4322–4324.

**By tenant.**—*See* pp. 260, 261, Nos. 2460–2467.

**Effect of clause for forfeiture on bankruptcy of tenant.**—*See* pp. 671, 672, Nos. 5947–5952.

**Rights of creditors—Bankrupt a tenant by repute.**—*See* pp. 755, 756, Nos. 6508–6512.

**Adoption of leases by trustee—What amounts to.**—*See* pp. 935–937, Nos. 7646–7658.

**Effect of adoption.**—*See* p. 938, Nos. 7663–7665.

**Option to take lease.**—*See* p. 934, No. 7638.

**Disclaimer of leases by trustee.**—*See* pp. 938, 939, 940, Nos. 7666–7669, 7674, 7684–7689, 7691–7693.

**Leave to disclaim.**—*See* pp. 941–944, Nos. 7694–7696, 7699–7705, 7707, 7723, 7726, 7727.

**Liability on failure to disclaim.**—*See* pp. 951 *et seq.*

**Effect of disclaimer.**—*See* pp. 945 *et seq.*

**Disclaimer or adoption—Agreement for lease.**—*See* p. 953, No. 7815.

**Whether trustee compellable to elect.**—*See* pp. 944, 945, Nos. 7728–7745.

**Vesting orders—Right to.**—*See* pp. 954, 955, Nos. 7818–7829.

**Exclusion of party refusing to accept.**—*See* pp. 955, 956, Nos. 7830–7836.

**Right of landlord to distrain.**—*See* pp. 956 *et seq.*

**Effect of bankrupt's discharge.**—*See* p. 588, Nos. 5380, 5381.

**Liability of trustee under deeds of arrangement, etc.—For rent.**—*See* p. 1107, Nos. 9026–9028.

**Liability of bankrupt after deed of arrangement, etc.**—*See* p. 1187, Nos. 9583, 9584.

**Bankrupt's right to deal with property acquired after bankruptcy—Until trustee intervenes.**—*See* p. 730, No. 6531.

**Debts due by landlord—Right to set off against rent.**—*See* pp. 394, 400, 414, Nos. 3607, 3609, 3610, 3646, 3742.

## SECT. 13.—WINDING UP OF LESSEE COMPANY.

**NOTE.**—*The references in this section are to pages & numbers in Volumes IX. & X., which deal with the title Companies.*

**Winding up by court—Right to prove for future rent.**—*See* p. 935, Nos. 6410–6413.

**Effect on right to distrain.**—*See* pp. 967–969, Nos. 6642–6667.

**Effect on right of re-entry.**—*See* p. 971, Nos. 6679–6681.

**Right of liquidator to assign—Covenant restricting assignment.**—*See* Sect. 1, sub-sect. 2, F. (d), *ante*.

**Voluntary winding up—Effect on right to distrain.**—*See* p. 1014, Nos. 7040–7043.

**Restraint of distribution until provision made for future rent.**—*See* p. 1000, Nos. 6946–6948.

**Application of proviso for re-entry.**—*See* pp. 995, 996, Nos. 6905, 6906.

**Effect of occupation by liquidator.**—*See* p. 996, No. 6907.

**Effect on uncompleted assignment—When vesting order made.**—*See* p. 1033, Nos. 7163, 7164, 7167–7169.

**Assignment by liquidator—Covenant restricting assignment.**—*See* Sect. 1, sub-sect. 2, F. (d), *ante*.

# Part XXII.—Assignment and Devolution of Reversion.

## SECT. 1.—WHAT OPERATES AS ASSIGNMENT.

**Attornment unnecessary.**—*See* Law of Property Act, 1925 (c. 20), s. 151.

**Necessity for deed.**—*See* DEEDS, Vol. XVII., p. 194, Nos. 51–53.

**5668. Surrender by copyholder—Before beginning of lease in futuro—Though lessee in possession.**—*SELBYE v. BECKE* (1626), Litt. 17; 124 E. R. 114.

**5669. Assignment of rent—Whether reversion included.**—*Qu.*: whether the assignment of rent by a reversioner in a lease does or does not carry with it the reversion.—*TAYLOR v. MARTINDALE* (1842), 1 Y. & C. Ch. Cas. 658; 62 E. R. 1060.

**5670. Whether grant of concurrent lease.**—A. lets a manor for thirty years; & the next day lets it to another for forty years to commence at

Michaelmas next after the date. This passes a reversionary interest.—*PALMER v. THORPE* (1589), Cro. Eliz. 152; 78 E. R. 410.

**5671. —**—A landlord who during the currency of a yearly tenancy grants a lease of the premises to a third person cannot, during the term granted by such lease, give the yearly tenant notice to quit.

The grant of the lease passes the reversion (LORD ALVERSTONE, C.J.).—*WORDSLEY BREWERY Co. v. HALFORD* (1903), 90 L. T. 89.

**5672. —**—If made to take effect in present. It is not possible now, having regard to the authorities to contend that a lease for years is not the grant of a reversion expectant on the determination of an existing shorter term if the lease is

## PART XXII. SECT. 1.

**5670 i. Whether grant of concurrent lease.**—M. being in possession of premises as tenant from year to year

to W., a lease of the same under seal was made to W. to J. for ninety-nine years from the date:—*Held*: such lease took effect as a grant of the

reversion for that term, & entitled J. to put an end to M.'s tenancy by a proper notice to quit.—*DOE d. JARVIS v. MCCARTHY* (1845), 3 Kerr, 63.—**CAN.**

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made to take effect in *presenti* (LUSH, J.).—HORN v. BEARD, [1912] 3 K. B. 181; 81 L. J. K. B. 935; 107 L. T. 87, D. C.

*Annotation:—Folld. Cole v. Kelly, [1920] 2 K. B. 106.*

5673. ———.]—COLE v. KELLY, No. 5737, *post*.

*See Law of Property Act, 1925 (c. 20), s. 149 (5).*

5674. Surrender & grant of concurrent yearly tenancy.—By parol.—To mesne tenant.]—The tenant of a farm underlet it to deft. on a yearly tenancy. He subsequently gave deft. notice to quit. During the currency of the notice he, by a parol arrangement with the owner of the farm & pltf. surrendered his reversion to the owner, who thereupon & as part of the same transaction granted to pltf. by parol a new tenancy from year to year to commence immediately & to run concurrently with, but subject to, the unexpired portion of deft.'s term. On the expiry of the notice to quit deft.'s rent was in arrear:—*Held*: by virtue of Real Property Act, 1845 (c. 100), s. 9, pltf. upon the grant to him of the new tenancy became entitled to the reversion expectant on deft.'s term notwithstanding the grant was by parol, & was consequently entitled to sue deft. for the rent.—PLUMMER & JOHN v. DAVID, [1920] 1 K. B. 326; 89 L. J. K. B. 1021; 122 L. T. 493.

5675. Whether grant of reversionary lease.]—Where A., being seised in fee, leased premises to B. for sixty-one years & afterwards granted a lease to C. of the same premises, to commence at the expiration of the sixty-one years:—*Held*: by the lease to C., A. did not part with his reversion, so as to disentitle him to distrain for rent due from B. under his lease.—SMITH v. DAY (1837), 2 M. & W. 684; Murp. & H. 185; 6 L. J. Ex. 219; 150 E. R. 931.

*Annotations:—Consd. Lewis v. Baker, [1905] 1 Ch. 46. Refd. Hogan v. Hand (1861), 14 Moo. P. C. C. 310; Mangatock v. Watney, Combe, Reid (1909), 79 L. J. K. B. 233.*

*See, further, REAL PROPERTY; WILLS.*

5676. Assignment of lease subject to underlease.—Underlease for longer term than lease.]—By an indenture dated Feb. 1, 1893, B. demised to W. certain premises for a term of twenty-one years. On Feb. 15, 1893, W. demised the premises to deft. for a term of forty years, less three days. On Jan. 16, 1894, W. assigned to pltf. the premises to hold for the residue of the term of twenty-one years subject to the underlease of Feb. 15, 1893, by W. to deft. In an action brought by pltf. against deft. to recover rent due at Lady Day, 1894, pltf. was non-suited:—*Held*: the non-suit was right. Assuming that W. had a reversion by estoppel, subject to the lease of forty years, less three days, that reversion was not assigned to pltf. by the deed of Jan. 16, 1894, because that deed only assigned to pltf. W.'s interest in the lease of Feb. 1, 1893.—NORRIS v. CRAIG (1895), 64 L. J. Q. B. 432; 59 J. P. 264; 43 W. R. 480; 39 Sol. Jo. 398, D. C.

## SECT. 2.—WHO ARE ASSIGNEES.

5677. Surrenderee of copyholds.]—A copyholder in fee grants a lease, & afterwards surrenders to pltf., *qu.*: if he can maintain an action as assignee against the lessee for non-performance of covenant.—PLATT v. PLOMMER (1025), Cro. Car. 24; 79 E. R. 627.

*Annotation:—Refd. Glover v. Cope (1691), Skin. 296.*

5678. ———.]—If a copyholder make a lease in which the lessee covenants to repair, & the copy-

holder afterwards surrenders the reversioner to the use of A. the assignee of the reversion, after admittance, may by 32 Hen. 8, c. 34, maintain covenant against the lessee for not repairing, although he had assigned the term.—GLOVER v. COPE (1691), 1 Show. 284; Comb. 185; 3 Lev. 326; 1 Salk. 185; Carth. 205; Holt, K. B. 159; Skin. 296; 4 Mod. Rep. 80; 89 E. R. 576.

*Annotations:—Folld. Whitton v. Peacock (1834), 3 My. & K. 325. Refd. Greenaway v. Hart (1854), 14 C. B. 340.*

5679. ———.]—The surrenderee of a copyhold is an assignee of a reversion within 32 Hen. 8, c. 34, & may maintain an action of covenant upon a lease made by his surrenderor, & deft. in such action cannot protect himself by alleging the invalidity of the lease.—WHITTON v. PEACOCK (1834), 3 My. & K. 325; 40 E. R. 124; *subsequent proceedings* (1836), 2 Bing. N. C. 411.

*Annotation:—Mentd. Re Liddard & Jackson's & Broadley's Contract (1889), 42 Ch. D. 254.*

5680. Remainderman.]—SANDERS v. PAGE (1688), 3 Rep. Ch. 223; 21 E. R. 772; *sub nom.* SAUNDERS v. BEALE, 2 Vern. 62.

5681. ———.]—Devise to the use of H. for life without impeachment of waste, etc., remainder to the use of pltf. for life, with power to make leases for two or three lives, etc., or for the term of twenty-one years, so as there be reserved the best rent without taking any sum or sums of money or other things for or in lieu of a fine; & H. by indenture Oct. 15, leased for fourteen years, to be computed as to the meadow land from Feb. 13 last, the pasture from Mar. 25 last, & the messuage from May 12 last, under a yearly rent, payable to lessor, & such other persons as should be entitled to the freehold & inheritance half yearly, on Nov. 11 & Mar. 25, the first payment to be made on Nov. 11 next ensuing, & lessee covenanted with lessor, his heirs, & assigns, for payment to lessor, & such other person, etc., of the rent at the days & times, etc.:—*Held*: pltf., after the death of H., was an assignee within 32 Hen. 8, c. 34, & might maintain covenant against the lessee for arrears of rent after the death of H. & during the continuance of the term.—ISHERWOOD v. OLDKNOW (1815), 3 M. & S. 382; 105 E. R. 654.

*Annotations:—Consd. Wright v. Burroughes (1846), 3 C. B. 685; Child v. Douglas (1854), Kay, 560; Greenaway v. Hart (1854), 14 C. B. 340. Refd. Iringlow v. Goodson (1838), 1 Arn. 322; Clarke v. Arden (1855), 3 C. L. R. 781; Yellowly v. Gower (1855), 11 Exch. 274; Johnstone v. Hall (1856), 2 K. & J. 414. Mentd. Spratt v. Jeffery (1829), 10 B. & C. 249; Doe d. Harries v. Morse (1834), 2 Cr. & M. 247; Rogers v. Humphreys (1835), 4 Ad. & El. 299; Rutland v. Wythe (1843), 10 Cl. & Fin. 419; Lewis v. Rees (1856), 3 K. & J. 132; Easton v. Pratt (1864), 2 H. & C. 676; Trehan v. Layton (1875), L. R. 10 Q. B. 459; Income Tax Special Purposes Comrs. v. Pemsol, [1891] A. C. 531.*

5682. ———.]—Where one seised in fee settles lands on himself for life, with remainders to other persons, reserving a leasing power, which he afterwards exercises, reserving rent to himself, his heirs & assigns, those in remainder shall have the rent. So, where one seised in fee settles lands on A., with remainders & gives him a leasing power, which he exercises, reserving rent, during the term, to himself, his heirs & assigns, those in remainder shall take it.—GREENAWAY v. HART (1854), 14 C. B. 340; 2 C. L. R. 370; 23 L. J. C. P. 115; 23 L. T. O. S. 174; 18 Jur. 449; 2 W. R. 702; 139 E. R. 140.

*Annotation:—Refd. Yellowly v. Gower (1855), 11 Exch. 274.*

5683. Heir.]—In covenant (which runs with the land) evidence that deft. is in as heir will support a declaration, charging him as assignee.—DERISLEY v. CUSTANCE (1790), 4 Term Rep. 75; 100 E. R. 902.

*Annotation:—Refd. Paull v. Simpson (1846), 9 Q. B. 365.*

**Mortgagee.**—See MORTGAGE.

**Assignee of reversion in part of premises.**—See Sect. 3, sub-sect. 2, C. (b), *post*.

**Assignee of part of reversion in whole premises.**

—See Sect. 3, sub-sect. 2, C. (a), *post*.

**5684. Effect of vesting by private Act.**—In 1844 property was demised by the Freeman & Stallingers of Sunderland to defts., predecessors in title for a term of ninety-nine years, & the lease contained covenants by the lessees to keep the premises in repair & deliver them up at the end of the term. By a private Act of Parliament passed in 1853, which recited that the Freeman & Stallingers & other persons had claims on the property, it was provided that the premises should be & the same were thereby absolutely vested in pltf., free from all claims & incumbrances, but subject to the existing leases thereof. Defts. threatened to commit a breach of the covenants, & pltf. brought this action for an injunction to restrain them from doing so. Defts. amongst other defences contended that pltf. were not grantees or assignees of the reversion within 32 Hen. 8, c. 34, inasmuch as the original lessors had not executed any grant or assignment to them, & that they could not sue on the covenants:—*Held*: the Act of 1853 must be treated as equivalent to a grant by the Freeman & Stallingers of Sunderland, the lessors under the lease of 1844, of the reversion expectant on that lease, & consequently pltf. came within 32 Hen. 8, c. 34, & could enforce the covenants.—**SUNDERLAND ORPHAN ASYLUM v. RIVER WEAR COMRS.** [1912] 1 Ch. 191; 81 L. J. Ch. 269; 106 L. T. 288.

### SECT. 3.—RIGHTS AND LIABILITIES OF SUCCESSORS.

#### SUB-SECT. 1.—IN GENERAL.

**5685. General rule.**—A purchaser of property in the occupation of a tenant has constructive notice of the terms under which the land is occupied. After the purchase, the tenant holds of the purchaser on the same terms as he previously held of the vendor, & the holding continues until the tenancy has been regularly determined, either by the landlord or tenant.—**GREENWOOD v. BAIRSTOW** (1836), 5 L. J. Ch. 179.

**5686. Relationship of assignee of reversion & lessee—Lease in futuro—Reversion assigned before commencement of term.**—A lease is made to commence at a future day, before which the reversion is several times granted over; afterwards the lessee entering commits waste, the last assignee may count *ex assignatione* of each to whom the land came after the lease made, although there was no tenure under them.—**DARELL v. WYBARNE** (1561), 2 Dyer, 206 b; 73 E. R. 455.

**5687. Whether privity of estate exists.**—**WALKER'S CASE**, No. 5450, *ante*.

**5688. Whether privity of contract exists.**—**THURSBY v. PLANT** (1669), 1 Saund. 230; 2 Keb. 492; 1 Lev. 259; 1 Sid. 401; 85 E. R. 254.

**Annotations:**—**Expld.** **Stuart v. Joy**, [1904] 1 K. B. 362. **Refd.** **Edwards v. Morgan** (1685), 3 Lev. 233; **Hornby v. Houlditch** (1737), Andr. 40; **Thrale v. Cornwall** (1747), 1 Wils. 165; **Ludford v. Barber** (1786), 1 Term Rep. 90; **Lewis v. Campbell** (1819), 8 Taunt. 715; **Dayrell v. Hoare** (1840), 12 Ad. & El. 356; **Brooke v. Spong** (1846), 15 L. J. Ex. 94; **Harrold v. Whitaker** (1846), 11 Q. B. 147; **Doe d. Biddulph v. Poole** (1848), 11 Q. B. 713; **Richards v. Bluck** (1848), 18 L. J. C. P. 15; **Morrison v. Chadwick** (1849), 13 Jur. 638; **Magnay v. Edwards** (1853), 1 W. R.

331; **David v. Sabin**, [1893] 1 Ch. 523; **Rogers v. Hosegood**, [1900] 2 Ch. 388. **Mentd.** **Kent v. Kent** (1734), **Lee temp. Hard.** 50; **Randall v. Rigby** (1838), 4 M. & W. 130; **Fryer v. Coombs** (1840), 11 Ad. & El. 403; **Vigers v. St. Paul's Dean** (1849), 14 Q. B. 909; **Metzner v. Bolton** (1854), 9 Exch. 518; **Martyn v. Williams** (1857), 26 L. J. Ex. 117; **Whitaker v. Forbes** (1875), 1 C. P. D. 51; **Finlay v. Chirney** (1888), 20 Q. B. D. 494; **Re Blackburn & District Benefit Bldg. Soc., Ex p. Graham** (1889), 42 Ch. D. 343.

**5689. Right of action for rent—After lease assigned.**—The bargainee of the reversion of a term cannot bring debt for rent against the lessee, after an assignment of the lease.—**HUMBLE v. GLOVER** (1594), Cro. Eliz. 328; **Gouldsb. 182**; **Moore, K. B. 351**; 78 E. R. 577; *sub nom.* **HUMBLE v. OLIVER**, Poph. 55.

**Annotations:**—**Consd.** **Overton v. Sydal** (1597), Cro. Eliz. 555. **Refd.** **Trehern v. Claybrook** (1624), Win. 69; **Helliar v. Casebrook** (1665), 1 Keb. 679.

**5690. Whether tenancy by estoppel possible.**—(1) An assignee of the reversion may establish his title against the lessee by way of estoppel. (2) Where pltf., in his declaration, set out the lease, & covenants alleging the assignment of the reversion to himself, the legal estate in pltf. was sufficiently set out.—**CUTHBERTSON v. IRVING** (1860), 6 H. & N. 135; 29 L. J. Ex. 485; 158 E. R. 56; *sub nom.* **IRVING v. CUTHBERTSON**, 8 L. T. 335; 6 Jur. N. S. 1211; 8 W. R. 704, Ex. Ch.

**Annotations:**—*As to* (1) **Refd.** **Morton v. Woods** (1869), 38 L. J. Q. B. 81; **Hartcup v. Bell** (1883), Cab. & El. 19; **David v. Sabin** (1893), 62 L. J. Ch. 347; **Onward Bldg. Soc. v. Smithson**, [1893] 1 Ch. 1; **Keith v. Gancia** (1904), 73 L. J. Ch. 411. *Generally*, **Refd.** **Underhay v. Read** (1887), 58 L. T. 457; **Brigg v. Thornton**, [1904] 1 Ch. 386.

*See, generally*, Part I., Sect. 3, *ante*.

**5691. Lease not under seal.**—Def't. being tenant under a lease not sealed, the lessor assigned the reversion to pltf., who gave notice to def't. of the assignment. Def't. continued to occupy, & afterwards was sued by pltf. for breach of certain terms of the lease. The declaration in *assumpsit* alleged that def't. became tenant to pltf. under the terms, & promised to perform them; the plea denied that def't. became tenant under the terms; & there was no plea of *non assumpsit*:—*Held*: the jury were warranted in finding for the pltf., & that the existence of a contract was not put in issue.

There is no doubt but that def't., by the conveyance in Jan. 1839, & by the operation of 4 Ann. c. 16, s. 9, became tenant to pltf. without any formal attornment. (**DENMAN, C.J.**).—**BRYDGES v. LEWIS** (1842), 3 Q. B. 603; 2 Gal. & Dav. 763; 11 L. J. Q. B. 208; 6 Jur. 837; 114 E. R. 639.

**Annotations:**—**Apld.** **Smith v. Eglington** (1874), 30 L. T. 521. **Refd.** **Arden v. Sullivan** (1850), 14 Q. B. 832.

**5692. Relationship of assignee of reversion & assignee of lease—Parol demise from year to year—Whether privity of estate exists.**—**ALLCOCK v. MOORHOUSE**, No. 5465, *ante*.

**5693. Whether privity of contract exists.**—**ALLCOCK v. MOORHOUSE**, No. 5465, *ante*.

**5694. Assignment by statute.**—**HENLEY v. JONES** (1666), 1 Sid. 310; 82 E. R. 1125.

**5695. Assignment to tenants in common.**—(1) Tenants in common, assignees of the reversion on a lease, may join in suing, & be jointly sued, on covenants therein.

(2) Assignees of the reversion may be sued by an outgoing tenant on a contract or custom of the country by which he is entitled to receive, on the termination of his tenancy by notice from the

### PART XXII. SECT. 3, SUB-SECT. 1.

**5685 f. General rule.**—**BUTLER v. ARCHER** (1860), 12 I. C. L. R. 104; 12

Ir. Jur. 276.—**IR.**

*o. Act of tenant without knowledge or sanction of landlord.*—Any act of a tenant without the knowledge or

sanction of the landlord can only affect his interest as tenant, & cannot prejudice the reversioner.—**DIXON v. CROSS** (1884), 4 O. R. 465.—**CAN.**

**Sect. 3.—Rights and liabilities of successors: Sub-sects. 1 & 2, A. & B. (a).]**

landlord, reasonable allowance for the value of labour bestowed on the land, & the benefit of which he loses by such termination of his tenancy, although he has paid all the rent to the original landlord & received notice from him, the assignees having renewed the notice after the conveyance to them, & possession having been given to them.

(3) A stipulation in a contract of tenancy that the tenant shall keep a certain proportion of the land demised for grass, & pay so much per acre for any deficiency below such proportion, is extinguished by severance of the reversion.—*WOMERSLEY v. DALLY* (1857), 26 L. J. Ex. 219.

**5696. — Right of one to sue alone.]**—Where a lease is granted by one person containing a covenant with the lessor, which runs with the land & after the execution of the lease the lessor devises his reversion in such a way that it becomes severed & vests in several tenants in common, are of such tenants in common can maintain an action to recover damages, either for a wrongful act causing injury to the reversion, or for breach of covenant without joining the other tenants in common as plffs.—*ROBERTS v. HOLLAND*, [1893] 1 Q. B. 665; 62 L. J. Q. B. 621; 41 W. R. 494; 5 R. 370, D. C.

*Annotation:—Refd. United Dairies v. Public Trustee*, [1923] 1 K. B. 469.

**SUB-SECT. 2.—RIGHTS.**

**A. Rent.**

See Part XV., Sect. 4, sub-sect. 2, C., *ante*.

**B. Benefit of Covenants and Conditions.**

**(a) In General.**

See Law of Property Act, 1925 (c. 20), ss. 141, 142.

**5697. Whether benefit passes—At common law—Covenant.]**—*BICKFORD v. PARSON*, No. 5482, *ante*.

**5698. — — — — —.]**—Covenants do not run with the reversion at common law. . . . It has long been settled that such covenants only pass to an assignee, as touch or concern the thing demised, & that the statute [32 Hen. 8, c. 34] does not extend to collateral covenants. . . . This covenant [to repair & yield up upon the determination of the term the works erected by virtue of the licence, & authority conferred by the indenture] directly touches & concerns the thing demised, & it would seem also to be assignable with the reversion (*MARTIN, B.*).—*MARTYN v. WILLIAMS* (1857), 1 H. & N. 817; 26 L. J. Ex. 117; 28 L. T. O. S. 321; 5 W. R. 351; 156 E. R. 1430.

*Annotations:—Folld. Norval v. Pascoe* (1864), 4 New Rep. 390; *Hooper v. Clark* (1867), L. R. 2 Q. B. 200. *Refd. Hastings v. N. E. Ry.*, [1898] 2 Ch. 674. *Mentd. Indermur v. Dames* (1867), 36 L. J. C. P. 181.

**5699. — — — — —.]**—A lease under seal contained a covenant by the lessor to finish laying down 1,000 acres, part of the land demised, in good English grass within a year. The deed contained a subsequent declaration "that there shall not be implied in this lease any covenant or provision whatever on the part of either of the parties hereto":—*Held*: the covenant must be construed as qualified & controlled by the declara-

tion, accordingly it did not run with the reversion; &, not being incident to the relation of landlord & tenant, liability for breach thereof properly fell to be borne by the general estate of the deceased lessor. Even if as held by the ct. below, it was unqualified & ran with the reversion, it was not a charge thereon. As between the specific devisees of the reversion & the general estate, the latter should primarily bear a liability which in its nature is not incident to the relation of landlord & tenant, but was incurred preparatory thereto.

At common law no covenant ran with the reversion (*LORD MACNAUGHTEN*).—*ECCLES v. MILLS*, [1898] A. C. 360; 67 L. J. P. C. 25; 78 L. T. 206; 46 W. R. 398; 14 T. L. R. 270, P. C.

*Annotations:—Consd. Re Hughes, Ellis v. Hughes*, [1913] 2 Ch. 491. *Refd. Re Betty, Betty v. A.-G.*, [1899] 1 Ch. 821; *Re Giers, Cooper v. Giers*, [1899] 2 Ch. 54; *Stuart v. Joy*, [1904] 1 K. B. 362.

**5700. — — — — —.]**—I think it is settled that at common law covenants run with the land, but not with the reversion (*FARWELL, J.*).—*MULLER v. TRAFFORD*, [1901] 1 Ch. 54; 70 L. J. Ch. 72; 49 W. R. 132.

*Annotation:—Refd. Woodall v. Clifton*, [1905] 2 Ch. 257.

**5701. — — — — —.]**—The assignee of the reversion on a lease, whether under seal or not, is entitled at common law to maintain an action against the lessee for breach of an implied, as distinct from an express, covenant in the lease committed since the date of the assignment. He is not, however, entitled to maintain an action for breach of such a covenant committed prior to the assignment if accrued causes of action do not pass to him by the assignment.

By the rules of common law none but parties or privies to express covenants were bound by or could take advantage of them, & grantees of reversions were regarded in the light of strangers. If the grantee of a reversion could have maintained an action of covenant against the lessee upon his express covenant, the provision of 32 Hen. 8, c. 34, would have been in a great degree unnecessary. But the statute refers only to express covenants, & not to covenants in law or implied covenants. The statute provides that grantees of reversions "shall & may have & enjoy all & every such like & the same advantage, benefit, & remedies by action only, for not performing of other conditions, covenants, or agreements contained & expressed in the indentures of their said leases." The reason why the statute extended only to express covenants was that no such provision was necessary with regard to covenants in law or implied covenants (*SWINFEN EADY, L.J.*).—*WEDD v. PORTER*, [1916] 2 K. B. 91; 85 L. J. K. B. 1298; 115 L. T. 243, C. A.

*Annotations:—Refd. Blane v. Francis*, [1917] 1 K. B. 252; *Barnes v. City of London Real Property Co.*, [1918] 2 Ch. 18; *Cole v. Kelly*, [1920] 2 K. B. 106.

**5702. — Effect of 32 Hen. 8, c. 34—Condition.]**—*LEONARD'S CASE* (undated), cited 2 Bulst. at p. 282; 80 E. R. 1123.

*Annotation:—Refd. Attoe v. Hemmings* (1614), 2 Bulst. 281.

**5703. — — — — —.]**—The grantee of a reversion of every common person may enter for conditions broken by the express words of the above Act.—*HILL v. GRANGE* (1556), 2 Dyer, 130 b; 1 Plowd. 167; 75 E. R. 258.

*Annotations:—Refd. Mallory's Case* (1601), 5 Co. Rep. 111 b; *Pain v. Malory* (1601), Cro. Eliz. 832; *Finch's*

**PART XXII. SECT. 3, SUB-SECT. 2.—B. (a).**

**5697. Whether benefit passes—At common law—Covenant.]**—M. let an hotel to B. under a written lease, which

provided that on receipt of a month's notice the tenant should be bound to transfer the license to the landlord or his nominee. M. sold the hotel, together with all leases, goodwill & rights,

to S.—*Held*: S. was entitled to obtain transfer from B. of the license for the premises.—*SOUTH AFRICAN BREWERIES v. BARRITT* (1902), 12 C. T. R. 291.—S. AF.

Case (1606), 6 Co. Rep. 63; Lofield's Case (1612), 10 Co. Rep. 106 a; Attoe v. Hemmings (1614), 2 Bulst. 281; Burton v. Browne (1622), Palm. 319; Crabbe v. Tooker (1626), Poph. 204. **Mentd.** Anon. (1561), Dal. 29, pl. 5; Tyrringham's Case (1584), 4 Co. Rep. 36 a; Wood v. Payne (1590), Cro. Eliz. 186; Luttrell's Case (1601), 4 Co. Rep. 84 b; Wade's Case (1601), 5 Co. Rep. 114 a; Lowe's Case (1609), 9 Co. Rep. 122 b; Clay & Barnett's Case (1613), Godb. 236; Clun's Case (1613), 10 Co. Rep. 127 a; Stukeley v. Butler (1615), Hob. 168; Rockingham v. Oxenden (1711), 2 Salk. 578; Ungley v. Chambers (1824), 1 Bing. 483; Doe d. Meyrick v. Meyrick (1832), 2 Cr. & J. 223; Hinchliffe v. Kinnoul (1838), 5 Bing. N. C. 1; Hopkins v. Helmore (1838), 3 Nev. & P. K. B. 453; Startup v. Macdonald (1843), 6 Man. & G. 593; Winter v. Perratt (1843), 9 Cl. & Fin. 606; Pannell v. Mill (1846), 3 C. B. 625; Waterpark v. Fennell (1859), 7 W. R. 634; Fergusson v. L. B. & S. C. Ry. (1863), 3 De G. J. & Sm. 653; Cuthbert v. Robinson (1882), 51 L. J. Ch. 238; Thomas v. Owen (1887), 20 Q. B. D. 225; Roe v. Siddons (1888), 22 Q. B. D. 224; Schwann v. Cotton, [1916] 2 Ch. 120; Hansford v. Jago, [1921] 1 Ch. 322.

**5704.** ———. ———.]—The grantee of a lease for years, to whom an under lessee has attorned, may enter upon such under lessee, for a condition broken.—**DAVY v. MATTHEW** (1599), Cro. Eliz. 649; **Moore, K. B. 525; 78 E. R. 888.**

**5705.** ———. ———.]—Covenant against a lessee for years for not repairing during the coverture, where the reversion is granted to the husband & wife, may be either by the husband alone, or jointly with his wife.—**BRETT v. CUMBERLAND** (1616), Cro. Jac. 399; 3 Bulst. 163; 1 Roll. Rep. 359; 79 E. R. 341; *subsequent proceedings* (1619), Cro. Jac. 521.

**Annotations:—****Refd.** *Hollar v. Caseborough* (1665), 1 Keb. 839; *Glover v. Cope* (1691), 1 Show. 284; *Bally v. Wells* (1769), 3 Wils. 25. **Mentd.** *Rumsey v. George* (1813), 1 M. & S. 176; *McNeillage v. Holloway* (1818), 1 B. & Ald. 218.

**5706.** ———. ———.]—The above Act applies to leases by deed only; & where a lease is not under seal, the assignee of the reversion cannot maintain *assumpsit* against the lessee for breach of his contract with the assignor to repair.

With regard to repairs, it was objected that the Act applied only to cases of demise by deed, & that the assignee of the reversion cannot sue in *assumpsit* on the contract made by the assignor (**LORD DENMAN, C.J.**).—**STANDEN v. CHRISMAS** (1847), 10 Q. B. 135; 16 L. J. Q. B. 265; 9 L. T. O. S. 169; 11 Jur. 694; 116 E. R. 53.

**Annotations:—****Consd.** *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608. **Refd.** *Elliot v. Johnson* (1866), L. R. 2 Q. B. 120; *Smith v. Eggington* (1874), L. R. 9 C. P. 145; *Wedd v. Porter*, [1916] 2 K. B. 91. **Mentd.** *Turner v. Cameron's Coalbrook Steam Coal Co.* (1850), 5 Exch. 932; *Churchward v. Ford* (1857), 2 H. & N. 446; *Hickman v. Machin* (1859), 4 H. & N. 716; *Phillips v. Miller* (1875), L. R. 10 C. P. 420.

**5706a.** ———. ———.]—**MARTYN v. WILLIAMS**, No. 5698, *ante*.

**5707.** ———. ———.]—**Assignment not by deed.**—**BICKFORD v. PARSON**, No. 5482, *ante*.

**5708.** ———. ———.]—**Lease not under seal.**—On June 30, 1872, one B., by an instrument not under seal, demised to plffs. standings for three lace-machines in a room in a factory in N., the tenancy to commence on June 24, the rent to be payable quarterly, the lessor to provide steam power & to pay all rates & taxes, & the tenancy to be determinable by either party on six months' notice to expire at Midsummer. At the time of making this demise the premises were under mtge. to a building society. Interest being in arrear, the mtgees. on Aug. 24 gave notice to plffs. not to pay any more rent to B., the mtgor.; & early in Sept., pursuant to the power contained in the indenture of mtge., the mtgees. contracted to sell the premises to deft., possession to be given on Dec. 25. The conveyance, however, was not executed until Feb. 14, 1873. On Sept. 28, 1872, the mtgees., protesting that plffs. were not

entitled to notice, gave them notice to give up their standings at Christmas, & in Nov. 1872, & Feb. 1873, they received from them the quarter's rent due respectively at Michaelmas & Christmas. In the meantime some conversations took place between plffs. & deft. as to the former continuing in the factory upon altered terms; but no terms were ever agreed to, & no rent was received by deft. On Mar. 24, 1873, deft. demanded possession of the portion of the factory occupied by plffs.; on May 15 he cut off the supply of steam power; & on May 22 plffs. brought their action:—**Held:** deft. was not bound by the contract between B. & plffs., it not being under seal, & therefore not within the above Act, & consequently, in the absence of adoption by him or of some new contract of tenancy between him & plffs., not liable in this action.—**SMITH v. EGGINGTON** (1874), L. R. 9 C. P. 145; 43 L. J. C. P. 140; 30 L. T. 521.

**Annotation:—****Refd.** *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608.

**5709.** ———. ———.]—**Running with reversion.**—

A mtgee. under a mtge. created in 1873, who was not in possession, but collected the rent as agent of the mtgors., executed an agreement under seal for a tenancy of a farm from year to year to deft. The agreement was expressed to be made between the mtgee. "as agent, hereinafter called the landlord," & deft., "hereinafter called the tenant." "The landlord" thereby let & "the tenant" took the premises. By one of the covenants the tenant agreed to consume on the premises all hay & fodder & to spread on the land all manure & compost produced on the farm, & not to sell off any hay or fodder, & to leave all manure & compost at the end of the tenancy. The mtgee. afterwards sold the farm, & his purchaser sought to enforce the above covenant by deft.:—**Held:** (1) the question who was the lessor was one of construction, in deciding which the ct. could look at the surrounding circumstances, & on the true construction of the agreement the demise was the demise of the mtgee.; the words "as agent" were not, in a demise under seal, sufficient to prevent the demise operating on the legal estate vested in the mtgee., & plff. as his assign could therefore enforce any covenant contained in the agreement the benefit of which ran with the reversion; (2) the covenant in question touched & concerned the land, & the benefit of it therefore ran with the reversion.

If the agreement operates as a demise of the farm by R. to deft., it follows that plff., as assignee of the reversion, can enforce any covenants contained therein the benefit of which runs with the reversion. In my judgment the benefit of the covenants in question does run with the reversion (**PARKER, J.**).—**CHAPMAN v. SMITH**, [1907] 2 Ch. 97; 76 L. J. Ch. 394; 96 L. T. 662; 51 Sol. Jo. 428.

**Annotation:—****Generally, Mentd.** *Ariadne S.S. Co. v. McKelvie*, [1922] 1 K. B. 518.

What covenants run with reversion, *see* Part XI., Sect. 6, *ante*.

**5710.** ———. ———.]—**Whether covenants in law or implied covenants included.**—**WEDD v. PORTER**, No. 5701, *ante*.

**5711.** ———. ———.]—**Covenant with owner of equitable interest only—Whether enforceable by assignee of legal estate.**—If mtgor. & mtgee. make a lease, in which the covenants for the rent & repairs are only with the mtgor. & his assigns, the assignee of the mtgee. cannot maintain an action for the breach of these covenants, because they are collateral to

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his grantor's interest in the land, & therefore do not run with it.—**WEBB v. RUSSELL** (1789), 3 Term Rep. 393; 100 E. R. 639.

**Annotations:—****Consd.** *Vernon v. Smith* (1821), 5 B. & Ald. 1. **Expld.** *Whitton v. Peacock* (1836), 2 Scott, 630. **Consd.** *Bickford v. Parson* (1848), 5 C. B. 920. **Refd.** *Keppell v. Bailey* (1834), 2 My. & K. 517; *Sturgeon v. Wingfield* (1846), 15 L. J. Ex. 212; *Wakefield v. Brown* (1846), 9 Q. B. 209; *Magnay v. Edwards* (1853), 1 C. L. R. 141; *Rogers v. Hosegood*, [1900] 2 Ch. 358; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608. **Mentd.** *Baker v. Gostling* (1834), 1 Bing. N. C. 19; *Upton v. Townend*, *Upton v. Greenlees* (1855), 17 C. B. 30; *London & Westminster Loan & Discount Co. v. Drake* (1859), 6 C. B. N. S. 798; *Eccles v. Mills*, *Comrs. of England & Wales v. Rowe* (1880), 5 App. Cas. 736.

Whether enforceable after interest parted with.]—*See* No. 5766, *post*.

**5712. — Legal estate subsequently acquired.**—In 1762, a lessor having only an equitable estate in a certain field, demised a portion of the field to a lessee, for ninety-nine years. In 1773, the lessor having acquired the legal estate in the field, demised the residue of the field to the lessee for the same term, by an indenture which recited the former lease, stipulated for its continuing in force, but provided that no more rent should be paid for the entire field than was paid for the first portion, & that the rent to be paid for the entire field was meant to be the same as that reserved for the first portion:—**Held**: the assignee of the reversion could not sue the assignee of the lessee upon the covenants in the lease of 1762.—**WHITTON v. PEACOCK** (1836), 2 Bing. N. C. 411; 1 Hodg. 376; 2 Scott, 630; 5 L. J. C. P. 124; 132 E. R. 161; *previous proceedings* (1834), 3 My. & K. 325.

**Annotations:—****Expld.** *Gouldsworth v. Knights* (1843), 11 M. & W. 337; *Irving v. Cuthbertson* (1860), 6 Jur. N. S. 121. **Refd.** *Webb v. Austin* (1844), 7 Man. & G. 701. **Mentd.** *Sturgeon v. Wingfield* (1846), 15 M. & W. 224.

**5713. — Lease before 1882—To equitable assignee of reversion.**—In the case of a lease made before Conveyancing Act, 1881 (c. 41), the equitable owner of the reversion cannot bring an action to recover possession of the premises.—**MATTHEWS v. USHER**, [1900] 2 Q. B. 535; 69 L. J. Q. B. 856; 83 L. T. 353; 49 W. R. 40; 16 T. L. R. 493; 44 Sol. Jo. 606, C. A.

**Annotations:—****Refd.** *Molyneux v. Richard*, [1906] 1 Ch. 34; *Turner v. Walsh*, [1909] 2 K. B. 484. **Mentd.** *Jolly v. Brown*, [1914] 2 K. B. 109.

**5714. — Lease after 1881—Lease not in writing.**—By Conveyancing Act, 1881 (c. 41), s. 10, "Rent reserved by a lease, & the benefit of every covenant or provision therein contained, having reference to the subject matter thereof, & on the lessee's part to be observed or performed, & every condition of re-entry & other condition therein contained, shall be annexed & incident to & shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, & shall be capable of being recovered, received, enforced, & taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased":—**Held**: the sect. does not apply to a lease which is not in writing.—**BLANE**

**v. FRANCIS**, [1917] 1 K. B. 252; 86 L. J. K. B. 304; 115 L. T. 850, C. A.

**Annotation:—****Refd.** *Cole v. Kelly*, [1920] 2 K. B. 106.

**5715. — Covenant not running with reversion.**—**ECCLES v. MILLS**, No. 5699, *ante*.

On bankruptcy of tenant.]—*See* **BANKRUPTCY**, Vol. V., p. 976, No. 7991.

**5716. Whether barred—By release by lessor to lessee—After covenant.**—**HARPER v. BIRD** (1678), T. Jo. 102; 2 Lev. 206; 84 E. R. 1167.

**5717. Reversioner claiming under several titles—Separate titles to parts of premises.**—A reversioner in fee of a house by one deed, & of a lease for years of land by another deed, may bring covenant on a lease against the person to whom both the house & land have been demised by the grantor of the reversions, although he derives his right from different titles.—**PYOT v. ST. JOHN (LADY)** (1613), Cro. Jac. 329; 79 E. R. 281; *sub nom.* **ST. JOHN (LADY) v. PIOTT**, 2 Bulst. 102.

**Annotations:—****Expld.** *Kitchen v. Buckley* (1663), 1 Lev. 109; *Twynam v. Pickard* (1818), 2 B. & Ald. 105. **Consd.** *Swansea Corp. v. Thomas* (1882), 10 Q. B. D. 48.

(b) *Necessity for Notice.*

*See* Law of Property Act, 1925 (c. 20), ss. 141, 142, 146.

**5718. Whether notice necessary—Condition—Bond for delivery of possession.**—A lessee for years was bound in a bond to give up the possession of the land demised to the lessor, or his assigns, at the end of the term, the lessor assigned over his interest, & the assignee required the lessee to perform the condition, who answered that he knew not whether he were the assignee, & thereupon refused: & the question was, whether he had broken the condition, & it was adjudged that he had, for he had taken upon him so to do.—**ANON.** (1618), Poph. 136; 79 E. R. 1238.

**5719. — — —**—A grantee shall not take advantage of a condition before he has given notice to the lessee, though he may of a covenant.—**HINGEN v. PAYN** (1618), Cro. Jac. 475; 79 E. R. 405; *sub nom.* **INGIN & PAYN'S CASE**, Godb. 272.

**Annotation:—****Refd.** *Roberts v. Herbert* (1660), 1 Sid. 5.

**5720. — Covenant.**—**HINGEN v. PAYN**, No. 5719, *ante*.

**5721. — — — Covenant to repair.**—The assignee of the reversion of a lease may maintain ejectment for breach of a covenant to repair, without giving the tenant notice of the assignment.—**SCALTOCK v. HAUSTON** (1875), 1 C. P. D. 106; 45 L. J. Q. B. 125; 34 L. T. 130; 24 W. R. 431.

**Notice by assignee claiming rent.**—*See* Part XV., Sect. 4, sub-sect. 2, C. (b), *ante*.

(c) *Breach before Assignment.*

*See, now*, Law of Property Act, 1925 (c. 20), s. 141.

**5722. Whether right of action passes.**—An assignee shall not have an action upon a breach of covenant before his own time.—**LEWES v. RIDGE** (1601), Cro. Eliz. 863; 78 E. R. 1089.

**Annotations:—****Apld.** *Canham v. Rust* (1818), 8 Taunt. 227. **Foll.** *Wedd v. Porter*, [1916] 2 K. B. 91.

**5723. — — —**—**WEDD v. PORTER**, No. 5701, *ante*.  
**Breach of covenant to repair.**—*See* Part XVIII., Sect. 3, sub-sect. 2, F. (a) i., *ante*.

**PART XXII. SECT. 3, SUB-SECT. 2.—B. (a).**

**57221. Whether right of action passes.**—Lands described as bounded by a proposed new street were demised in 1872 to a lessee whose interest became vested in pltf. in 1888. By the lease

the lessor covenanted to make the new street within one year from the date thereof. The lessor died in 1878. The trustees of his will & his exor. assigned his interest in the lease to defts. The street not having been constructed, the action was brought in 1892 by pltf. against defts. for breach of the cove-

nant to make the street within one year:—**Held**: the covenant was broken once for all when the year had elapsed, & long before pltf.'s title accrued, & pltf. was not entitled to recover.—**MORRIS v. KENNEDY**, [1896] 2 I. R. 247.—**IR.**

**5724. — Breach of covenant to treat land in husbandlike manner.]—**A., seised in fee, demised for a term to B.; the indenture contained covenants for treating the lands in a husbandlike manner, & imposed penalties upon the tenant for every rod of living fence & every tallow or tree which he should cut down or spoil during the term. The lessor died having devised the demised premises to pltf. in fee. The latter sought to recover penalties for tallows, trees, & hedges, cut down & spoiled during the term:—*Held*: pleas alleging that the tallows, trees, & hedges were cut down & spoiled in the lifetime of the lessor were a good answer to the alleged breaches; & the devisee of the reversion could not recover the penalties.—*DAUBUZ v. RICKMAN* (1833), 3 L. J. (C. P. 14.

**5725. — Breach of covenant not to assign.]—**Deft. was the lessee of a shop, the lease containing a covenant by him not to assign or underlet the premises. There was a condition for re-entry upon breach of any of the covenants in the lease. Deft. let the premises to pltf. for the remainder of the term, this lease containing a covenant by deft. for quiet enjoyment of the premises by pltf. without any interruption by deft. or any person lawfully claiming through him. Subsequently the original lessor assigned the reversion, & the assignees of the reversion brought an action against deft. to recover possession of the premises as upon the breach of covenant against assignment. Deft. gave pltf. notice of the action, telling him that there was no defence, & signed a consent to judgment for possession, under which pltf. was evicted:—*Held*: as deft. had a good defence to the action, the breach of covenant having occurred before the assignment of the reversion, the act of deft. in consenting to judgment for possession was the cause of the interruption of pltf.'s enjoyment, & was therefore a breach of the covenant for quiet enjoyment.—*COHEN v. TANNAR*, [1900] 2 Q. B. 609; 69 L. J. Q. B. 904; 83 L. T. 64; 48 W. R. 642, C. A.

*Annotations*:—*Refd.* *Eastwood v. Ashton*, [1913] 2 Ch. 39; *Malzy v. Elchholz* (1916), 85 L. J. K. B. 1132; *Booth v. Thomas* (1925), 42 T. L. R. 114.

*See, generally*, Part XXI., Sect. 10, sub-sect. 3, B. (c), *ante*.

**Assignment of right of action.]—***See CHOSER IN ACTION*, Vol. VIII., p. 431, No. 86.

**5726. Whether right of re-entry passes.]—**A forfeiture by tenant for years in levying a fine, not having been taken advantage of by the entry of the then reversioner to avoid the lease, cannot be taken advantage of, after the reversion has been conveyed away, to recover the estate in ejectment from the tenant, upon the several demises of the grantor & grantee of such reversion.—*FENN d. MATTHEWS & LEWIS v. SMART* (1810), 12 East, 444; 104 E. R. 173.

*Annotations*:—*Refd.* *Liddy v. Kennedy* (1871), L. R. 5 H. L. 134; *Moore v. Ullocoats Mining Co.*, [1908] 1 Ch. 575.

**— Breach of covenant to insure.]—***See Part XX.*, Sect. 1, sub-sect. 3, C. (a), *ante*.

**5727. — Breach of covenant to complete buildings—Within given time.]—**A lease was granted of a piece of land with two messuages thereon in course of erection, with a covenant by the lessee to complete the messuages within two months, & also to keep "the said messuages or tenements & premises in repair during the term,"—with a proviso for forfeiture for breach of any of the covenants. The premises never were finished, & were much dilapidated:—*Held*: a forfeiture was incurred by the breach of the covenant to repair, in respect of which forfeiture the

assignee of the reversion might sue. *Qu.*: whether the assignee of the reversion can avail himself of a forfeiture arising out of a breach of a covenant to complete the premises demised within a given time—a breach having been incurred before the assignment to him.—*BENNETT v. HERRING* (1857), 3 C. B. N. S. 370; 30 L. T. O. S. 151; 6 W. R. 37; 140 E. R. 784.

*Annotations*:—*Consd.* *Jacob v. Down*, [1900] 2 Ch. 156. *Refd.* *Eccles v. Mills*, [1898] A. C. 360; *Stephens v. Junior Army & Navy Stores*, [1914] 2 Ch. 516.

**Breach of covenant to pay rent.]—***See Part XV.*, Sect. 10, *ante*.

**What covenants run with reversion generally.]—***See Part XI.*, Sect. 6, *ante*.

(d) *Enforcement by Personal Representatives.*

*See, now*, Administration of Estates Act, 1925 (c. 23), s.1.

**Breach in lifetime of deceased.]—***See EXECUTORS*, Vol. XXIII., p. 290, Nos. 3563–3575.

**Breach after death of testator.]—***See EXECUTORS*, Vol. XXIII., p. 292, No. 3576.

(e) *Pleading Assignee's Title.*

*See, generally*, PLEADING.

**5728. What must be shown—Lessor's estate.]—**

In a declaration by the exors. of one of several lessors, against the assignee of the lease, it is necessary for pltf. to show what estate their testator had in the premises, although the covenant was with their testator alone; for the assignee is chargeable only by reason of the privity of estate, & not by reason of any privity of contract.

*Semble*: in a declaration charging the assignee of a lease at the suit of the lessor, the entry of the lessee is a material averment, & traversable.—*WIGGINS v. MASSON* (1827), 6 L. J. O. S. K. B. 93.

**5729. — & derivation of assignee's title.]—**In an action upon covenants in an expired lease, pltf. stated the lease, that the term had expired, that at its expiration defts. were the assigns of the lease, & liable to perform the lessee's covenants, that pltf. became, & at the expiration of the term was entitled to, the immediate reversion in the demised property, subject only to the term, that he was & is entitled to enforce all the lessee's covenants, & that defts. had for eight years paid him rent:—*Held*: such pleading was insufficient, & pltf. ought also to have shown what the reversion was which the lessor had, & how pltf. derived his title to that particular reversion. Accordingly, a statement of claim containing the statements so held to be insufficient was ordered to be struck out under R. S. C., Ord. 19, r. 27, as a pleading tending to embarrass the fair trial of the action.—*DAVIS v. JAMES* (1884), 26 Ch. D. 778; 53 L. J. Ch. 523; 50 L. T. 115; 32 W. R. 406.

*Annotations*:—*Consd.* *Pledge v. Pomfret* (1905), 74 L. J. Ch. 357. *Refd.* *Darbyshire v. Leigh*, [1896] 1 Q. B. 554. *Mentd.* *Roberts v. Oppenheim* (1884), 26 Ch. D. 724.

**5730. Sufficiency of pleading—Allegation that lessor was seised.]—**The assignee of the reversion suing deft. in covenant, alleged that the lessor was seised, without stating of what estate, & being so seised, devised to pltf. in fee. After verdict:—*Held*: a sufficient allegation of title.—*HARRIS v. BEAVAN* (1828), 4 Bing. 646; 1 Moo. & P. 633; 6 L. J. O. S. C. P. 149; 130 E. R. 918.

**5731. — Particulars of lease & assignment of reversion.]—***CUTHBERTSON v. IRVING*, No. 5690, *ante*.

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**5732.** ———.]—*DAVIS v. JAMES*, No. 5729, *ante*.

**Action for recovery of possession—In High Court.]—See REAL PROPERTY.**

— **In county court.]—See COUNTY COURTS**, Vol. XIII., pp. 470, 471.

**Right of lessee to impugn title.]—See Part I.**, Sect. 3, sub-sect. 1, *ante*.

### *C. Severance of Reversion.*

#### *(a) Severance of Estate.*

*See Law of Property Act, 1925 (c. 20), ss. 140–142.*

**5733. General rule—Grantee entitled as assignee.]**

—(1) If a lessee for years attorns to the second grantee of the reversion, the grantee may enter for a condition broken, although no attornment was made to his grantor.

(2) 32 Hen. 8, c. 34, does not extend to the grantees of the reversion of part of the land.—*PAIN v. MALORY* (1601), Cro. Eliz. 832; 78 E. R. 1058; *sub nom.* *MALLORY'S CASE*, 5 Co. Rep. 111 b.

*Annotations:—As to (1) Rehd. Blucke v. Mole* (1661), 1 Lev. 40. *Generally, Mentd. Finch's Case* (1606), 6 Co. Rep. 63 a; *Mollinoux v. Mollinoux* (1608), Cro. Jac. 144; *Frances's Case* (1609), 8 Co. Rep. 89 b; *Hewet v. Painter* (1611), 1 Bulst. 174; *Tracey v. Dutton* (1621), Cro. Jac. 617; *Bland's Case* (1632), Godb. 448; *Sacheverell v. Froggatt* (1671), 2 Saund. 367 a; *Williams v. Fry* (1672), 3 Keb. 19; *Long v. Buckridge* (1718), 1 Stra. 106; *Wood v. Leadbitter* (1845), 13 M. & W. 838; *Scaltock v. Harston* (1875), 1 C. P. D. 106.

**5734. ——— Assignment for term.]—ATTOE v. HEMMINGS** (1614), 2 Bulst. 281; 80 E. R. 1123; *sub nom.* *ATHOWE v. HEMING*, 1 Roll. Rep. 80.

*Annotations:—Mentd. Robins v. Evans* (1863), 2 H. & C. 410; *Delacherols v. Delacherols* (1864), 11 H. L. Cas. 62.

**5735. ———.]—WRIGHT v. BURROUGHS**, No. 5749, *post*.

**5736. ———.]—Certain owners of land made a lease to deft. for three years. They then assigned their reversion. The assignees of the reversion made a lease to pltf. to take effect *in presenti* for twenty-one years. A quarter's rent being unpaid by deft.:—*Held*: by virtue of 4 & 5 Ann. c. 3, ss. 9, 10, pltf. could sue deft. before attornment for the quarter's rent.—*HORN v. BEARD*, [1912] 3 K. B. 181; 81 L. J. K. B. 935; 107 L. T. 87, D. C.**

*Annotation:—Rehd. Cole v. Kelly*, [1920] 2 K. B. 106.

**5737. ———.]—By an indenture of lease dated Feb. 24, 1913, the lessee of a house in London for a term of ten years, thereafter called the lessor, demised the first, second, & third floors thereof, with the hall on the ground floor & the staircase & passages, to deft. for five years from Dec. 25, 1912, the lease reserving to the lessor & her employees a right to use the hall for the purpose of gaining access from the street to the shop & premises occupied by her. The lease contained covenants by deft. that she would keep & yield up the premises in good & tenable repair, that she would not make any alteration or addition to the premises without the consent of the lessor, that she would pay for the gas consumed in the premises including the hall, & that she would use the premises for carrying on occupations of a quiet & inoffensive nature only. The lessor covenanted that she would pay the rent & perform & observe the covenants in the lease under which she held, & would pay all rates, taxes, & outgoings payable in respect of the demised premises. By an agreement between the administrators of the lessor who had died & deft. contained in**

correspondence, it was arranged that on the expiration on Dec. 25, 1917, of deft.'s lease she should as from that date continue to occupy the premises on a quarterly tenancy. On June 20, 1918, deft. gave a quarter's notice to quit the premises on Sept. 29, 1918. Before the expiration of that notice, by an indenture dated July 10, 1918, the administrators demised the premises to pltf. for the residue of the term created by the head lease less three days. Pltf. sued deft. for alleged breaches of the repairing covenants:—*Held*: pltf. was the assignee of the reversion expectant upon the determination of deft.'s tenancy; the terms of the expired lease as to repairs were to be implied in the new agreement in writing for a quarterly tenancy; those terms being implied in the written agreement were "therein contained" within the meaning of Conveyancing Act, 1881 (c. 41), s. 10 (1), & therefore pltf. was entitled to sue for breaches of the covenants to repair as contained in the agreement for the quarterly tenancy.—*COLE v. KELLY*, [1920] 2 K. B. 106; 89 L. J. K. B. 819; 123 L. T. 105; 36 T. L. R. 262, C. A.

*Annotation:—Rehd. Re Leeds & Batley Breweries & Bradbury's Lease, Bradbury v. Grimble*, [1920] 2 Ch. 548.

**5738. Tenancy in common—Right of assignees to enforce—Assignment to lessor & another.]—A lease contained a proviso empowering the lessor "upon giving three months' notice of his intention to resume any portion of the demised premises . . . to enter into such possession." The lessor subsequently conveyed by deed his reversion to the use of himself & another as tenants in common. Shortly afterwards the tenants in common served upon the lessees a notice of resumption of the whole of the lands:—*Held*: (1) the fact that a sum "per acre" which was by the lease covenanted to be allowed as rebate upon resumption, would in the case of resumption of the whole of the lands exceed the rent per acre originally reserved would not constitute evidence of an intention to resume part only of the entire demised premises; (2) actual re-entry was not necessary under such notice; (3) the severance of the reversion did not determine the right to resumption in pursuance of the proviso; (4) service of the notice upon a servant living at the house of one of the lessees, the said servant "promising to give it to him on his return home in a few days" was good service upon that lessee.**

With regard to the question as to the proper service of notice. . . . The jury has found that it was served at the usual place of abode of appts. & that was quite sufficient (*LORD CHELMSFORD*).—*LIDDY v. KENNEDY* (1871), L. R. 5 H. L. 134; 20 W. R. 150, H. L.

**5739. ———.]—H. demised a farm to certain lessees whose interest was vested in deft. During the continuance of the lease H. died, & under his will the reversion was severed & became vested in several tenants in common, of whom pltf. was one.—*Held*: pltf. could, without joining the other tenants in common, maintain an action to recover damages for wrongful acts causing injury to the reversion, & for breach of a covenant running with the land.—*ROBERTS v. HOLLAND*, [1893] 1 Q. B. 665; 62 L. J. Q. B. 621; 41 W. R. 494; 5 R. 370, D. C.**

*Annotation:—Rehd. United Dairies v. Public Trustee*, [1923] 1 K. B. 469.

**Apportionment of rent—As between persons entitled.]—See Part XV., Sect. 9, sub-sect. 1, *ante*.**

## (b) Severance of Premises.

## i. Enforcement of Covenant.

See Law of Property Act, 1925 (c. 20), ss. 140, 141.

**5740. Whether covenant apportionable.]—**PAIN v. MALORY, No. 5733, *ante*.

**5741. —**—Covenant will lie by the assignee of the reversion of part of the demised premises, against the lessee for not repairing.—TWYNAM v. PICKARD (1818), 2 B. & Ald. 105; 106 E. R. 305.

*Annotations:—***Apld.** *Badeley v. Vigurs* (1854), 4 E. & B. 71. **Refd.** *West London Ry. v. L. & N. W. Ry.* (1853), 11 C. B. 327; *Norval v. Pascoe* (1864), 4 New Rep. 390; *Hyde v. Warden* (1877), 3 Ex. D. 72; *Swansea Corp'n. v. Thomas* (1882), 10 Q. B. D. 48.

**5742. —**—WRIGHT v. BURROUGHS, No. 5749, *post*.

**5743. — Partial merger of term.]—**Declaration by B. & L. against the exor. of V., alleged that G., holding premises under lease for ninety-nine years expiring in Dec. 1849, underlet them to V. & S. for a term ending in Mar. 1849, V. & S. jointly & severally covenanting with G. to repair during the term, & to deliver up the premises to G., or his assigns, in repair at the end of the term; & V. & S. entered & became possessed as joint tenants; that, during the continuance of the lease to V. & S. G. granted his reversion to S., B. & L.; that afterwards V. assigned his interest in the underlease to S.; that afterwards S. died, before the determination of the underlease made to V. & S.: Breach: that V. did not deliver up the premises in repair, at the expiration of the underlease to V. & S. On demurrer to the plea:—**Held:** the declaration showed a good cause of action. For that the whole reversion existing at the time of the breach was then in B. & L. alone; either from the grant of the reversion by G. to S., B. & L. operating so as to cause one undivided third of the interest to coalesce with so much of S.'s interest in the term, which, *semble*, was the legal effect, or from one-sixth then coalescing & another sixth on the subsequent assignment by V. to S.; that B. & L. being solely interested in the whole existing reversion, could sue alone on the covenant, though the damages they could recover must be commensurate with their interest; that, supposing, which, *semble*, was not the case that, during the interval between the grant by G. to S., B. & L. & the assignment by V. to S., S. was interested in the covenant both as covenantor & covenantee, this, though it might have suspended & so destroyed the right of action for any breach happening at that time, did not affect the right to sue on the covenant for a breach happening after S. ceased to be so interested; that the right of action in such a covenant, by virtue of privity of contract under H. 8, c. 34, s. 1, is apportionable; but in this case pl'tfs. would recover without apportionment, since the covenantee was bound to leave the whole of the premises in repair, though pl'tfs. B. & L. would be entitled to only two-thirds of the damages.—**BADLEY v. VIGURS** (1854), 4 E. & B. 71; 2 C. L. R. 1627; 23 L. J. Q. B. 377; 23 L. T. O. S. 297; 1 Jur. N. S. 159; 119 E. R. 28.

**5744. — Reversioner with reserved interest in residue.]—**Deft., being tenant of land under a lease for years granted by pl'tfs. & containing the usual

lessee's covenant to pay rent, assigned all her interest in the term. Subsequently pl'tfs. granted their reversion in part of the demised premises. No rent having been paid by the assignees of def't., pl'tfs. sued her for arrears of rent accrued due since the grant of their reversion in part of the premises, the sum claimed being a fair apportionment of the rent in respect of the other part, the reversion of which remained in pl'tfs.:—**Held:** the covenant to pay rent was divisible; the rent could be apportioned, although the action was founded on a privity of contract only; & therefore pl'tfs. were entitled to recover.

It was admitted by counsel for def't. that no rent had ever been paid by the assignees, & def't.'s name still stood as tenant in the books of the corp'n. Under these circumstances the mere knowledge by pl'tfs. of the assignment did not amount to an extinguishment of the privity of contract between pl'tfs. & def't. . . . The covenant is divisible, so that the assignee of the reversion of part may sue upon the covenant in respect of his interest in that part. If, therefore, the reversioner can assign the reversion of part of the premises to A. & of the residue to B., & A. & B. can both sue in respect of their respective interests, there seems no good reason why, if the reversioner assigns the reversion of part of the premises to A., & reserves to himself the reversion in the residue, he should not be allowed to sue in respect of his interest in the residue (POLLOCK B.).—**SWANSEA CORPN. v. THOMAS** (1882), 10 Q. B. D. 48; 52 L. J. Q. B. 340; 47 L. T. 657; 47 J. P. 135; 31 W. R. 506.

*Annotation:—***Refd.** *Baynton v. Morgan* (1888), 21 Q. B. D. 101.

**Apportionment of rent.]—**See Part XV., Sect. 6, sub-sect. 1, *ante*.

## ii. Apportionment of Condition.

See Law of Property Act, 1925 (c. 20), ss. 140, 142.

**5745. Lease made before Dec. 31, 1881—Severance by act of grantor—Condition not apportionable.]—**If the reversion of a lease for years be severed in any part, the entire condition reserved upon the lease shall not be destroyed, if the severance be by descent, eviction or act of the law. *Secus*, if by act of the party.—**WINTER'S CASE** (1572), 3 Dyer, 308 b; 73 E. R. 697; *sub nom.* **WYNTER'S CASE**, 1 Co. Inst. 215 a.

*Annotations:—***Apld.** *Knight's Case* (1588), 5 Co. Rep. 54 b; *Piggott v. Middlesex County Council*, [1909] 1 Ch. 134. **Refd.** *Fox v. Whitecocks* (1614), 2 Bulst. 290; *Stukeley v. Butler* (1615), Hob. 168; *Twynam v. Pickard* (1818), 2 B. & Ald. 105; *Taitte v. Gosling* (1879), 11 Ch. D. 273. **Mentd.** *Garbrey v. Brown* (1588), Gouldsb. 96; *Wade's Case* (1601), 5 Co. Rep. 114 a; *Beare v. Woodley* (1630), Cro. Car. 154; *Ward v. Everet* (1698), 1 Ld. Raym. 422; *Orby v. Mohun* (1706), Freem. Ch. 291.

**5746. — — — — —.]—**A lease was made by a prior & convent of several houses, at the rent of £5 10s. 11d. at the four usual feasts; *scilicet*, for one house £3 0s. 11d., for another 20s., & for the others several rents residue of the said rent of £5 10s. 11d., with condition of re-entry if the said rent of £5 10s. 11d. be behind in part or in all. The said houses came to the King's hands by surrender, & by 31 Hen. 8. The King, by letters patent under the Great Seal, granted one of the houses, for which 20s. of the rent was by the said lease reserved, to the lessee & another in fee, the lessee died, afterwards it

# SECT. 4.—RIGHTS AND LIABILITIES OF LESSOR AFTER ASSIGNMENT.

## SUB-SECT. 1.—RIGHTS.

**5765. General rule—Covenants not enforceable.]**—ANON. (undated), *Plowd. Queries*, 19; 75 E. R. 883.

**5766. Where covenant in gross—Lease by equitable & legal owner.]**—A. being possessed of a term for years conveys it by way of mtge. & then joins with the mtgee. in a lease for a shorter term according to their respective estates & interests, & the lessee covenants with the mtgor. & his assigns to pay rent & keep the premises in repair during the lease; the term with all the estate & interest of mtgor. & mtgee. becomes vested in the assigns of the reversion, yet the mtgor. may afterwards maintain an action of covenant against the lessee, the covenants being in gross.—*RUSSELL v. STOKES* (1791), 1 Hy. Bl. 562; 126 E. R. 323, Ex. Ch.; *affg. S. C. sub nom. STOKES v. RUSSELL* (1790), 3 Term Rep. 678.

*Annotations* :—*Reid. L. C. v. Allen*, [1914] 3 K. B. 642. *Mentd. Formby v. Barker*, [1903] 2 Ch. 539.

**Loss of right to distrain.]**—*See DISTRESS*, Vol. XVIII., pp. 322, 323.

## SUB-SECT. 2.—LIABILITIES.

**5767. Covenant not running with reversion—Not incident to relation of landlord & tenant—Liability of lessor's estate—As against specific demise.]**—*ECCLES v. MILLS*, No. 5699, *ante*.

**5768. Covenant running with reversion—Continued liability of lessor.]**—A lessor who has assigned his reversion remains liable upon his express covenants, running with the reversion, in a lease for years under seal.—*STUART v. JOY*, [1904] 1 K. B. 362; 73 L. J. K. B. 97; 90 L. T. 78; 20 T. L. R. 109, C. A.

*Annotation* :—*Consd. Bath v. Bowles* (1905), 93 L. T. 801.

**5769. Covenant for quiet enjoyment—Liable for acts of assignee.]**—Where a lessor covenants that the lessee shall peaceably enjoy the demised premises without any interruption by the lessor or any person claiming under him, the effect of the covenant is that the lessor agrees to be bound by any act of interruption by himself or by any person whom he has expressly or impliedly authorised to do the act, but he is not responsible for wrongful or negligent acts which he has not authorised.—*WILLIAMS v. GABRIEL*, [1906] 1 K. B. 155; 75 L. J. K. B. 149; 94 L. T. 17; 54 W. R. 379; 22 T. L. R. 217.

**5770. Lessor a tenant for life—Breach by assignees of remaindermen.]**—Pltfs. were the exors. of A., & the defts. the exors. of B., & the action was brought for the balance of compensation for certain crops, etc., pursuant to a covenant in a lease granted by B. to A. B. was tenant for life, & under the powers of the Settled Land Acts granted the lease, & by its terms it was provided: "The lessor hereby for himself & his assigns covenants with the lessee that he will pay the tithe rent-charge on the said premises, also that he the lessor or his assigns or the succeeding tenants will at the expiration or sooner determination of the said term take & pay for the growing crops & manure then upon the said demised premises & the unexhausted tillages & dressings according to the custom of the country at a fair valuation to be made by two valuers, one to be chosen by each party, or, in the event of their differing, then by a third person to be chosen by such valuers." After certain other provisions the lease proceeded: "Provided also that in the event of the lessor or his assigns at any time or times & from time to time desiring during the said term to resume possession of any of the lands (but not the house, garden, building or yards) comprised in this demise for any purpose other than agriculture it shall be lawful for him & them so to do upon giving to the lessee, his exors., administrators, or assigns, or leaving upon some part of the demised premises three calendar months' notice in writing of such desire, & thereupon at the expiration of such notice a reduction of "rent should be made, "& the lessor or his assigns shall . . . pay to the lessee, his exors., administrators, or assigns, for the growing crops," etc., "& for the unexhausted tillages & dressings the like amount as he or they would be entitled to upon quitting, pursuant to the covenant of the lessor in that behalf before contained." The lessor having died, the owners of the fee simple sold a certain portion of the demised property to C. & Co., subject to the tenancy & to the payment of compensation, etc., under the lease. Pltfs. paid rent in respect of this portion to C. & Co., & notice having been given by C. & Co. to pltfs. that they intended to resume possession, it was agreed that C. & Co. should pay pltfs. £50 in respect of the unexhausted improvements.

C. & Co. being wound up pltfs. could not obtain this amount, & they then sued defts. on the covenant by B. in the lease :—*Held*: defts. were not liable.—*BATH v. BOWLES* (1905), 93 L. T. 801, D. C.

# Part XXIII.—Notice to Quit.

## SECT. 1.—NECESSITY FOR.

### SUB-SECT. 1.—YEARLY TENANCY.

**5771. General rule.]**—Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice as the original lessor must have given.—*MADDON d. BAKER v. WHITE* (1787), 2 Term Rep. 159; 100 E. R. 86.

*Annotations* :—*Reid. Doe d. Thomas v. Roberts* (1847), 16

*M. & W. 778. Mentd. N. W. Ry. v. M'Michael, Birkenhead, Lancashire & Cheshire Junction Ry. v. Pilcher* (1850), 5 Exch. 114; *Cooper v. Simmons* (1862), 7 H. & N. 707; *Clements v. L. & N. W. Ry.*, [1894] 2 Q. B. 482.

**5772. —.]**—So long ago as the time of the Year Books it was held that a general occupation was an occupation from year to year, & that the tenant could not be turned out of possession without reasonable notice to quit (*LORD KENYON*,

## PART XXII. SECT. 4, SUB-SECT. 2.

**5768 l. Covenant running with reversion—Continued liability of lessor.]**—*ANSLEY v. PETERS* (1845), 2 Kerr, 593.—CAN.

## PART XXIII. SECT. 1, SUB-SECT. 1.

**5771 l. General rule.]**—*DOE d.*

*MACQUEEN v. HUNTER* (1842), 1 Kerr, 518.—CAN.

**5771 ii. —.]**—*WHITE v. NELSON* (1860), 10 C. P. 158.—CAN.

**5771 iii. —.]**—*MANNING v. DEVER* (1874), 35 U. C. R. 294.—CAN.

**5771 iv. —.]**—*DOE d. HEATHCOTE*

*v. HUGHES* (1879), 19 N. B. R. 368.—CAN.

**5771 v. —.]**—Unless there is an express agreement for the expiry of a tenancy on a certain day, a tenancy from year to year is only determined by a notice to quit.—*SITARAM BHIMAJI DESHPANDE v. SADHU BIN AWAJI PARI* (1913), 1 L. R. 38 Bom. 240.—IND.

C.J.).—*DOE d. MARTIN v. WATTS* (1797), 7 Term Rep. 83; 2 Esp. 500; 101 E. R. 866.

*Annotations*:—*Expld.* *Doe d. Symmons v. Morse* (1830), 9 L. J. O. S. K. B. 77. *Consd.* *Lowe v. Adams*, [1901] 2 Ch. 598. *Refd.* *Doe d. Tucker v. Morse* (1830), 1 B. & Ad. 365. *Mentd.* *Zouch d. Forse v. Forse* (1806), 7 East, 186; *Roe d. Brune v. Pridcaux* (1808), 10 East, 158; *Smith v. Widlake* (1877), 3 C. P. D. 10; *Croft v. Blay*, [1919] 2 Ch. 343; *Lloyd-Jones v. Clark-Lloyd*, [1919] 1 Ch. 424.

5773. —.]—*SAUVAGE v. DUPUIS*, No. 5790, *post*.

5774. — To bar interest of tenant's creditors.]

—A tenancy from year to year cannot be determined so as to bar the interest of the tenant's creditors, unless there be either a legal notice to quit, or a surrender in writing.—*DOE d. READ v. RIDOUT* (1814), 5 Taunt. 519; 128 E. R. 792.

*Annotations*:—*Refd.* *Doe d. Huddleston v. Johnston* (1825), *McCle. & Yo.* 141. *Mentd.* *Nation v. Tozer* (1834), 3 L. J. Ex. 234.

5775. —.]—Tenant for life granted a lease, rendering rent in money & a quantity of culm to be carried to the lord's house. After the death of the tenant for life, the remainderman sent his servant to the different tenants for the culm to be brought home. Culm was accordingly sent twice, at intervals, & received:—*Held*: even assuming the lease granted by the tenant for life to be invalid, the remainderman had adopted the tenant so far, that the latter was entitled to a notice to quit before ejectment could be maintained.—*DOE d. TUCKER v. MORSE* (1830), 9 L. J. O. S. K. B. 77; 1 B. & Ad. 365; 109 E. R. 822.

*Annotation*:—*Refd.* *Croft v. Blay* (1919), 35 T. L. R. 556.

5776. Exception to rule—Agreement of parties.]

—By deed dated June 1, 1871, A. mortgaged a mill & other premises to the trustees of a building society. The mtge. deed contained an attornment clause whereby A. attorned tenant from year to year to the trustees in respect of the mtged. premises at a yearly rent of £800, to be paid by equal quarterly payments, & it was thereby agreed that it should be lawful for the trustees "at any time after Sept. 1, 1871, without giving previous notice of their intention so to do, to enter upon & take possession of the premises, & to determine the tenancy created by the aforesaid attornment." A. filed a liquidation petition on May 17, 1879, when a receiver was appointed, & notice of the petition & the appointment was given to the mtgees. On May 19, the mtgees. entered & distrained upon the goods & chattels on the premises in respect of a half-year's rent:—*Held*: the attornment clause created a tenancy from year to year, although determinable at the will of the landlord, & not a tenancy at will, & the mtgees. were entitled, under 32 & 33 Vict. c. 71, s. 34, to distrain for the half-year's rent due from A. to them at the date of the petition.

There is no principle of law which prevents persons who are free to contract from agreeing that a tenancy may be determined on whatever notice they like (*COTTON, L.J.*).—*Re THRELFALL, Ex p. QUEEN'S BENEFIT BUILDING SOCIETY* (1880), 16 Ch. D. 274; 44 L. T. 74; 29 W. R. 128; *sub nom. Re THRELFALL, Ex p. BLAKEY*, 50 L. J. Ch. 318, C. A.

*Annotations*:—*Consd.* *King v. Eversfield*, [1897] 2 Q. B. 475. *Mentd.* *Re Knight, Ex p. Volsey* (1882), 21 Ch. D. 442.

See, also, MORTGAGE.

## SUB-SECT. 2.—TENANCIES AT WILL AND AT SUFFERANCE.

5777. Tenancy at will.]—Half a year's notice must be given to a tenant at will or his exor. to quit, or ejectment does not lie. Six months' notice is not sufficient.—*PARKER d. WALKER v. CONSTABLE* (1769), 3 Wils. 25; 95 E. R. 913.

5778. —.]—If a tenant, whose lease has expired, is permitted to continue in possession, pending a treaty for a further lease, he is not a tenant from year to year; but so strictly at will, that he may be turned out of possession without notice. *Aliter*, if he has continued in possession a year, or rent has been received.—*DOE d. HOLLINGSWORTH v. STENNETT* (1799), 2 Esp. 717, N. P.

*Annotations*:—*Refd.* *Persse v. Kinnear* (1859), 1 L. T. 77; *Morgan v. Harrison*, [1907] 2 Ch. 137. *Mentd.* *Dougal v. McCarthy* (1893), 68 L. T. 699.

5779. —.]—Tenant in tail having received an ancient rent of £1 18s. 6d. from the lessee in possession under a void lease granted by tenant for life under a power, the rack rent value of which was £30 a year, cannot maintain an ejectment, laying his demise, at least, on a prior day, without giving the lessee some notice to quit, so as to make him a trespasser, after such recognition of a lawful possession either in the relation of tenant, or at least, as continuing by sufferance till notice.—*DENN d. BRUNE v. RAWLINS* (1808), 10 East, 261; 103 E. R. 774; *previous proceedings, sub nom. ROE d. BRUNE v. PRIDEAUX*, 10 East, 158.

*Annotations*:—*Mentd.* *Oakley v. Monck* (1866), L. R. 1 Exch. 159; *Smith v. Widlake* (1877), 3 C. P. D. 10.

5780. —.]—The vendor of a term, before the whole of the purchase money is paid, agrees with the purchaser that the latter shall have possession of the premises till a given day, paying the reserved rent in the meantime, & that if he does not pay the residue of the purchase-money on that day, he shall forfeit the instalments already paid & shall not be entitled to an assignment of the lease. The purchaser being thus put into possession, if the residue of the purchase-money is not paid at the day appointed, the vendor may maintain an ejectment without any notice to quit or demand of possession.—*DOE d. LEESON v. SAYER* (1811), 3 Camp. 8, N. P.

5781. —.]—Agreement between P. & W. for the sale of lands to W., to be completed on Mar. 25, & before the day W. agrees to let to deft. from that day, & deft. is let into possession before the day by consent of P., upon notice to P. that W. had agreed to let to him; on May 29, conveyance executed as of Mar. 25, subject to a term redeemable on payment by W. of purchase-money with interest, with power to P. to enter for default of payment by W.:—*Held*: P. might bring ejectment for default of payment, without giving deft. notice to quit.—*DOE d. PARKER v. BOULTON* (1817), 6 M. & S. 148; 105 E. R. 1198.

5782. —.]—The duly elected minister of a dissenting congregation, who is put in possession of a chapel & dwelling-house by trustees, in whom they are legally vested, in trust to permit the chapel to be used for the purpose of religious worship, is mere tenant at will to such trustees, & his tenancy is determined by a demand of possession without any previous notice to quit.—*DOE d. JONES v.*

## PART XXIII. SECT. 1, SUB-SECT. 2.

5777i. Tenancy at will.]—A tenancy at will may be subject to a stipulation that it shall not be determined without reasonable notice, & in such a case a

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notice by the lessor of his intention to determine the will does not determine the tenancy until the expiration of the period of reasonable notice.—*LANDALE v. MENZIES* (1909), 9 C. L. R. 89.—*AUS.*

5777ii. —.]—CANADA PERMANENT BUILDING & SAVINGS SOCIETY v. BYERS (1869), 19 C. P. 473.—*CAN.*

5777iii. —.]—CHAIINE v. CROKER (1883), 12 L. R. Ir. 151.—*IR.*

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*Sect. 1.—Necessity for: Sub-sects. 2, 3 & 4. Sect. 2: Sub-sect. 1.]*

JONES (1830), 10 B. & C. 718; 5 Man. & Ry. K. B. 616; 8 L. J. O. S. K. B. 310; 109 E. R. 616.

*Annotations:—Refd. Perry v. Shipway (1859), 1 Giff. 1; Spurgin v. White (1860), 2 Giff. 473.*

**5783. S. P. DOE d. NICHOLL v. M'KAE** (1830), 10 B. & C. 721; 5 Man. & Ry. K. B. 620; 8 L. J. O. S. K. B. 311; 109 E. R. 618.

*Annotations:—Consd. Spurgin v. White (1860), 2 Giff. 473. Refd. Burton v. Brooks (1851), 11 C. B. 41; Perry v. Shipway (1859), 1 Giff. 1; Collier v. King (1861), K. & G. 385.*

**5784. —.**—[A lessee for years mortgaged his estate, & his term having become forfeited, the superior landlord recovered the premises by ejectment, & granted a new lease to the mtgee., who, having received possession of the premises from the mtgor., returned the key of the house to him, saying: "go on as before; pay me the money you owe me, & then you shall have a lease":—*Held*: this did not create a tenancy from year to year, & upon non-payment of the money due, & no rent having been paid, the mtgee. was entitled to maintain an ejectment without six months' notice to quit.—**DOE d. ROGERS v. PULLEN** (1836), 2 Bing. N. C. 749; 2 Hodg. 39; 3 Scott, 271; 5 L. J. C. P. 229; 132 E. R. 288.

**5785. —.**—[Where, under a contract of purchase, by which the vendee was let into possession immediately, & was to pay 5 *per cent.* interest upon the purchase-money, if the contract were not completed within three months, until its completion; & it was not completed within that time, & he continued in possession, but failed in the payment of the interest:—*Held*: only a tenancy at will existed between the parties, & consequently, no notice to quit was necessary before bringing an ejectment.—**DOE d. TOMES v. CHAMBERLAINE** (1839), 5 M. & W. 14; 9 L. J. Ex. 38; 151 E. R. 7. *Annotation:—Refd. Ley v. Peter (1858), 3 H. & N. 101.*

**5786. —.**—[**JERRED v. EDWARDS** (1891), 92 L. T. Jo. 8.

**5787. — Custom of London.**—[By the custom of London a tenant at will paying under 40s. rent shall not be turned out without a quarter's warning & a tenant at will paying above 40s. *per annum* shall not be turned out without half a year's warning.—**DETHIK v. SAUNDERS** (1657), 2 Sid. 20; 82 E. R. 1233.

**5788. Tenancy at sufferance.**—[If a man gets into possession of a house to be let, without the privity of the landlord, & they afterwards enter into a negotiation for a lease, but differ upon the terms; the landlord may maintain ejectment to recover possession of the premises, without giving any notice to quit

If this was a tenancy of any sort it was a tenancy

**5788i. Tenancy at sufferance.**—[Where a tenant, under a parol lease for seven years holds over the term, no rent having been paid, no notice to quit is necessary before ejectment brought by the landlord.—**DOE d. PARKINSON v. HAUTMAN** (1839), 2 N. B. R. (Ber.) [645], 434.—**CAN.**

**5788ii. —.**—[**DOE d. WISMER v. HEARNES** (1849), 6 U. C. R. 193.—**CAN.**

**PART XXIII. SECT. 1, SUB-SECT. 3.**

**5789i. Tenancy for one year certain.**—[In the case of a lease for one year certain, the tenancy expires by effluxion of time, & notice to quit is not necessary to determine it.—**SALESSES v. HARRISON** (1911), 10 E. L. R. 544; 41 N. B. R. 103.—**CAN.**

**t. — With privilege of holding over.**—[Pltf. leased to deft. for one year, with the privilege of holding for an indefinite time, on condition that three months' notice in writing should be given prior to leaving the premises, & prior to the termination of a full year, by either party so inclined:—*Held*: deft. was bound to give three months' notice of his intention to quit at the end of the first year.—**COUNTER v. MORTON** (1851), 9 U. C. R. 253.—**CAN.**

**a. Tenant holding under void lease.**—[A tenant holding under a lease for seven years, void for want of due execution, can be ejected at the end of the term without notice.—**HOLMES v. NORTH** (1876), 2 V. L. R. 84.—**AUS.**

**b. —.**—[**OSBORNE v. EARNSHAW** (1862), 12 C. P. 267.—**CAN.**

at sufferance & a notice to quit was unnecessary (**LORD ELLENBOROUGH**).—**DOE d. KNIGHT v. QUIGLEY** (1810), 2 Camp. 505, N. P.

**SUB-SECT. 3.—TENANCY FOR A TERM CERTAIN.**

**5789. Tenancy for one year certain.**—[The demise being for one year & no longer, a notice to quit is not necessary at the end of the year in order to put an end to the tenancy (*per CUR.*).—**COBB v. STOKES** (1807), 8 East, 358; 103 E. R. 380.

**5790. Yearly tenancy for residue of term.**—[Deft. agreed by parol to rent a house, as tenant from year to year, for the residue of a term, which was three years & three quarters; he held for three years & one quarter, & quitted:—*Held*: though perhaps he might have quitted without notice at the end of three years, yet the remaining longer implied a contract to pay rent for the residue of the term.—**SAUVAGE v. DUPUIS** (1811), 3 Taunt. 410; 128 E. R. 163.

**5791. Lease for term determinable on event.—To partners during partnership.**—[By the terms of a deed of co-partnership a house is to be used & occupied by the co-partners during the co-partnership. After a dissolution of partnership no notice to quit is necessary previous to an action of ejectment against a co-partner.—**DOE d. WATTHMAN v. MILES** (1816), 1 Stark. 181; 4 Camp. 373, N. P. *Annotation:—Refd. Pocock v. Carter, [1912] 1 Ch. 663.*

**SUB-SECT. 4.—WEEKLY AND OTHER PERIODIC TENANCIES.**

**5792. Weekly tenancy.**—[In the case of an ordinary weekly tenancy a week's notice to quit is not implied as a part of the contract, unless there be a usage to that effect; but, in the absence of such usage, a weekly tenant, who enters on a fresh week, may be bound to continue until the expiration of that week, or pay the week's rent. A week is not exceeded by holding for six days & two fractions of a day.—**HUFFELL v. ARMITSTEAD** (1835), 7 C. & P. 56, N. P.

*Annotations:—Consd. Jones v. Mills (1861), 10 C. B. N. S. 788. Refd. Towne v. Campbell (1847), 3 C. B. 921; Hoddesdon Gas & Coke Co. v. Haselwood (1859), 6 C. B. N. S. 239; Bowen v. Anderson, [1894] 1 Q. B. 164; Simmons v. Crossley, [1922] 2 K. B. 95.*

**5793. —.**—[**TOWNE v. CAMPBELL**, No. 5845, *post*.

**5794. —.**—[*Semble*: a tenancy from week to week can only be determined by a week's notice.—**JONES v. MILLS** (1861), 10 C. B. N. S.

**c. Lease of farm for specific term.**—[A person taking a farm on shares for a specific term is a lessee, & entitled to six months' notice to quit.—**DOE d. BUNNILL v. LIN** (1837), 2 Ont. Dig. 3841.—**CAN.**

**PART XXIII. SECT. 1, SUB-SECT. 4.**

**5792i. Weekly tenancy.**—[*Ex p. ROBERTS* (1853), 1 Legge, 775.—**AUS.**

**5792ii. —.**—[In the case of a weekly tenancy a notice to quit is not necessary before bringing ejectment.—**CALVERT v. TURNER** (1865), 2 W. W. & A. B. 174.—**AUS.**

**5792iii. —.**—[**R. v. SUTCLIFFE, Ex p. BROOKS** (1878), 4 V. L. R. 150.—**AUS.**

**d. Monthly tenancy.**—[**ORRER v. VERNON** (1864), 14 C. P. 573.—**CAN.**

788; 31 L. J. C. P. 66; 8 Jur. N. S. 387; 142 E. R. 664.

**Annotations:—***Consd.* Bowen v. Anderson, [1894] 1 Q. B. 164; *Simmons v. Crossley*, [1922] 2 K. B. 95. *Apld.* Queen's Club Gardens Estates v. Bignell, [1924] 1 K. B. 117.

**5795.** —.]—A weekly tenancy is not determined without notice at the end of each week. The continuance of the tenant's occupation on the expiration of each week does not render the landlord liable for the defects then existing, as if there had been a re-letting.—*BOWEN v. ANDERSON*, [1894] 1 Q. B. 164; 58 J. P. 213; 42 W. R. 236; 38 Sol. Jo. 131; 10 R. 47, D. C.

**Annotations:—***Consd.* *Simmons v. Crossley*, [1922] 2 K. B. 95. *Expld.* Queen's Club Gardens Estates v. Bignell, [1924] 1 K. B. 117. *Refd.* *Mellows v. Low*, [1923] 1 K. B. 522.

**5796.** —.]—The letting to a weekly tenant does not expire at the end of the first & each succeeding week. In the ordinary course it is a letting for a period of time determinable by due notice which is generally regarded as being one week (*McCARDIE, J.*).—*MELLOWS v. LOW*, [1923] 1 K. B. 522; 92 L. J. K. B. 363; 128 L. T. 667; 39 T. L. R. 190; 67 Sol. Jo. 261; 21 L. G. R. 180, D. C.

**Annotations:—***Apld.* Queen's Club Gardens Estates v. Bignell, [1924] 1 K. B. 117. *Mentd.* *Keeves v. Dean*, *Nunn v. Pellegrini*, [1924] 1 K. B. 685.

**5797. Quarterly tenancy.**—*TOWNE v. CAMPBELL*, No. 5845, *post*.

**5798.** —.]—*SIMMONS v. CROSSLEY*, No. 5813, *post*.

## SECT. 2.—LENGTH OF NOTICE—HOW REGULATED.

### SUB-SECT. 1.—BY TERMS OF TENANCY.

**5799. General rule.**—Agreement to take a farm, the arable from old Candlemas, the pasture from old Lady Day, & the meadow from old May Day, paying rent half-yearly at old Michaelmas & Lady Day, is substantially a taking of the whole from old Lady Day; & notice to quit delivered before old Michaelmas, is sufficient to determine the tenancy.

In tenancies from year to year, which these kinds of holdings over are held to be, there must be six months' notice on either side to quit, according to the ancient law, except where any special agreement or the custom of particular places intervenes (*per CUR.*).—*DOE d. DAGGET v. SNOWDON* (1779), 2 Wm. Bl. 1224; 96 E. R. 720.

**Annotations:—***Apld.* *Doe d. Strickland v. Spence* (1805), 6 East, 120. *Refd.* *Doe d. Allan v. Calvert* (1802), 2 East, 376; *Rutland v. Wythe* (1843), 10 Cl. & Fin. 419.

**5800.** —.]—Agreement for a demise for a year, the rent to be paid weekly, & to have a month's warning, if no default was made in payment of the rent; but which agreement the lessor afterwards refused to execute, & the tenant paid his rent weekly:—*Held*: he was entitled to a month's notice to quit, though the agreement was not executed, & although, if a weekly tenant, a week's notice was good.—*DOE d. PEACOCK v. RAFFAN* (1806), 6 Esp. 4, N. P.

**Annotation:—***Refd.* *Huffell v. Armitstead* (1835), 7 C. & P. 56.

**5801.** —.]—An agreement for a mining lease contained certain provisions enabling the lessors

to determine the tenancy on certain contingencies, & also the following clause: the "lessees to be at liberty to determine this agreement, or the lease hereby agreed to be granted, & to abandon the said ironworks, on giving to the lessor six months' notice in writing of their intention so to do." The lessees entered & worked the mines & paid rent, but no lease was ever executed. On Aug. 10, 1863, the lessees gave notice of their intention to quit at the end of six months:—*Held*: in an action to recover the rent for a whole year, this being a mining lease, & taking into consideration the surrounding circumstances, the lessees were entitled to determine the tenancy at any time by giving six months' notice, such tenancy to expire at the expiration of six months after the date of the notice.

All contracts are to be construed according to the intention of the parties, & in construing a contract, you must take the words of the instrument & the surrounding circumstances at the time it is made. . . . It is competent to the parties to make special terms—to make the tenancy determinable at a three months' or a six months' notice, to expire at any time; but in the absence of such special arrangement, the general presumption holds. Premises are let for one year & so on for any number of years the parties may mutually agree: either party is at liberty to give the other a six months' notice that he will not let or take the land for the ensuing year, that is the meaning of the ordinary six months' notice to quit (*ERLE, C.J.*).—*BRIDGES v. POTTS* (1864), 17 C. B. N. S. 314; 33 L. J. C. P. 338; 11 L. T. 373; 10 Jur. N. S. 1049; 144 E. R. 127.

**Annotation:—***Consd.* *Soames v. Nicholson*, [1902] 1 K. B. 157.

**5802.** —.]—*Re THRELFALL, Ex p. QUEEN'S BENEFIT BUILDING SOCIETY*, No. 5776, *ante*.

*See, also*, No. 5844, *post*.

**5803. Proviso for reasonable time after expiration—For removal of goods.**—There is no objection in law to a tenancy determinable by a week's notice to quit, & a reasonable time being allowed after the expiration of the notice for the tenant to remove his goods.

A. let a house to B. as weekly tenant on the terms that A. would allow B. a reasonable time to remove his goods after the termination of a notice to quit. A. died, & his son C. succeeded to the property & received rent from B. C. gave B. a week's notice to quit, & at the end of the week, took possession of the premises & refused to allow B. a reasonable time to remove his goods:—*Held*: a jury were justified in finding that C. was bound by the stipulation respecting the tenancy entered into by his father, & B.'s tenancy continued for a reasonable time after the notice so far as was necessary for the purpose of removing the goods.—*CORNISH v. STUBBS* (1870), L. R. 5 C. P. 334; 39 L. J. C. P. 202; 22 L. T. 21; 18 W. R. 547.

**Annotations:—***Refd.* *Smith v. Egginton* (1874), 30 L. T. 521. *Mentd.* *Mellor v. Watkins* (1874), L. R. 9 Q. B. 400; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608; *Hurst v. Picture Theatres*, [1915] 1 K. B. 1; *Wedd v. Porter* (1915), 113 L. T. 819.

**5804. Variation by local custom.**—In a lease for a yearly tenancy, determinable on May 13, in any succeeding year, it was expressly provided that six calendar months' notice to quit should be given by either side. In that part of the country, county Durham, it was admittedly the custom for

### PART XXIII. SECT. 2, SUB-SECT. 1.

**5799i. General rule.**—A tenant, under a written lease for a year, agreed verbally to give up possession on a week's notice if the landlord could sell the property; he remained in possession

after the termination of the lease, & the landlord gave him notice to quit at the termination of the third quarter in the second year:—*Scmble*: The verbal agreement formed part of the terms under which he remained in possession,

& the tenancy was properly determined by the notice.—*Ex p. COLE* (1853), 2 All. 539.—*CAN.*

**5799ii.** —.]—*BURGOYNE v. MALLETT* (1912), 21 W. L. R. 566; 5 D. L. R. 62.—*CAN.*

**Sect. 2.—Length of notice—How regulated: Sub-sects. 1, 2 & 3, A.]**

tenants of small holdings to pay rent on Nov. 22 & on May 13 in each year; & notice to quit given after Nov. 13 but before Nov. 22 was commonly accepted as a full six months' notice expiring on May 13 following. On Nov. 21, 1895, a notice to quit on May 13, 1896, having been served on the tenant under the lease above-mentioned:—*Held*: notwithstanding the custom, the notice was invalid, it not being a six calendar months' notice as required by the terms of the lease.—*TRAVERS v. MASON* (1896), 45 W. R. 77; 41 Sol. Jo. 29; 60 J. P. Jo. 724, D. C.

**5805. Less than six months—Yearly tenancy—Twenty-eight days.]—CANNON BREWERY v. NASH, No. 5850, *post*.**

**5806. ——— Three months.]—**By an agreement of tenancy a public-house was let from a certain date "until such tenancy shall be determined as hereinafter mentioned" at a yearly rent of £70 clear of all deductions except land & property tax payable quarterly on certain named days, the tenant agreeing, *inter alia*, to keep the premises in repair. The agreement contained a provision that it should be lawful for either party "to determine the tenancy hereby created by giving to the other of them three calendar months' notice in writing for that purpose:—*Held*: the agreement created a yearly tenancy determinable by three months' notice expiring with any year of the tenancy, & not a tenancy for an indefinite term determinable by a three months' notice expiring at any time.—*LEWIS v. BAKER*, [1906] 2 K. B. 599; 75 L. J. K. B. 848; 95 L. T. 10; 22 T. L. R. 680; 50 Sol. Jo. 616, C. A.

*Annotation*:—*Refd.* *Simmons v. Crossley*, [1922] 2 K. B. 95.

**5807. ———.]—**By a tenancy agreement property was let from Apr. 1, 1917, to Apr. 1, 1918, at a yearly rent of £90 or £7 10s. per month, the first payment of £7 10s. to be made on the signing of the agreement, & thenceforward in advance on the first day of each month "until either party shall give three months' notice in writing to terminate the tenancy." The tenant entered into possession, & paid rent regularly in advance. He was served in 1919 with a three months' notice to quit expiring on July 1, 1919, but refused to go out, asserting that he was a yearly tenant, & therefore the notice was invalid as it did not expire at the period when the tenancy began:—*Held*: (1) the tenant holding over was subject to exactly the same conditions as were contained in the agreement; (2) notice could be given at any time to expire at the end of any month; & (3) in these circumstances the notice was a valid one & the landlords were entitled to recover possession.—*MITCHELL v. TURNER* (1919), 63 Sol. Jo. 776.

**5808. ———.]—**It is not repugnant to the nature of a tenancy from year to year to include a provision that it be determinable by a notice to quit less than six months in length; or by notices to quit by the landlord & tenant respectively which are unequal in length; or by notice to quit by either party, & also in some other way depending upon the discretion of one of the parties only, as, for example, on the sale of the premises by the landlord.

A farm being in the occupation of T. as tenant from year to year subject to the usual six months' notice to quit on either side, & his tenancy being about to expire, an agreement was entered into in Feb. 1915, between plffs., who were the owners of the farm, & deft., by which the latter engaged

"to become tenant of the farm . . . now occupied by T. from Apr. 6, next . . . upon the same terms as he is now tenant until Apr. 6, 1916, or such later date being Apr. 6, immediately following the sale of the farm." Deft. took possession of the farm under the agreement. Pltf. sold the farm in Oct. 1919. Deft. refused to give up possession on Apr. 6, 1920, & plffs. brought an action against him for possession:—*Held*: the agreement, on its true construction, was for a tenancy from year to year, determinable by the usual six months' notice to quit by either party, or on Apr. 6, which next followed the sale of the farm by the lessors; the last-mentioned mode of determining the tenancy was not repugnant to the nature of a tenancy from year to year; in the circumstances the tenancy was duly determined on Apr. 6, 1920, & plffs. were entitled to possession of the farm.—*ALLISON v. SCARGALL*, [1920] 3 K. B. 443; 89 L. J. K. B. 1084; 123 L. T. 815; 36 T. L. R. 708.

*Annotation*:—*Refd.* *Gray v. Spyer*, [1921] 2 Ch. 549.

**5809. Different periods by landlord & tenant respectively.]—ALLISON v. SCARGALL, No. 5808, *ante*.**

**5810. Notice by either depending on discretion of one.]—ALLISON v. SCARGALL, No. 5808, *ante*.**

**SUB-SECT. 2.—BY CUSTOM.**

**5811. General rule.]—DOE d. DAGGET v. SNOWDON, No. 5799, *ante*.**

**5812. — Tenancy at will—Custom of London.]—DETHIK v. SAUNDERS, No. 5787, *ante*.**

**5813. Proof of custom—Admissibility.]—**In ejectment for a messuage in London, it was objected against the title of pltf., that this was a messuage above 40s. *per annum* rent, & that the custom of the city is, that there ought to be warning given for the space of half a year where the messuage is of such a rent, & by the space of a quarter of a year where it is under such a rent; & an ancient book in French was produced, in which such custom was registered; the which was allowed to prove the custom.—*TYLEY v. SEED* (1696), Skin. 649; 90 E. R. 290.

**5813a. ———.]—ROGERS v. KINGSTON-UPON-HULL DOCK CO., No. 5833, *post*.**

**5814. — Necessity for.]—Qu.**: whether a year's notice to quit is necessary, when it has been the custom to give that notice.

It is too much for me to say that under a special custom twelve months' notice is not necessary. But there ought to be very strong evidence (*LORD KENYON, C.J.*).—*ROE d. HENDERSON v. CHARNOCK* (1790), Peake, 6, N. P.

**5815. ———.]—**A tenant from year to year of a stone quarry in Yorkshire received from his landlord six months' notice to quit. The tenant claimed the right, under an alleged custom of the district, to be allowed to continue in possession a reasonable time after the expiration of the notice, to enable him to "get the stone he had "barred." At the expiration of the notice the landlord brought an action of ejectment against the tenant, who thereupon filed a bill to restrain the action, & setting up the custom as against the landlord:—*Held*: the evidence failed to prove the existence of the custom as alleged; &, even if it had existed, the proper remedy of the tenant would have been at law.—*VINT v. CONSTABLE* (1871), 25 L. T. 324.

**5816. Custom in neighbouring territory.]—ROE d. BROWN v. WILKINSON** (1773), Co. Litt. 270 b, n. **Custom ousted by terms of lease.]—See No. 5804, *ante*.**

## SUB-SECT. 3.—BY COMMON LAW.

## A. Yearly Tenancies.

**5817. Reasonable notice.]**—DOE d. MARTIN v. WATTS, No. 5772, *ante*.

**5818. One month's notice.]**—A month's notice not sufficient to quit a lease from year to year; & if the party die, it is not sufficient to the exor.—GULLIVER d. TASKER v. BURR (1766), 1 Wm. Bl. 596; 96 E. R. 345.

*Annotation:*—**Refd.** Parker d. Walker v. Constable (1769), 3 Wils. 25.

**5819. Six months' notice.]**—DOE d. DAGGET v. SNOWDON, No. 5799, *ante*.

**5820. —.]**—In the case of a tenancy from year to year there must be half a year's notice to quit, ending at the expiration of the year.—RIGHT d. FLOWER v. DARBY (1786), 1 Term Rep. 159; 99 E. R. 1029.

*Annotations:*—**Consd.** Bridges v. Potts (1864), 17 C. B. N. S. 314; Wilkinson v. Calvert (1878), 3 C. P. D. 360; Barlow v. Teal (1885), 15 Q. B. D. 403. **Refd.** Doe d. Clark v. Snarridge (1845), 6 L. T. O. S. 172; Doe d. Hull v. Wood (1845), 14 M. & W. 682; Cattley v. Arnold, Banks v. Arnold (1859), 1 John. & H. 651; Jones v. Mills (1861), 10 C. B. N. S. 788; Morgan v. Davies (1878), 3 C. P. D. 260; Dougal v. McCarthy, [1893] 1 Q. B. 378; Sidebotham v. Holland, [1895] 1 Q. B. 378; Wedd v. Porter (1916), 85 L. J. K. B. 1298; Croft v. Blay, [1919] 2 Ch. 343; Cole v. Kelly, [1920] 2 K. B. 106.

**5821. —.]**—The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences. In order to obviate them, the cts. very early raised an implied contract for a year, & added that the tenant could not be removed at the end of the year without receiving six months' previous notice (LORD KENYON, C.J.).—DOE d. SHORE v. PORTER (1789), 3 Term Rep. 13; 100 E. R. 429.

*Annotations:*—**Consd.** Wilkinson v. Calvert (1878), 3 C. P. D. 360. **Refd.** R. v. Stone (1795), 6 Term Rep. 295; Sidebotham v. Holland, [1895] 1 Q. B. 378; Croft v. Blay, [1919] 1 Ch. 277. **Mentd.** James v. Dean (1805), 11 Ves. 383.

**5822. —.]**—JOHNSTONE v. HUDLESTONE, No. 5832, *post*.

**5823. —.]**—GOODE v. HOWELLS, No. 5943, *post*.

**5824. —.]**—BRIDGES v. POTTS, No. 5801, *ante*.

**5825. —.]**—ALLISON v. SCARGALL, No. 5808, *ante*.

**5826. — Rent reserved quarterly.]**—(1) Where rent is reserved quarterly it does not dispense with the necessity for six months' notice to quit.

(2) When three months' notice only were given, & the lessor expressed neither an assent nor dissent to the admitting it, & took the rent up to the time when the tenant quitted, it shall be taken as a waiver of the regular notice to quit, & an acquiescence on the part of the lessor.—SHIRLEY v. NEWMAN (1795), 1 Esp. 265, N. P.

*Annotations:*—**As to (2)** **Consd.** Johnstone v. Hudlestone (1825), 4 B. & C. 922; Russell v. Landsberg (1845), 7 Q. B. 638.

**5827. — Tenancy of incorporeal hereditament.]**—A lessor purported to lease certain shooting rights for one year from Mar. 25, 1895, by an instrument not under seal. On Dec. 31, 1895, the lessor consented to a future reduction of rent in a letter addressed to the lessee. Subsequently to Mar. 25, 1896, the lessee continued for some

years longer in tacit possession of the shooting at the reduced rent, but nothing further was agreed between the parties as to the nature or duration of such tacit possession. On Feb. 26, 1901, the lessor determined the said possession by verbal, & on Mar. 23 by written, notice, as from Mar. 25 then instant:—**Held:** the common law rule as to the necessity of giving six months' notice to determine a tenancy from year to year in a corporeal hereditament does not apply in the case of an incorporeal hereditament such as the one now in question; & assuming that debts. were entitled to "reasonable notice," "reasonable notice" had in fact been given in the circumstances.—LOWE v. ADAMS, [1901] 2 Ch. 598; 70 L. J. Ch. 783; 85 L. T. 195; 50 W. R. 37; 17 T. L. R. 763.

*Annotations:*—**Mentd.** Jones v. Tankerville, [1909] 2 Ch. 440; Hurst v. Picture Theatres, [1915] 1 K. B. 1.

**5828. — Meaning of—Customary half year.]**—DOE d. HARROP v. GREEN (1802), 4 Esp. 198, N. P. *Annotation:*—**Mentd.** Haddrick v. Heslop (1848), 12 Q. B. 267.

**5829. — — — —.]**—A notice given on Sept. 26, to quit at the end of six calendar months, is good to determine a holding, commencing on Mar. 25.—HOWARD v. WEMSLEY (1806), 6 Esp. 53, N. P.

**5830. — — — —.]**—A six months' notice to quit need not contain six full calendar months; a customary half year, as, from Sept. 28 to Mar. 25, suffices.—ROE d. DURANT v. DOE (1830), 6 Bing. 574; 4 Moo. & P. 391, 531; 8 L. J. O. S. C. P. 227; 130 E. R. 1402.

*Annotations:*—**Refd.** Morgan v. Davies (1878), 3 C. P. D. 260; Sidebotham v. Holland, [1895] 1 Q. B. 378.

**5831. — — — —.]**—A six months' notice to determine a yearly tenancy commencing on one of the ordinary feast days, means a "customary six months," that is, from one of the usual quarter days to the quarter day next but one following, though such six months should exceed or fall short of the number of days which constitute half a year. Consequently a notice served on Mar. 26, to quit on Sept. 29, then next, is not a valid notice.—MORGAN v. DAVIES (1878), 3 C. P. D. 260; 39 L. T. 60; 26 W. R. 816.

*Annotations:*—**Distd.** Barlow v. Teal (1885), 15 Q. B. D. 501. **Refd.** Sidebotham v. Holland, [1895] 1 Q. B. 378.

**5832. — — — Six lunar months.]**—A notice to quit, given by a tenant less than six months before the expiration of the current year of his tenancy, is not binding upon the tenant himself; & does not authorise the landlord, upon the tenant's refusing to quit, to charge him with the double rent.

The law requires that there must be half a year's notice to quit in order to determine such a tenancy. . . . But in legal proceedings the word "months" means lunar months, unless the contrary appear to be the meaning from the subject matter to which that term is applied. Six lunar months must necessarily be less than half a year, & therefore, there has not been the notice required by law to determine the tenancy (BAYLEY, J.).—JOHNSTONE v. HUDLESTONE (1825), 4 B. & C. 922; 7 Dow. & Ry. K. B. 411; 4 L. J. O. S. K. B. 71; 107 E. R. 1302.

*Annotations:*—**Refd.** Weddall v. Capes (1836), 1 Gale, 432; Doe d. Murrell v. Milward (1838), 1 Horn & H. 79;

Bom. 38.—IND.

**e. Three months' notice.]**—Notice by tenant to quit in Apr. next, the tenancy actually terminating on Apr. 3, & served three months before the actual termination.—**Held:** sufficient.—BROWN v. BOOLE (1840), 1 Thom. 1st ed. 108; 2nd ed. 137.—CAN.

## PART XXIII. SECT. 2, SUB-SECT. 3.—A.

**58171. Reasonable notice.]**—In the absence of custom to the contrary, no tenant from year to year can be ejected without being served at a reasonable time beforehand with a notice to quit at the period of the year at which the

tenancy commenced.—ABDULLA RAWUTAN v. PAKKARI MOHAMED RAWUTAN (1878), 1 L. R. 2 Mad. 346.—IND.

**58191. Six months' notice.]**—**Re** HADDISTY & BISHOPRIC (N. W. T.) (1905), 2 W. L. R. 21.—CAN.

**581911. —.]**—JACKS & Co. v. JOOSAB MAHOMED (1923), 1 L. R. 48



in absence of evidence of a contract or usage requiring notice to quit, a notice is necessary to determine a weekly hiring of furnished apartments.—*TOWNE v. CAMPBELL* (1847), 3 C. B. 921; 3 L. J. C. P. 128; 8 L. T. O. S. 360; 11 J. P. 30; 136 E. R. 369.

*notation*.—*Reid*. *Jones v. Mills* (1861), 8 Jur. N. S. 387.

#### SUB-SECT. 4.—BY STATUTE.

**Agricultural Holdings Acts.**—*See* AGRICULTURE, vol. II., pp. 8, 9, Nos. 22–24.

#### SECT. 3.—TIME FOR GIVING NOTICE.

**5846. Before commencement of periodic term.**—If a lease be made at will, after a quarter of a year commenced the lessee may determine it, but when he is obliged to pay that quarter's rent; & if the lessor determines his will after the commencement of a quarter, he shall lose the rent for that quarter; but where a lease is made from year to year, so long as both parties please, ere after a year is commenced, neither the lessor or lessee can determine their wills for that year; they having for so long time certainly willed the state (*HOLT*, C.J.).—*LAYTON v. FIELD* (1701), 10 L. T. O. S. 415; 3 Salk. 222; 90 E. R. 1129.

**5847. Tenancy for fixed term—Continuation of tenancy.**—If premises are taken "for twelve months certain, & six months' notice to quit afterwards" the tenancy may be determined by six months' notice to quit expiring at the end of the first year.—*THOMPSON v. MABERLY* (1811), 2 Camp. 573, N. P.

*notations*.—*Expld.* *Doe d. Chadborn v. Green* (1839), 9 Ad. & El. 658. *Apld.* *Brown v. Symons* (1860), 29 L. J. C. P. 251. *Expld.* *Gardner v. Ingram* (1889), 61 L. T. 729. *Reid.* *Tilling v. James* (1906), 22 T. L. R. 599.

**5848.** ———.]—A tenancy from year to year so long as both parties please is determinable at the end of the first as well as of any subsequent year, unless, in creating such tenancy, the parties use words showing that they contemplate a tenancy for two years at least.

Where a tenant, at the expiration of a term of years, held over, & the landlord received rent from him:—*Held*: the landlord might, by a half year's notice, require him to quit at the end of the first year after the term of years had expired.—*DOE d. CLARKE v. SMARIDGE* (1845), 7 Q. B. 957; 1 L. J. Q. B. 327; 6 L. T. O. S. 172; 9 Jur. 781; 5 E. R. 748.

*notation*.—*Reid.* *Croft v. Blay*, [1919] 1 Ch. 277.

**5849.** ———.]—A demise by deed for a term of three years "determinable on a six months' previous notice to quit by either lessor or lessee; or, otherwise to continue from year to year until the term shall cease by notice to quit at the usual times," is a demise for three years certain, & the tenancy cannot be determined sooner than by a six months' notice ending with the third year.—*NES v. NIXON* (1862), 1 H. & C. 48; 31 L. J. Ex. 5; 6 L. T. 330; 8 Jur. N. S. 648; 158 E. R. 3.

**5850.** ———.]—Premises were let, under a written agreement, "for the term of one year certain from the date thereof & so on from year to year, unless or until the tenancy thereby created should be determined by either party giving to the other twenty-eight days' notice in writing, such notice to expire at any period of the year without any reference to the time of entry, the date of the agreement, or the commencement of the tenancy":—*Held*: the tenancy could not be determined by notice during the first year.—*CANNON BREWERY v. NASH* (1898), 77 L. T. 648; 14 T. L. R. 158, C. A.

**5851.** ———.]—A demise "for two years certain & thereafter from year to year until either party" gives a three months' notice to determine the tenancy is not determinable at the end of the two years, but it is a tenancy for three years at least, & only determinable by a notice expiring at the end of the third or any subsequent year.—*Re SEARLE, BROOKE v. SEARLE*, [1912] 1 Ch. 610; 81 L. J. Ch. 375; 106 L. T. 458; 56 Sol. Jo. 444.

**5852.** ———.]—An agreement provided that it should continue until Dec. 31, 1911, & should continue thereafter subject to determination by twelve months' previous notice. A notice was given in 1910 to determine the agreement on Dec. 31, 1911:—*Held*: the notice was invalid & of no effect.—*Re BRINSMEAD (JOHN) & SONS, LTD.* (1912), 56 Sol. Jo. 253.

**5853.** ———.]—A lease for five years contained a provision that "after the expiration of the first three years of the term," if the lessees should desire to determine the lease, & should give to the lessors six calendar months' previous notice in writing, such notice to determine in any quarter day, the lease should determine, on the expiration of such notice:—*Held*: no valid notice could be given until the expiration of the first three years, & the lease could not therefore be determined until the expiration of a further six months.—*Re LANCASHIRE & YORKSHIRE BANK'S LEASE, DAVIS (W.) & SON v. LANCASHIRE & YORKSHIRE BANK*, [1914] 1 Ch. 522; 83 L. J. Ch. 577; 110 L. T. 571, C. A.

*See, further, Sect. 4, post.*

**5854. Yearly tenancy—Notice during first year.**—A tenancy from year to year may be determined at the end of the first year by a six months' notice to quit.—*DOE d. HOGG v. TAYLOR* (1837), 1 Jur. 960.

**5854a.** ———.]—*DOE d. CLARKE v. SMARIDGE*, No. 5848, *ante*.

**5855.** ———.]—By a written agreement the tenancy was to be "from year to year from Michaelmas next, at the yearly sum of £55, payable half-yearly at Lady Day & Michaelmas, except the last half year, which portion of the rent shall be paid on or before Aug. 1, in that year; the tenant to dress the lands in the due course of husbandry, etc., & to allow the landlord or incoming tenant in the last year to enter on May 1, to make fallows, etc., the tenant to be allowed the use of the barns for stacking & threshing the crops, etc., of the last year, until May 1, after the tenancy":—*Held*: the agreement did not create

#### PART XXIII. SECT. 3.

**5846 i. Before commencement of periodic term.**—Where a yearly tenancy is on a particular date, a notice to quit on or before that date in any preceding year is sufficient.—*STORY v. DOBBS* (1883), 9 V. L. R. 150.—*AUS.*

**48 ii.** ———.]—When a monthly tenancy expires on the last day of the calendar month, notice to quit must

be served not later than that day in order to put an end to the lease at the end of the next calendar month.—*Re MAGEE v. SMITH* (1894), 10 Man. L. R. 1.—*CAN.*

**5846 iii.** ———.]—A notice to quit on or before the anniversary of the commencement of the tenancy is good.—*BURROWS v. MICKLESON* (1904), 24 C. L. T. 326; 14 Man. L. R. 739.—*C.*

**5846 iv.** ———.]—*Re CAMPBELL & DOERING*, [1925] 1 D. L. R. 1204; 1 W. W. R. 46; *reversg.*, *sub nom.* *CAMPBELL v. DOERING*, [1924] 2 D. L. R. 1131; 2 W. W. R. 95.—*CAN.*

**5846 v.** ———.]—*FULTON v. NUNN* (1904), T. S. 123.—*S. AF.*

**5847 i. Tenancy for fixed term—Continuation of tenancy.**—*VON FERBER v. ENRIGHT* (1900), 12 W. L. R. 216.—*C.*

**Sect. 3.—Time for giving notice. Sect. 4: Sub-sects. 1, 2 & 3, A.]**

a tenancy for more than a year, & notice to quit might be given, expiring at the end of the first year.—*DOE d. PLUMER v. MAINBY* (1847), 10 Q. B. 473; 16 L. J. Q. B. 303; 11 Jur. 308; 116 E. R. 180; *sub nom.* *DOE d. LOVER v. NAINBY*, 9 L. T. O. S. 50.

**5856.** ————].—A tenancy agreement in writing by which certain premises were let by pltf. to deft. at a rent of £60 *per annum* payable on the usual quarter days, provided that "the tenancy shall commence on Sept. 1, 1918, to continue from year to year until determined by three calendar months' notice to quit, which may be given on either side & at any time. On Apr. 29, 1919, pltf. gave to deft. a notice to quit which expired on Aug. 2, 1919 :—*Held* : the agreement created a yearly tenancy, & the notice was a bad notice in that it purported to determine the tenancy before the end of the first year.—*MAYO v. JOYCE*, [1920] 1 K. B. 824; 89 L. J. K. B. 561; 122 L. T. 777, D. C.

**5857. Validity of notice on Sunday.]**—Notice by tenant of intention to quit premises, good, though given on Sunday.—*SANGSTER v. NOY* (1867); 16 L. T. 157.

*Annotation* :—*Reid*. *Child v. Edwards*, [1909] 2 K. B. 753.

**SECT. 4.—DATE OF EXPIRATION OF NOTICE.**

**SUB-SECT. 1.—IN GENERAL.**

**5858. General rule—At end of period of tenancy.]**

—Where an agreement of demise for a year, from Mar. 25, preceding its date in June, of two cottages & pasture land, requires six months' notice of determination, that notice must follow the general rule, & expire at the end of the current year, though there is a clause for the payment of a proportionate part of the rent reserved for any time less than a year that the tenant shall occupy the premises.—*DOE d. WHITE v. OKEY* (1845), 5 L. T. O. S. 245; 9 J. P. 233.

**5859.** ————].—*PRECIOUS v. REEDIE*, No. 5844, *ante*.

**5860. Exception to rule—Agreement of parties—Proviso for notice "at any time."]**—An agreement of tenancy provided that the tenancy should commence on May 1, 1895, & that the rent should be payable quarterly on May 1, Aug. 1, Nov. 1, & Feb. 1, "subject to three months' notice on either side at any time to terminate this agreement." The lessor on Jan. 24, 1901, gave the tenant three months' notice to quit on Apr. 25 :—*Held* : the notice to quit was good.—*SOAMES v. NICHOLSON*, [1902] 1 K. B. 157; 71 L. J. K. B. 24; 85 L. T. 614; 50 W. R. 169; 40 Sol. Jo. 52, D. C.

*Annotations* :—*Reid*. *Lewis v. Baker*, [1905] 2 K. B. 576; *Croft v. Blay*, [1919] 1 Ch. 277; *Phipps* (Northampton & Towcester Breweries) *v. ROGERS*, [1924] 2 K. B. 45.

**5861. What constitutes "end of tenancy"—In yearly tenancy—Anniversary of date of commencement.]**—Premises are let from year to year,

upon an agreement, that either party may determine the tenancy by a quarter's notice. This notice must expire at that period of the year when the tenancy commenced.—*DOE d. PITCHER v. DONOVAN* (1809), 1 Taunt. 555; 2 Camp. 78; 127 E. R. 949.

*Annotations* :—*Distd.* *Doe d. King v. Grafton* (1852), 18 Q. B. 496. *Consd.* *Bridges v. Potts* (1864), 17 C. B. N. S. 314. *Apld.* *Dixon v. Bradford & District Ry. Servants' Coal Supply Soc.*, [1904] 1 K. B. 444. *Reid*. *Willelsen Overseers v. Paddington Overseers* (1863), 3 B. & S. 593; *Lewis v. Baker*, [1905] 2 K. B. 576.

**5862.** ————].—Deft. entered as tenant, under a written agreement, on May 7, 1850, but paid no rent :—*Held* : a six months' notice to quit, expiring on May 7, 1851, was a good notice.—*DOE d. CORNWALL v. MATTHEWS* (1851), 11 C. B. 675; 138 E. R. 640.

*Annotations* :—*Distd.* *Sidebotham v. Holland*, [1895] 1 Q. B. 378. *Mentd.* *Kelly v. Patterson* (1874), 30 L. T. 842.

**5863.** ————].—A tenant agreed in writing to take a tenement at a certain rent *per annum* from a certain date, & to pay rates & taxes. The agreement contained this clause : "three months' notice on either side to terminate this agreement" :—*Held* : the tenancy was a yearly tenancy, & a notice to quit expiring on any day not being an anniversary of the date of the commencement of the tenancy was invalid.—*DIXON v. BRADFORD & DISTRICT RAILWAY SERVANTS' COAL SUPPLY SOCIETY*, [1904] 1 K. B. 444; 73 L. J. K. B. 136; 90 L. T. 122; 20 T. L. R. 159.

*Annotations* :—*Consd.* *Lewis v. Baker*, [1905] 2 K. B. 576. *Reid*. *Croft v. Blay*, [1919] 1 Ch. 277; *Simmons v. Crossley*, [1922] 2 K. B. 95.

**5864.** ————].—*SIDEBOTHAM v. HOLLAND*, No. 5866, *post*.

**5865.** ————].—By an agreement a farm was let to defts. for a period of three years commencing on Mar. 25, 1907, & so on from year to year until the tenancy should be determined by either party giving to the other one year's notice in writing. On Mar. 21, 1910, pltfs. gave defts. a notice to quit on Mar. 25, 1911 :—*Held* : the notice so given was good.—*HERRON v. MARTIN* (1911), 27 T. L. R. 431.

**5866.** ————].—**Last day of current year.]**—(1) In determining tenancies commencing at a particular time, the expressions "at," "on," "from" or "on & from" are equivalent expressions.

(2) A notice to determine a yearly tenancy ought to expire on the last day of the current year; nevertheless a half year's notice to quit on the anniversary of the day on which the tenancy commenced is a valid notice.

H. became yearly tenant of S. under an agreement dated May 19, 1890, such yearly tenancy "commencing on May 19, instant." On Nov. 17, 1893, S. gave written notice to H. to quit & deliver up "possession to him on May 19, next" of the premises :—*Held* : such notice to quit was a valid notice; the tenancy commenced on May 19, & would be determined at midnight of May 18. A notice to quit on May 18, would equally have been a good notice.

**PART XXIII. SECT. 4, SUB-SECT. 1.**

**5858 i. General rule—At end of period of tenancy.]**—*Ex p. LE TONGE* (1911), 11 S. R. N. S. W. 96; 28 N. S. W. W. N. 14.—*AUS.*

**5858 ii.** ————].—*BAKER v. McCURDY* (1914), 30 W. L. R. 79; 7 W. W. R. 727.—*CAN.*

**5858 iii.** ————].—*Held* : deft., being rightfully in possession as a monthly tenant, could not be ejected without one month's notice expiring on the date on which his rent became

due.—*TOM GUNG v. FONG LEE* (1915), 48 N. S. R. 317.—*CAN.*

**5858 iv.** ————].—A weekly tenancy commencing on Thursday, held to be duly determined by written notice served on Thursday, Nov. 5, to quit & deliver up possession on or before Friday, Nov. 13.—*HARVEY v. COPELAND* (1898), 30 L. R. Ir. 412.—*IR.*

**5858 v.** ————].—A week's notice to quit, expiring on any day, is sufficient to determine a weekly tenancy.—*SKELLY v. THOMPSON* (1911), 45 L. T. 138.—*IR.*

**5858 vi.** ————].—A notice to quit served on Friday, Dec. 17, requiring deft. to give up possession of premises held under a weekly tenancy on Friday, Dec. 24, is sufficient, but deft. has the whole of Friday, Dec. 24, within which to give up possession, & a summons for possession served on that day is premature.—*SULLIVAN v. SHEEHAN* (1916), 50 I. L. T. 41.—*IR.*

**5861 i. What constitutes "end of tenancy"—In yearly tenancy—Anniversary of date of commencement.]**—*DEMPSEY v. TRACY*, [1924] 2 I. R. 171.—*IR.*

The express statement in this agreement that the tenancy is to commence on May 19, is too clear & unambiguous to warrant any inference which might otherwise have been drawn from the stipulation that the rent is to be paid by equal quarterly payments, in advance if demanded, on the usual quarter days (LINDLEY, L.J.).

Pltf. has only himself to blame for the difficulties he is in this case. Had he added the words which are very ordinarily inserted in a notice to quit, "or at the expiration of the year of your tenancy, which shall expire next after the end of one half year from the service of this notice" . . . all would have been in order (SMITH, L.J.).—SIDEBOTHAM v. HOLLAND, [1895] 1 Q. B. 378; 64 L. J. Q. B. 200; 72 L. T. 62; 43 W. R. 228; 11 T. L. R. 154; 39 Sol. Jo. 105; 14 R. 135, C. A.

**Annotations:**—As to (1) *Consd.* Brakspear v. Barton, [1924] 2 K. B. 88. *Refd.* Ratkes v. Ogle, [1921] 1 K. B. 576. As to (2) *Consd.* Re Lancashire & Yorkshire Bank's Lease, Davis v. Lancashire & Yorkshire Bank, [1914] 1 Ch. 522; Croft v. Blay, [1919] 2 Ch. 343. *Refd.* Dixon v. Bradford & District Ry. Servants' Coal Supply Soc., [1904] 1 K. B. 444; Meggeson v. Groves, [1917] 1 Ch. 158; Savory v. Bayley (1922), 38 T. L. R. 619; Simmons v. Crossley, [1922] 2 K. B. 95.

**5867.** — **Four weeks' tenancy—Periodical recurrence of day of commencement.**—Where a tenancy agreement is made for four weeks certain, & the tenancy, if not then determined, is to continue, subject to four weeks' notice, the notice must be such as to bring the tenancy to an end on a day which is a periodical recurrence of the day on which the tenancy began.—SAVORY v. BAYLEY (1922), 38 T. L. R. 619.

**5868.** — **Last day of period of tenancy.**—SIMMONS v. CROSSLEY, No. 5843, *ante*.

**5869.** — **Weekly tenancy—Last day of period of tenancy.**—SIMMONS v. CROSSLEY, No. 5843, *ante*.

**5870.** — **—**—QUEEN'S CLUB GARDENS ESTATES v. BIGNELL, No. 5932, *post*.

#### SUB-SECT. 2.—TENANCY COMMENCING ON FEAST-DAY.

**5871. Whether old or new style—Admissibility of evidence.**—Where a holding is general from Michaelmas, the custom of the country as to whether that shall be deemed old or new Michaelmas Day, is admissible evidence.—FURLEY d. CANTERBURY CORPN. v. WOOD (1794), 1 Esp. 198, N. P.

**Annotations:**—*Folld.* Doe d. Hall v. Benson (1821), 4 B. & Ald. 588; Den d. Peters v. Hopkinson (1823), 3 Dow. & Ry. K. B. 507.

**5872.** — **—**—The custom of the country cannot be set up against the legal presumption that Michaelmas means any other day than Sept. 29 (ERLE, C.J.).—HOGG v. NORRIS & BERRINGTON (1860), 2 F. & F. 246, N. P.

**5873.** — **Lease not under seal.**—Upon a parol demise, rent to take place from the following Lady Day, evidence of the custom of the country is admissible to show that by "Lady Day" the parties meant "Old Lady Day."—DOE d. HALL v. BENSON (1821), 4 B. & Ald. 588; 106 E. R. 1051.

**Annotations:**—*Folld.* Den d. Peters v. Hopkinson (1823), 3 Dow. & Ry. K. B. 507. *Mentd.* Spartali v. Bencke (1850), 10 C. B. 212.

**5874.** — **—**—Upon a written agreement to demise from the following "Lady Day," a notice to quit "on Apr. 6," is good, upon parol evidence that by "Lady Day" the parties meant "old Lady Day." Such evidence is admissible, where the written agreement is not under seal.—

DEN d. PETERS v. HOPKINSON (1823), 3 Dow. & Ry. K. B. 507; *sub nom.* DOE d. PETERS v. HOPKINSON, 2 L. J. O. S. K. B. 11.

**Annotations:**—*Refd.* Smith v. Walton (1832), 1 Moo. & S. 380. *Mentd.* Simpson v. Margitson (1847), 11 Q. B. 23.

**5875.** — **Lease by deed—Since new style.**—A lease of lands by deed, since the new style to hold from the feast of St. Michael, must be taken to mean from new Michaelmas, & cannot be shown by extrinsic evidence to refer to a holding from old Michaelmas: & a notice to quit at old Michaelmas, though given half a year before new Michaelmas, is bad.—DOE d. SPICER v. LEA (1809), 11 East, 312; 103 E. R. 1024.

**Annotations:**—*Distd.* Doe d. Hall v. Benson (1821), 4 B. & Ald. 588; Doe d. Peters v. Hopkinson (1823), 2 L. J. O. S. K. B. 11; Smith v. Flower (1826), 11 Moore, C. P. 264. *Folld.* Smith v. Walton (1832), 8 Bing. 235. *Consd.* Cadby v. Martinez (1840), 11 Ad. & El. 720. *Distd.* Doe d. Willis v. Perrin (1840), 9 C. & P. 467. *Refd.* Sidebotham v. Holland, [1895] 1 Q. B. 378; Croft v. Blay, [1919] 1 Ch. 277; Simmons v. Crossley, [1922] 2 K. B. 95.

**5876. Notice to quit on feast-day—Good for old or new style.**—A notice to quit on Lady Day is a good termination of a holding, either from Lady Day old or Lady Day new style.—DENN d. WILLAN v. WALKER (1800), Peake, Add. Cas. 194, N. P.

**5877.** — **—**—If a tenant from year to year hold from old Michaelmas a notice to quit "at Michaelmas" generally, is good.—DOE d. HINDE v. VINCE (1809), 2 Camp. 256, N. P.

**5878.** S. P. DOE v. BROOKES (1809), 2 Camp. 257, n., N. P.

**5879.** — **New style presumed.**—A notice to quit "on St. Michaelmas Day," is *prima facie* a notice to quit at new Michaelmas; but if the holding be from old Michaelmas, it will be a sufficient notice to quit at that time.—DOE d. WILLIS v. PERRIN (1840), 9 C. & P. 467, N. P.

*See, also,* No. 5878, *ante*, No. 5901, *post*.

**5880. Notice to quit at old feast-day—Given half year before new feast-day.**—DOE d. SPICER v. LEA, No. 5875, *ante*.

*See, also,* No. 3700, *ante*.

#### SUB-SECT. 3.—ASCERTAINMENT OF DATE OF COMMENCEMENT OF TENANCY.

##### A. In General.

**5881. Information by tenant—How far binding on tenant.**—Where a tenant on being applied to respecting the commencement of his holding, informs the party that it begins on a certain day, & notice to quit on that day is given at a subsequent time, he shall be bound by the information he so gave, & not be permitted to show that in fact it began at a different time.—DOE d. EYRE v. LAMBLY (1798), 2 Esp. 635, N. P.

**Annotation:**—*Expld.* Doe d. Murrell v. Milward (1838), 3 M. & W. 528.

**5882. Entries in rent book—By landlord.**—*Qu.*: if entries made by a landlord in his rent book are evidence of the date of the demise.—DOE d. BLOOMER v. BRANSON (1837), 1 Jur. 842.

**5883. Necessity for proof.**—In ejectment against a weekly tenant, the notice proved was, to quit on Wednesday, Aug. 4. The witness who was called to prove that Wednesday was the expiration of the current week of the tenancy, said, "that he guessed" deft. came in "about a Tuesday or a Wednesday, but had no recollection which":—*Held*: insufficient.—DOE d. FINLAYSON v. BAYLEY (1831), 5 C. & P. 67, N. P.

**Annotation:**—*Refd.* Queen's Club Gardens Estates v. Bignell, [1924] 1 K. B. 117.

**5884. Question of fact.**—In ejectment pltf. proved that S. was the tenant of the premises when

**Sect. 4.—Date of expiration of notice: Sub-sect. 3, A., B., C., D. & E.]**

he became the owner, & had paid rent to him for many years; that she quitted & was succeeded by H.; that N. succeeded H. & paid rent. In the beginning of Sept. 1858, deft. & N. severally called on pltf. & asked if he would accept deft. as tenant. On each occasion pltf. said he would. On Sept. 7 deft. took possession, & in Oct. of the same year, paid the rent to Michaelmas, 1858, for which pltf. gave a receipt as for rent due from N. Pltf. received the rent at Christmas, 1858, & gave a receipt for it to deft. as for rent due from him. In Mar. 1859, pltf. gave to deft. notice to quit at Michaelmas or otherwise at the end of the year of the tenancy which should expire after the end of one half year from the time of his being served with that notice. On Dec. 17, 1859, pltf.'s agent served a notice on deft. to quit at Midsummer. Deft. said pltf. might have the house if he paid the valuation of the fixtures & goodwill:—*Held*: it was a question for the jury, & not for the judge, to be determined by a consideration of all the facts, at what time the tenancy commenced; there was evidence of a tenancy ending at Michaelmas, & it was a misdirection to withdraw from the jury all the facts, except the conduct of deft. when the notice to quit at Midsummer was served on him.—*WALKER v. GODE* (1861), 6 H. & N. 591; 30 L. J. Ex. 172; 4 L. T. 16; 158 E. R. 245.

*Annotation*:—*Consd.* *Oakley v. Monck* (1865), 3 H. & C. 706.

*See, also*, No. 5892, *post*.

**Memorandum on draft lease.—Rent payable six weeks before term.]—See No. 1243, *ante*.**

**B. Date Stated in Agreement.**

**5885. "From henceforth"—Meaning of—Day of delivery of lease—Whole day.]—Indentures of demise were ingrossed bearing date May 26, of land in L. to have & to hold for three years "from henceforth," & the said indentures were delivered at 4 o'clock in the afternoon of June 20, in the same year:—*Held*: (1) "from henceforth" shall be accounted from the day of the delivery of the indentures, & not by any computation of date; (2) though the delivery was in the afternoon of June 20, the lease shall end on June 19, for the law rejects all fractions of a day; (3) in this case, as also where a lease is limited to take effect from the making thereof, the day of the delivery shall be taken inclusively; but if a lease be made to begin from the day of the making or from the day of the date, the day itself of the date is excluded. "From the date" & "from the day of the date" are of one sense.—*CLAYTON'S CASE* (1585), 5 Co. Rep. 1 a; 77 E. R. 48.**

*Annotations*:—*As to* (1) *Consd.* *Steele v. Mart* (1825), 4 B. & C. 272. *As to* (3) *Refd.* *Hemming v. Brabason* (1660), O. Bridg. 1. *Generally, Refd.* *Oshoy v. Hicks* (1610), Cro. Jac. 263; *Bellasis v. Hoester* (1696), 1 Ld. Raym. 280; *Pugh v. Leeds* (1777), 2 Cowp. 714; *Sidebotham v. Holland*, [1895] 1 Q. B. 378. *Mentd.* *Liefe v. Saltingstone* (1674), 1 Mod. Rep. 189; *Reynolds v. Thorpe* (1728), 2 Stra. 796; *Brown v. Burton* (1847), 2 Saund. & C. 220.

**5886. "From" date—Inclusion of day of date.]—CLAYTON'S CASE, No. 5885, *ante*.**

**5887. ———.]—ANON. (1773), Lofft, 275; 98 E. R. 648.**

**5888. ———.]—By an agreement bearing date Aug. 31, 1838, W. agreed to let & R. to take certain premises at a certain yearly rent payable quarterly, "to commence from Sept. 29, next, & the first quarter's rent to become due & payable on Dec. 25, next," etc., & at the end of the agreement was the following provision: "W. agrees to take the fixtures again at the expiration of R.'s**

tenancy, & to allow the price at which they may be valued, provided they are in as good condition then as they now are; & R. agrees to leave the premises in the same state as they now are":—*Held*: under this agreement, the tenancy commenced on Sept. 29, & it was properly described in the declaration as an agreement to leave the premises at the expiration of the tenancy in the same state as they were in at the commencement of the tenancy, & not at the date of the agreement.—*WHITE v. NICHOLSON* (1842), 4 Man. & G. 95; 4 Scott, N. R. 707; 11 L. J. C. P. 264; 134 E. R. 40. **5889. ———.]—SIDEBOTHAM v. HOLLAND, No. 5866, *ante*.**

**5890. ——— Effect of contrary indication—From dates of payment of rents.]—SIDEBOTHAM v. HOLLAND, No. 5866, *ante*.**

**C. Tenant Entering between Quarter Days.**

**5891. No provision for commencement in agreement—Commencement from date of entry.]—Where premises are taken under an agreement by which the "tenant is always to be subject to quit at three months' notice," this constitutes a quarterly tenancy, which may be determined by a three months' notice to quit, expiring at the same time of the year it commenced, or any corresponding quarter day. But although the tenant under such an agreement enters in the middle of one of the usual quarters, if there appears to be no agreement to the contrary, he will be presumed to hold from the day he enters; & the tenancy can only be determined by a notice expiring that day of the year, or some other quarter day calculated from thence.—*KEMP v. DERRETT* (1814), 3 Camp. 510, N. P.**

*Annotations*:—*Refd.* *Doe d. Lansdell v. Gower* (1851), 16 Jur. 100; *Doe d. King v. Grafton* (1852), 16 Jur. 833; *Jones v. Mills* (1861), 10 C. B. N. S. 788; *R. v. St. Giles without Cripplegate* (1863), 4 B. & S. 509; *Sidebotham v. Holland*, [1895] 1 Q. B. 378; *King v. Eversfield*, [1897] 2 Q. B. 475; *Croft v. Blay*, [1919] 2 Ch. 343; *Simmons v. Crossley*, [1922] 2 K. B. 95; *Queen's Club Estates v. Bignell*, [1924] 1 K. B. 117.

**5892. ——— Date of execution of agreement—Question of law.]—In the absence of any evidence to the contrary, the tenancy under a written agreement for the hire of premises at a yearly rental, from year to year, must be taken to begin from the day on which that agreement professes to have been executed; & that question is for the judge & not for the jury.—*BISHOP v. WRAITH* (1853), 2 C. L. R. 287.**

**5893. ———.]—SANDILL v. FRANKLIN, No. 5895, *post*.**

**5894. ——— Tenancy of widow—Presumed continuation of husband's tenancy.]—A. held premises of B., as tenant for a year, & so on from year to year so long as C. should live, the tenancy commencing at Christmas. After the death of A., C. being also dead, A.'s widow, by agreement with the landlord, continued to occupy the premises at the same rent, nothing being said about the commencement of her tenancy:—*Held* there was evidence enough to warrant the jury in assuming that the widow's tenancy was a mere continuation of the original tenancy of A., & therefore properly determined by a notice to expire at Christmas.—*HUMPHREYS v. FRANKS* (1856), 18 C. B. 323; 27 L. T. O. S. 108; 20 J. P. 486; 139 E. R. 1394.**

*Annotations*:—*Consd.* *Kelly v. Patterson* (1874), L. R. 9 C. P. 681. *Refd.* *Croft v. Blay*, [1919] 1 Ch. 277.

**5895. ——— Provision for rent days—Commencement from rent day.]—Where no date is expressed for the commencement of a tenancy in the agreement creating it, the ordinary rule that the tenancy commences from the date of the agreement**

will not take effect if a contrary intention be shown by the days fixed for the payment of the rent.

A written agreement for the letting of certain premises expressed the tenancy to be "for a year certain, & so on from year to year until a half-year's notice should be given by or to either party, at a yearly rent of £50 payable quarterly, the first payment to be on Mar. 25, next." The agreement was dated Dec. 20, 1872, & specified no date for the commencement of the term:—*Held*: a notice to quit given by the landlord on June 24, 1874, was a good notice.—*SANDILL v. FRANKLIN* (1875), L. R. 10 C. P. 377; 44 L. J. C. P. 216; 32 L. T. 309; 39 J. P. 311; 23 W. R. 473.

*Annotation*:—*Reid*. *Sidebotham v. Holland*, [1895] 1 Q. B. 378.

*See, also*, No. 5866, *ante*.

**5896. Rent paid to first quarter day—Subsequent payments on regular quarter days.**—If a tenant comes in the middle of a quarter, & afterwards pays for the time to the beginning of a succeeding regular quarter, from which time he pays half-yearly, his tenancy commences from that regular quarter day to which he paid up.—*DOE d. HORCOMB v. JOHNSON* (1806), 6 Esp. 10, N. P.

*Annotations*:—*Fold*. *Doe d. Savage v. Stapleton* (1828), 3 C. & P. 275. *Distd*. *Doe d. Cornwall v. Matthews* (1851), 11 C. B. 675. *Consd*. *Croft v. Blay*, [1919] 2 Ch. 343. *Reid*. *Kelly v. Patterson* (1874), 30 L. T. 842; *Sidebotham v. Holland*, [1895] 1 Q. B. 378.

**5897.** ———.]—A party took possession of premises on Aug. 1, & at the Michaelmas following paid the half quarter's rent, & continued afterwards to pay quarterly, on the usual feast days:—*Held*: in such case a notice to quit at Michaelmas was sufficient, & although the landlord had at first given a notice expiring with the half quarter, it was not necessarily to be presumed from that circumstance that the tenancy was one from year to year, commencing with the half quarter.—*DOE d. SAVAGE v. STAPLETON* (1828), 3 C. & P. 275, N. P.

*Annotation*:—*Reid*. *Croft v. Blay*, [1919] 2 Ch. 343.

**5898.** ———.]—Premises were let from Apr. 19, 1841, at the yearly rent of £42 payable quarterly, the first payment, of £7 13s. 6d., to be made on June 24, 1841, being the proportion down to that date; the tenant to hold & enjoy, etc., at the said rent, until one of the said parties should give the other six calendar months' notice to quit; the tenant to leave the said premises in as good condition as at the date of the agreement:—*Held*: notice might be given to quit at the expiration of any six months after June 24; & a notice on June 24, for Dec. 25, 1841, was good.—*DOE d. KING v. GRAFTON* (1852), 18 Q. B. 496; 21 L. J. Q. B. 276; 19 L. T. O. S. 108; 16 Jur. 833; 118 E. R. 188.

*Annotations*:—*Consd*. *Lewis v. Baker*, [1906] 2 K. B. 599; *Croft v. Blay*, [1919] 2 Ch. 343. *Reid*. *Bridger v. Potts* (1864), 17 C. B. N. S. 314; *Florence v. Robinson* (1871), 24 L. T. 705; *Sidebotham v. Holland*, [1895] 1 Q. B. 378; *King v. Eversfield*, [1897] 2 Q. B. 475; *Dixon v. Bradford & District Ry. Servants' Coal Supply Soc.*, [1904] 1 K. B. 444.

**5899.** ———.]—Deft. went into possession of certain premises under an agreement for three years by which he agreed to pay a yearly rent of £50, such rent to commence as from May 9, 1891, & the first half quarter was to become due & payable on June 24, & after that on the usual quarter days. At the end of the three years he stayed on, & continued to pay the rent quarterly as before. On Sept. 28, 1896, notice to quit was served on him for Mar. 25, 1897:—*Held*: the notice to quit was bad, as the tenancy did not commence on Mar. 25.—*SIMMONS v. UNDERWOOD* (1897), 76 L. T. 777; 41 Sol. Jo. 590.

**Tenant holding over after term.**—*See* Sub-sect. 3, F., *post*.

#### D. Entry on Different Parts of Premises at Different Times.

*See* AGRICULTURE, Vol. II., pp. 6–8, Nos. 9–17.

#### E. Date for Quitting in Notice.

**5900. Presumption as to commencement of tenancy—Onus of proof.**—*DOE d. PUDDICOMBE v. HARRIS* (1784), cited 1 Term Rep. 161; 99 E. R. 1030.

*Annotation*:—*Fold*. *Thomas d. Jones v. Thomas* (1811), 2 Camp. 647.

**5901.** ———.]—(1) It is not necessary that a notice to quit should be directed to the tenant in possession, if proved to be delivered to him at the proper time.

(2) A notice to quit on one of two days is good as on old or new Lady Day is good, if served six months before the day on which the tenancy commenced.

(3) If the tenant disputes the time when his tenancy commenced, that his notice to quit does not correspond with it, it is incumbent on him to show the true time of the commencement of his tenancy, not on the lessor.—*DOE d. MATTHEWSON v. WRIGHTMAN* (1801), 4 Esp. 5, N. P.

**5902. Whether evidence of date of commencement.**—(1) Where rent is usually paid at a banker's, if the banker, without any special authority, receives rent accruing after the expiration of a notice to quit, the notice to quit is not thereby waived.

(2) A notice to quit is not *prima facie* evidence of the period of the year, when the tenancy commenced.—*DOE d. ASH v. CALVERT* (1810), 2 Camp. 387, N. P.

*Annotation*:—*As to* (2) *Distd*. *Thomas d. Jones v. Thomas* (1811), 2 Camp. 647.

**5903. — Tenant not objecting—Tenant's right to object at hearing.**—If notice to quit at Midsummer be given to a tenant holding from Michaelmas, he may insist on the insufficiency of the notice at the trial though he did not make any objection at the time when it was served.

Whether deft. had or had not assented to be considered as holding from Midsummer, would have been a question of fact for the jury, if there had been any evidence on this point (*BULLER, J.*).—*OAKAPPLE d. GREEN v. COPOUS* (1791), 4 Term Rep. 361; 100 E. R. 1064.

**5904. — Date of quitting same as usual rent day.**—If half a year's notice requires a tenant to quit at the same time of the year at which he has usually paid rent, & he does not, on receiving it, object to the time, this is sufficient evidence that the year of his tenancy determines at the time mentioned in the notice.—*DOE d. LEICESTER v. BIGGS* (1809), 2 Taunt. 109; 127 E. R. 1017.

*Annotations*:—*Mentd*. *Tenny d. Gibbs v. Moody* (1825), 3 Bing. 3; *Sherratt v. Bentley* (1834), 2 My. & K. 149; *White v. Parker* (1835), 1 Bing. N. C. 573; *Doe d. Gratex v. Homfray* (1837), 6 Ad. & El. 206; *Morrall v. Sutton* (1845), 1 Ph. 533; *Baker v. White* (1875), L. R. 20 Eq. 166; *Re Tanqueray-Willame & Landau* (1882), 20 Ch. D. 465; *Re Allsop & Joy's Contract* (1889), 61 L. T. 213; *Re Lashmar, Moody v. Penfold*, [1891] 1 Ch. 258; *Re Brooke, Brooke v. Brooke*, [1894] 1 Ch. 43; *Re Adams & Perry's Contract*, [1899] 1 Ch. 554.

**5905. — Served on tenant personally.**—If a notice to quit is served personally on the tenant in possession, & he makes no objection to it, this is *prima facie* evidence to be left to the jury, that the tenancy commenced at the season of the year when the notice to quit expires.—*THOMAS d. JONES v. THOMAS* (1811), 2 Camp. 647, N. P.

*Sect. 4.—Date of expiration of notice: Sub-sect. 3, E. & F.; sub-sect. 4. Sect. 5: Sub-sect. 1, A.]*

**5906.** ————.]—A notice to quit at Michaelmas served personally on the tenant, who made no objection at the time, is *prima facie* evidence from whence the jury may find that the tenancy commenced at that period.—*DOE d. CLARGES v. FORSTER* (1811), 13 East, 405; 104 E. R. 426.

*Annotation:—**Reid. Walker v. Gode* (1861), 6 H. & N. 594.

**5907.** ————.]—A notice was given, on Mar. 22, by a landlord to his tenant to quit at the expiration of the current year. A declaration in ejectment laying the demise on Nov. 1, was on Jan. 16, following served upon the tenant, who at the time made no objection to the notice to quit, but said he should go out as soon as he could fit himself:—*Held: prima facie* evidence, that the tenancy commenced at Michaelmas & was determined before the day of the demise.—*DOE d. BAKER v. WOOMBWELL* (1811), 2 Camp. 559, N. P.

*Annotation:—**Reid. Walker v. Gode* (1861), 6 H. & N. 594.

#### *F. Tenant Holding Over.*

**5908. After expiration of term—Of years & part of year.]—**Tenant for life makes a lease for years, to commence on a certain day, & dies, before the expiration of the lease, in the middle of a year. The remainderman receives rent from the lessee, who continues in possession, but not under a fresh lease, for two years together, on the days of payment mentioned in the lease. This is evidence, from which the ct. will presume an agreement between the remainderman & the lessee, that the lessee should continue to hold from the day, & according to the terms of the original demise, so that notice to quit ending on that day is proper.—*ROE d. JORDAN v. WARD* (1780), 1 Hy. Bl. 97; 126 E. R. 58.

*Annotations:—**Fold. Kelly v. Patterson* (1874), L. R. 9 C. P. 631. *Reid. Roe d. Brune v. Prideaux* (1808), 10 East, 158; *Doe d. Buddle v. Lewis* (1848), 17 L. J. Q. B. 108; *Oakley v. Monck* (1865), 12 L. T. 465; *Croft v. Blay*, [1919] 1 Ch. 277.

**5909.** ————.]—Demise of one year & six months certain from Aug. 13, at a rent payable on the usual quarter days; three calendar months' notice to be given on either side before determination of the said tenancy. The tenant continued to occupy beyond the year & six months:—*Held: a three months' notice to quit, expiring on Aug. 13, was proper; & not a notice expiring at the end of a year from the termination of the year & six months.*—*DOE d. ROBINSON v. DOBELL* (1841), 1 Q. B. 806; 1 Gal. & Dav. 218; 10 L. J. Q. B. 242; 5 Jur. 434; 113 E. R. 1340.

*Annotations:—**Expld. & Distd. Croft v. Blay*, [1919] 2 Ch. 343. *Reid. Doe d. Clarke v. Smarridge* (1845), 14 L. J. Q. B. 327; *Doe d. Buddle v. Lines* (1848), 11 Q. B. 402; *Sidebotham v. Holland*, [1895] 1 Q. B. 378.

**5910.** ————.]—By an agreement dated Nov. 15, 1915, pltf. let premises to deft. "for the term of one year & one-eighth of another year from Nov. 11, 1915, at the yearly rent of £40 payable quarterly on the usual quarter days, the first payment to be for the half-quarter ending Dec. 25, 1915, & to be the sum of £5." On the expiration of the term at Christmas 1916, deft. held over without any further agreement, & pltf. accepted the quarter's rent due on Lady Day, 1917:—*Held: deft. was tenant from year to year under an implied tenancy commencing at Christmas, 1916, & a notice given by him on June 8, 1917, to quit on Dec. 25, 1917, was valid.*

The statement, first appearing in *Cole on Ejectment*, p. 50, & since repeated in other text-books,

that, "generally speaking, an implied tenancy from year to year, created by the payment & acceptance of rent after the end or determination of a previous term, will be deemed to have commenced at the same time of the year as the original term, & notice to quit should be given accordingly" is not supported by the cases relied upon as authority for it.—*CROFT v. WILLIAM, F. BLAY, LTD.*, [1919] 2 Ch. 343; 88 L. J. Ch. 545; 121 L. T. 18; 35 T. L. R. 556; 63 Sol. Jo. 607, C. A.

**5911. Under void lease.]—**If a landlord lease for seven years by parol, & agree that the tenant shall enter at Lady Day, & quit at Candlemas, though the lease be void by Stat. Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; & therefore, the landlord can only put an end to the tenancy at Candlemas.—*DOE d. RIGGE v. BELL* (1793), 5 Term Rep. 471; 101 E. R. 265.

*Annotations:—**Apld. Beale v. Saunders* (1837), 3 Hodg. 147. *Reid. Doe d. Warner v. Browne* (1807), 8 East, 165; *Doe d. Rogers v. Pullen* (1836), 3 Scott, 271; *Arden v. Sullivan* (1850), 19 L. J. Q. B. 268; *Cattley v. Arnold Banks v. Arnold* (1859), 1 John. & H. 651. *Mentd. Adams v. Clutterbuck* (1883), 10 Q. B. D. 403.

**5912.** ————.]—Where tenant for life grants a lease for years which is void against the remainderman & the latter, before he elects to avoid it, receives rent from the tenant, whereby a tenancy from year to year is created, yet there is with reference to the old term, & therefore a half year's notice to quit from the remainderman ending with the old year is good.—*DOE d. COLLINS v. WELLER* (1798), 7 Term Rep. 478; 101 E. R. 1086.

*Annotations:—**Consd. Croft v. Blay*, [1919] 1 Ch. 277. *Reid. Dowell v. Dew* (1842), 1 Y. & C. Ch. Cas. 345; *Doe d. Buddle v. Lines* (1848), 17 L. J. Q. B. 108; *Toler v. Slater* (1867), 37 L. J. Q. B. 33; *Kelly v. Patterson* (1874), L. R. 9 C. P. 681.

**5913. Absence of special arrangement.]—**A. enters upon premises as tenant to B., under an agreement, not binding under Stat. Frauds, for five years & a half from Michaelmas 1823. In 1826 a negotiation is entered into for a term of seven years "from the expiration of the present term," at an increased rent, the landlord making some alterations. The alterations are made, but no lease is executed. At Michaelmas, 1829, a whole year's rent is paid at the increased rate, & payments are afterwards made on the same footing:—*Held: a notice given on Mar. 11, 1835, to quit at Michaelmas, was a valid notice.*

A party who enters under an agreement void by Stat. Frauds, becomes by that Stat. tenant at will to the owner, & the tenancy described in the Stat. as a tenancy at will has since been construed to enure as a tenancy from year to year. But such tenant may quit without notice, & be ejected without notice, at the expiration of the period contemplated in the agreement. If, subsequently to that period, the tenant goes on paying the rent, I think he must be considered as tenant with reference to the period of the original entry, unless something appears which shows that a different arrangement was come to. Here, the letters show that the parties entered into a negotiation for a term of seven, fourteen, or twenty-one years, to commence from Lady Day. But deft. did not enter under that negotiation; he was in possession before. It is convenient not to depart from the general rule of construction in cases of tenancies from year to year; which rule is, that the time for giving notice to quit is fixed & determined by the period of the original entry. I think, therefore, that a non-suit ought to be entered (*COLTMAN, J.*).—*BERRY v. LINDLEY* (1841), 3 Man. & G. 498;

4 Scott, N. R. 61; 11 L. J. C. P. 27; 5 Jur. 1061; 133 E. R. 1240.

*Annotations*.—*Consd.* Kelly v. Patterson (1874), L. R. 9 C. P. 681. *Expld.* Croft v. Blay, [1919] 2 Ch. 343. *Refd.* Doe d. Clarke v. Smarridge (1845), 14 L. J. Q. B. 327; Doe d. Buddle v. Lines (1848), 12 Jur. 80; Tress v. Savage (1854), 4 E. & B. 36.

**5914. — Assignment by tenant.**—Where a tenant by lease continues to hold after the expiration of it as tenant at will, & assigns to another, the tenancy of the assignee shall be held to commence at the day on which it commenced, under the lease, & a notice to quit on that day only is good, notwithstanding the assignee came in on a different day.—*DOE d. CASTLETON v. SAMUEL* (1804), 5 Esp. 173, N. P.

*Annotation*.—*Refd.* Croft v. Blay (1919), 35 T. L. R. 556.

**5915. — Granted to sub-lessor.**—By a lease dated Apr. 28, 1834, certain premises were demised to E. to hold from May 1, then next, for forty years, at the rent of £55 a year, payable half yearly, on Nov. 1, & May 1. The lease contained a covenant by E. not to underlet without the consent in writing of the lessors, & a proviso for re-entry in case he should commit any act of bkpcy., on which a *fiat* should issue under which he should be duly found & declared a bkpt. In Dec. 1838, E. underlet a part of the premises to deft., with the consent in writing of the lessors for twenty-one years, at a rent of £25 per year. In Nov. 1840 E. committed an act of bkpcy., on which a *fiat* issued, under which in Feb. 1841, he was found & declared a bkpt. The lessors thereupon brought an ejectment against E. did not serve it upon deft. E. let judgment go by default, & the writ of possession was executed on May 12, 1841. Deft. remained in possession of the part underlet to him. In Feb. 1843 an execution was levied on his goods & the lessors served the sheriff with notice that £25 "a year's rent due in Nov. last," was in arrear from deft. to them, & required the sheriff to pay over the same out of the levy, which he did accordingly. On Apr. 29, 1843 deft. was served by the lessors with a notice to quit :—*Held* : in ejectment brought against deft., on a demise dated May 4, 1844, the proper inference to be drawn from the facts above stated was, that deft.'s tenancy from year to year to the lessors commenced on May 12, & therefore the demise was laid too soon.—*DOE d. LLOYD v. INGLEBY* (1845), 14 M. & W. 91; 14 L. J. Ex. 240; 5 L. T. O. S. 96; 153 E. R. 402.

**5916. —**—*J.*—Tenant for a term underleased. The sub-lessee held over, & paid rent. The original lease commenced at Christmas & expired at Midsummer :—*Held* : the tenancy from year to year commenced at Midsummer, not Christmas, & notice to quit must be given accordingly.—*DOE d. BUDDLE v. LINES* (1848), 11 Q. B. 402; 17 L. J. Q. B. 108; 10 L. T. O. S. 390; 12 Jur. 80; 116 E. R. 527.

*Annotations*.—*Consd.* Kelly v. Patterson (1874), L. R. 9 C. P. 681. *Apld.* Croft v. Blay, [1919] 2 Ch. 343. *Refd.* Sidbotham v. Holland, [1895] 1 Q. B. 378.

**5917. — Permission from head lessor to remain in possession.**—Premises were let by the owner in fee on a lease expiring at Midsummer, 1866. The lessee underlet to deft. on a lease from year to year, commencing at Michaelmas. Deft. was in possession at Midsummer, 1866, when the lease of his immediate lessor came to an end,

& the owner in fee granted a new lease to pltf. as from that time. Deft., who continued to occupy the premises, paid pltf. a sum equal to a quarter's rent on the terms on which he had held the premises, as for rent from Midsummer to Michaelmas, 1866, at which time pltf. insisted upon an increase of £5 *per annum* on the rent, & such increased rent was thenceforth paid by deft. In Dec. 1873, pltf. gave deft. a six months' notice to quit at Midsummer :—*Held* : the notice was bad, deft. having been allowed to hold over the expiration of the lease originally granted to him, without any explanation or fresh stipulation, save as to the increased rent; the inference being that there was a tacit agreement between him & pltf. that he should continue to hold as tenant from year to year according to his original holding, that is, as from Michaelmas to Michaelmas.—*KELLY v. PATTERSON* (1874), L. R. 9 C. P. 681; 43 L. J. C. P. 320; 30 L. T. 842.

*Annotation*.—*Consd.* Croft v. Blay, [1919] 2 Ch. 343.

#### SUB-SECT. 4.—TIME FOR OBJECTION TO INSUFFICIENT NOTICE.

**5918. No objection made on service—Right to object at trial.**—*OAKAPPLE d. GREEN v. COPOUS*, No. 5903, *ante*.

—*J.*—*See, also*, Nos. 5904–5907, *ante*.

#### SECT. 5.—FORM AND CONSTRUCTION OF NOTICE.

##### SUB-SECT. 1.—FORM OF NOTICE.

###### A. In General.

**5919. Necessity for particular form—Request for information as to date of expiration—Followed by reply.**—On Jan. 11, 1892, a tenant wrote to his landlord's agents as follows: "I hereby give you notice that I wish to terminate my tenancy of the offices. . . . Will you kindly let me know when my tenancy will expire?" The reply, dated Jan. 13, was: On referring to your agreement we find that six months' notice must be given to terminate on July 1, in any year, you therefore hold the rooms till July, 1893 :—*Held* : a valid notice to quit had been given & accepted, & the tenant was not liable for rent after July 1, 1893.—*GENERAL ASSURANCE CO. v. WORSTLEY* (1895), 64 L. J. Q. B. 253; 72 L. T. 358; 15 R. 328, D. C.

**5920. Must be such as tenant can act upon with safety.**—*DOE d. LISTER v. GOLDWIN*, No. 5925, *post*.

**5921. —**—*J.*—A notice to quit must be such as the tenant may act upon with safety, that is, one which is in fact, & which the tenant has reason to believe to be, binding on the landlord.—*JONES v. PHIPPS* (1868), L. R. 3 Q. B. 567; 9 B. & S. 761; 37 L. J. Q. B. 198; 18 L. T. 813; 33 J. P. 229; 16 W. R. 1044.

*Annotations*.—*Distd.* Seaward v. Drew (1898), 67 L. J. Q. B. 322. *Consd.* Stait v. Fenner, [1912] 2 Ch. 504. *Refd.* *Re* Knight & Hubbard's Underlease, Hubbard v. Highton, [1923] 1 Ch. 130.

**5922. Must be clear & definite in terms.**—*AHEARN v. BELLMAN, SEDGWICK v. AHEARN*, No. 5926, *post*.

#### PART XXIII. SECT. 5, SUB-SECT. 1.—A.

**1. Necessity for particular form.**—A notice to quit as between landlord & tenant may be given verbally & does not require to be in any particular form.—*GEMEROY v. PROVERBS*, [1924]

3 D. L. R. 579; [1924] 2 W. W. R. 764; 18 Sask. L. R. 364.—*CAN.*

*J.*—*J.*—*LANGLEY v. WILLIAMS* (1856), 28 L. T. O. S. 24.—*IR.*

**5922 i. Must be clear & definite in terms.**—*LADD v. ELLIOTT* (1865), 1 Old. 703.—*CAN.*

**5922 ii. —**—*J.*—A notice to quit must be unambiguous & certain in its terms, & it must indicate an intention to put an end to the tenancy.—*GEMEROY v. PROVERBS*, [1924] 3 D. L. R. 579; [1924] 2 W. W. R. 764; 18 Sask. L. R. 364.—*CAN.*

**Sect. 5.—Form and construction of notice: Sub-sect. 1, A. & B.]**

**5923.** —[—]—**GARDNER v. INGRAM**, No. 5931, *post*.

**5924. What amounts to definiteness—Addition of words—Requiring different rent in case of default.**—A notice to quit "or I shall insist on double rent," is good to support an ejectment.—**DOE d. MATTHEWS v. JACKSON** (1779), 1 Doug. K. B. 175; 99 E. R. 115.

**Annotations:**—**Dbtd.** **Ahearn v. Bellman**, **Sedgwick v. Ahearn**, [1879] 4 Ex. D. 201. **Refd.** **Doe d. Lyster v. Goldwin** (1841), 2 Q. B. 143; **Bury v. Thompson**, [1895] 1 Q. B. 696.

**5925.** —[—]—(1) A notice to quit must be such that the tenant may safely act on it at the time of receiving it; therefore a notice by an unauthorised agent cannot be made good by an adoption of it by the principal after the proper time for giving it.

(2) Notice to quit at the end of the current year of tenancy "on failure whereof, I shall require you to pay me double former rent or value for so long as you detain possession," is an unqualified notice, & does not give the tenant an option.—**DOE d. LYSTER v. GOLDWIN** (1841), 2 Q. B. 143; 1 Gal. & Dav. 463; 10 L. J. Q. B. 275; 114 E. R. 57.

**Annotations:**—As to (1) **Apld.** **Dibbins v. Dibbins**, [1896] 2 Ch. 348. **Generally, Refd.** **Doe d. Parsley v. Day** (1842), 2 Q. B. 147; **Doe d. Pulker & Whithelo v. Walker** (1845), 14 L. J. Q. B. 181; **Jones v. Phipps** (1868), L. R. 3 Q. B. 567.

**5926.** —[—]—**Deft.** was tenant to pltf. from year to year of a shop & premises, pltf. gave deft. notice in writing to quit on a day terminating the tenancy. The notice contained the following clause: " & I hereby further give you notice that should you retain possession of the premises after the day before mentioned the annual rental of the premises now held by you from me will be £160, payable quarterly, in advance ":—**Held:** the notice to quit being otherwise sufficient, it was not rendered invalid by the additional clause.

It is laid down . . . "a notice to quit must be clear & intelligible," so must every other notice & every document, . . . "a notice to quit should be clear & certain in its terms," of course it ought, & so ought everything else, " & not ambiguous & not optional." A notice to quit which is optional is not a notice to quit (**BRAMWELL, L.J.**).—**AHEARN v. BELLMAN, SEDGWICK v. AHEARN** (1879), 4 Ex. D. 201; 48 L. J. Q. B. 681; 40 L. T. 771; 43 J. P. 621; 27 W. R. 928, C. A.

**Annotations:**—**Folld.** **Bury v. Thompson**, [1895] 1 Q. B. 696. **Consd.** **Norfolk County Council v. Child**, [1918] 2 K. B. 351; **Hill v. Hasler**, [1921] 3 K. B. 643. **Apld.** **Re Perrett & Bennett-Stanford's Arbitration**, [1922] 2 K. B. 592. **Refd.** **Freeman v. Evans**, [1922] 1 Ch. 36; **Edell v. Dulieu**, [1923] 2 K. B. 247.

**5927.** —[—]—In the case of a lease determinable at the end of seven years by six months' notice, a letter by the lessee stating that he would not be able to stop over the first seven years of his term unless his rent was reduced:—**Held:** sufficient to determine the lease.—**BURY v.**

**THOMPSON**, [1895] 1 Q. B. 696; 64 L. J. Q. B. 500; 72 L. T. 187; 59 J. P. 228; 43 W. R. 338; 11 T. L. R. 267; 39 Sol. Jo. 314; 14 R. 299, C. A. **Annotation:**—**Refd.** **Norfolk County Council v. Child**, [1918] 2 K. B. 351.

**5928.** —[—]—**Amounting to claim to cancel notice in certain event.**—An agreement for a yearly tenancy provided that the tenancy might be determined by six months' notice to be given on Mar. 1, & Sept. 1, in any year. On Dec. 23, 1913, the tenants wrote to the landlord giving notice to quit the premises "at the earliest possible moment," & stating that if, as the tenants hoped, a satisfactory re-organisation of their business was effected, the notice would be cancelled:—**Held:** the fact that the tenants claimed by the notice to exercise in a certain event a right which they did not possess, namely to cancel the notice, did not render the notice bad as being conditional, & the letter constituted a valid notice determining the tenancy at the expiration of six months from Mar. 1, 1914.—**MAY v. BORUP**, [1915] 1 K. B. 830; 84 L. J. K. B. 823; 113 L. T. 694, D. C.

**Annotations:**—**Distd.** **Precious v. Reedie**, [1924] 2 K. B. 149. **N.F.** **Phipps v. Rogers**, [1925] 1 K. B. 14. **Refd.** **Norfolk County Council v. Child**, [1918] 2 K. B. 805.

**5929.** —[—]—An agreement for a yearly tenancy of a small holding provided that the tenancy might be determined by six months' written notice expiring at any Michaelmas. On Mar. 21, 1917, the agent for the landlords sent to deft., who was in arrear with his rent, a written notice to quit on Oct. 11, old Michaelmas Day, 1917. The notice to quit was enclosed in a letter in which the agent said: "I am instructed by the Small Holdings & Allotments Committee to serve upon you the enclosed notice to quit which is intended to terminate your tenancy at Michaelmas next unless they see sufficient reason in the meantime to change their opinion." The tenant claimed that the notice was a conditional notice & therefore invalid. In Mar. 1916, a notice to quit had also been given to deft., whose rent was in arrear, but this notice was withdrawn at deft.'s request upon his paying the rent due:—**Held:** the covering letter on its true construction, read in the light of what happened in the previous year, did not introduce into the notice to quit a condition or a reservation of right to pltfs., & the notice was valid.—**NORFOLK COUNTY COUNCIL v. CHILD**, [1918] 2 K. B. 805; 87 L. J. K. B. 1122; 119 L. T. 639; 34 T. L. R. 592; 16 L. G. R. 738; 82 J. P. Jo. 351, C. A.

**5930.** —[—]—**"Without prejudice to original notice"—Original notice subject of appeal.**—**PHIPPS & Co. (NORTHAMPTON & TOWCESTER BREWERIES), LTD. v. ROGERS** (No. 2) (1924), 158 L. T. Jo. 332.

**5931.** —[—]—**To quit "on or before" date.**—G. agreed to B. for five years, determinable by six months' notice, "after expiration of the term of three years out of the term for five years," at the corresponding quarter day of tenancy commencing. B. entered on Sept. 29, 1885, & on Mar. 23, 1888, wrote to the landlord, "I intended to surrender

**5922 iii.** —[—]—**FERGUSON v. DALY** (1873), 1 R. 8 C. L. 216.—**IR.**

**5922 iv.** —[—]—**DAYALJEE v. NAI-DOO** (1915), 36 N. L. R. 66.—**S. AF.**

**5924 i. What amounts to definiteness—Addition of words—Requiring different rent in case of default.**—A notice of ejectment served by a landlord on his tenant contained, besides the usual terms of a notice to quit, a further statement that if the tenant did not vacate the house by the time specified,

the landlord would hold him liable from that date to rent at an enhanced rate:—**Held:** the notice was a good notice.—**SHANKAR LAL v. BABU RAM** (1920), 1 L. R. 43 All. 330.—**IND.**

**5928 i.** —[—]—**Amounting to claim to cancel notice in certain event.**—One month before one of the monthly periods a notice in writing was given by B. to A. demanding payment of rent then alleged to be due, & in default of payment, that A. should immediately quit, & stating that, in

the event of A. paying the sum demanded, the tenancy would be determined as from the end of the particular monthly period:—**Held:** the tenancy was properly determined.—**BAYNE v. LOVE** (1909), 7 C. L. R. 748.—**AUS.**

**5928 ii.** —[—]—**KIKABHAI GANDBHAI v. KALU GHELA** (1896), 1 L. R. 22 Bom. 241.—**IND.**

**5928 iii.** —[—]—**GILCHRIST v. WESTREN** (1890), 17 R. (Cl. of Sess.) 363; 27 Sc. L. R. 273.—**SCOT.**

to you the tenancy of this house on or before Sept. 29, 1888:—*Held*: the notice was not sufficiently certain, & was bad.—*GARDNER v. INGRAM* (1889), 61 L. T. 729; 54 J. P. 311; 6 T. L. R. 75, D. C.

*Annotations*:—*Apld.* *Re Lancashire & Yorkshire Bank's Lease, Davis v. Lancashire & Yorkshire Bank*, [1914] 1 Ch. 522. *Consd.* *Norfolk County Council v. Child*, [1918] 2 K. B. 351. *Apprvd.* *Phipps v. Rogers*, [1925] 1 K. B. 14.

**5932.** ———.]—Where a notice to quit specifies the date for which it may properly be given, & adds "on or before which date they [the landlords] will require vacant possession": *Qu.*: whether these words do not render the notice void for uncertainty.

In order that a weekly tenancy may be determined by a notice to quit, the notice must be one which expires at the end of a periodic week from the commencement of the tenancy.

A weekly tenancy ran from Saturday in each week to the same day in the next week. The landlords on a Friday served upon the tenant a notice to quit, which was expressed to be "the requisite week's notice for the termination of your tenancy one week from Monday next":—*Held*: the notice to quit was invalid, inasmuch as it was not a notice expiring at the end of the weekly term.—*QUEEN'S CLUB GARDENS ESTATES, LTD. v. BIGNELL*, [1924] 1 K. B. 117; 93 L. J. K. B. 107; 130 L. T. 26; 39 T. L. R. 496; 21 L. G. R. 688, D. C.

*Annotations*:—*Apld.* *Precious v. Reedie*, [1924] 2 K. B. 149. *Refd.* *Aston v. Smith*, [1924] 2 K. B. 143. *Mentd.* *Braby v. Bedwell* (1925), 42 T. L. R. 141.

**5933.** ———.]—To quit "on earliest day tenancy can be determined."—*PHIPPS (P.) & CO. (NORTHAMPTON & TOWCESTER BREWERIES) LTD. v. ROGERS*, No. 5947, *post*.

*See, also*, Nos. 5954, 5955, *post*.

**5934. Error—Effect of—Misdescription of premises.**—A misdescription of the premises in a notice to quit, is not fatal, if they are otherwise sufficiently designated that the party to whom notice has been given, has not been misled by it.—*DOE d. COX v. ROE* (1802), 4 Esp. 185, N. P.

*Annotation*:—*Refd.* *Doe d. Armstrong v. Wilkinson* (1840), 5 J. P. 45.

**5935.** ———.]—*DOE d. RODD v. ARCHER*, No. 5956, *post*.

**5936.** ———.]—*DOE d. BONNEKER v. GROVE* (1847), 9 L. T. O. S. 125.

**5937.** ———.]—Notice, to a yearly tenant, to quit "that messuage, farm, etc., situated at D., in the county of York, which you now hold under me as tenant from year to year." The premises were not situated at D. but at H. D. & H. were adjoining parishes:—*Held*: not a material variance, the tenant not having shown that he held more than one farm under the lessor of *pltf.*, or that he was misled by the notice, & not having desired to have any question on this last point submitted to the jury.—*DOE d. ARMSTRONG v. WILKINSON* (1840), 12 Ad. & El. 743; Arn. & H. 39; 4 Per. & Dav. 323; 5 J. P. 45; 113 E. R. 995.

**5938.** ———.]—**Wrong Christian name of party—No other tenant of same surname.**—If a notice to quit is directed to the tenant by a wrong Christian name, & he keeps it, it is a waiver of the misdirection, & the lessor may recover on it, if there was no other tenant of the name.—*DOE v. SPILLER* (1806), 6 Esp. 70.

**B. Necessity for Statement of Date of Expiration.**

**5939. Use of general words—Commencement of tenancy unknown.**—*DOE d. PHILLIPS v. BUTLER* (1797), 2 Esp. 589, N. P.

**5940.** ———.]—**Alternative to specified date.**—A weekly tenancy commenced on a Wednesday. The landlord gave the tenant notice to quit, "on Friday, provided your tenancy commenced on a Friday, or otherwise, at the end of your tenancy next after one week from the date hereof":—*Held*: sufficient.—*DOE d. CAMPBELL v. SCOTT* (1830), 6 Bing. 362; 4 Moo. & P. 20; 8 L. J. O. S. C. P. 110; 130 E. R. 1319.

**5941.** ———.]—A notice to quit lands on a given day "or at such time as your holding shall expire next after the expiration of half a year from the receipt of this notice" is a sufficient demand of possession within the 4 Geo. 2, c. 28, s. 1, to render the tenant liable for holding over after the determination of the notice.—*HIRST v. HORN* (1840), 6 M. & W. 393; 151 E. R. 464.

*Annotations*:—*Expld.* *Phipps v. Rogers*, [1925] 1 K. B. 14. *Mentd.* *Tancred v. Christy* (1843), 2 L. T. O. S. 190; *Crook v. Whitbread* (1919), 88 L. J. K. B. 959.

**5942.** ———.]—*SIDEBOTHAM v. HOLLAND*, No. 5866, *ante*.

**5943.** ———.]—**Denoting intention to give up at proper time.**—The same notice is requisite to determine a yearly composition for tithes, as in the case of a tenancy of lands, namely, six months' notice, ending at the expiration of the year of composition.

Where a party held tithes under a yearly composition, commencing at Michaelmas, some of the tithes being payable in May, & on Mar. 24, he gave the tithe owner notice that he intended "from henceforth" to set out the tithes in kind:—*Held*: this notice could not enure to determine the composition from the Michaelmas following, but it was altogether inoperative.

Suppose a tenant of land on Mar. 24, gave this notice: "I hereby give you notice that I intend to quit & deliver up the farm I now hold of you," without more; would that be a good notice for Michaelmas? Such a notice only can be good as, on a reasonable construction of it, denotes an intention to give up the premises at the lawful time (*PARKE, B.*).—*GOODE v. HOWELLS* (1838), 4 M. & W. 198; 1 Horn & H. 199; 7 L. J. Ex. 312; 3 J. P. 513; 150 E. R. 1401.

*Annotation*:—*Refd.* *Simmons v. Crossley*, [1922] 2 K. B. 95.

**5944.** ———.]—**Notice bad as to date.**—A notice dated June 17, to quit was given to a tenant from year to year "on Oct. 11, now next ensuing, or such other day or time as your said tenancy may expire on." The notice being insufficient for the next Oct. 11:—*Held*: the subsequent words did not make it a good notice for the next year.

This notice is upon the face of it a three months' notice for Oct. 11, 1840, & to make it applicable to the next year, care should have been taken to make it more distinct in its terms. The landlord here seems not to have been quite certain himself of the time at which the tenancy would expire, & he has tried to throw the burden of discovering that upon his tenant (*ALDERSON, B.*).—*MILLS v. GOFF* (1845), 14 M. & W. 72; 14 L. J. Ex. 240; 5 L. T. O. S. 96; 9 J. P. 777; 153 E. R. 394.

**5945.** ———.]—**No specific date given.**—Where a tenant is entitled to six months' notice to quit,

the landlord will know when he may give possession to a new tenant.—*GEREROY v. PROVERBS* (Saak.), [1924] 3 D. L. R. 579; [1924] 2 W. W. R. 761.—*CAN.*

#### PART XXIII. SECT. 5, SUB-SECT. 1.—**B.**

**5940 i. Use of general words—Alternative to specified date.**—*ASHTOWN (LORD) v. LARKE* (1872), 1 R. 6 C. L. 270.—*IR.*

**5945 i.** ———.]—**No specific date given.**—A notice to quit must indicate the date of the quitting, not necessarily specifying in express words the exact date, but being so sufficiently certain, that on a reasonable construction of its terms

**Sect. 5.—Form and construction of notice: Sub-sect. 1, B., C., D., E. & F.; sub-sect. 2.]**

a notice to quit "at the expiration of the present year's tenancy" is sufficient, although it does not appear on the face of it that it was given six months before the period therein specified for quitting.—**DOE d. GORST v. TIMOTHY** (1847), 2 Car. & Kir. 351.  
*Annotation:—Consd. Phipps v. Rogers*, [1925] 1 K. B. 14.

**5946. — "At the earliest possible moment."]**  
—**MAY v. BORUP**, No. 5928, *ante*.

**5947. — "Earliest day your tenancy can legally be terminated."]**—A written agreement of tenancy of a public-house contained the clause: "either party shall be at liberty to determine the tenancy hereby created upon giving to the other three months' previous notice in writing of his or their intention so to do expiring on any one of the days appointed as special transfer sessions by the justices of the district in which the said premises are situate." On Oct. 12, 1923, the landlords served on the tenant a notice to quit in these terms: "We hereby give you notice to quit & deliver up to us . . . on the earliest day your tenancy can legally be terminated by valid notice to quit given to you by us at the date of the service hereof all that," etc., naming the demised premises.

The justices of the district at the annual general meeting in Feb. 1923, had fixed Jan. 8, 1924, as a date of special transfer sessions. At the annual general meeting in Feb. 1924, Apr. 8, 1924, was fixed for special transfer sessions. If the words "three months" in the tenancy agreement meant lunar months, the earliest day on which the tenancy could be terminated by a valid notice to quit given on Oct. 12, 1923, would be the earlier day fixed for the special transfer sessions, namely, Jan. 8, 1924; but if the words "three months" meant three calendar months, Apr. 8, 1924, would be the earliest day.

The landlords, notwithstanding that they had supplied the tenant with liquors after Jan. 8, in the belief that he was entitled to three calendar months' notice to quit, brought an action for possession of the premises, alleging that the tenancy had been determined by a valid notice to quit expiring on Jan. 8:—*Held*: (1) the expression "three months" in the tenancy agreement meant three lunar months; (2) the landlords were not in the circumstances precluded from asserting that the tenancy had determined on Jan. 8, & (3) the notice to quit was invalid, inasmuch as it placed upon the tenant the burden of resolving the questions of law, when his tenancy could be legally determined, & what was a valid notice to quit.—**PHIPPS (P.) & CO. (NORTHAMPTON & TOWCESTER BREWERIES), LTD. v. ROGERS**, [1925] 1 K. B. 14; 93 L. J. K. B. 1009; 132 L. T. 240; 89 J. P. 1; 40 T. L. R. 849; 69 Sol. Jo. 50, C. A.

**5948. Notice on alternative days.]—DOE d. MATTHEWSON v. WRIGHTMAN**, No. 5901, *ante*.

**C. Necessity for Writing.**

**5949. General rule—Parol demise.]—Parol notice to quit where there was no instrument in writing:—Held: sufficient.—TIMMINS v. ROWLINSON** (1765), 3 Burr. 1603; 1 Wm. Bl. 533; 97 E. R. 1003.

*Annotation:—Reid. Johnstone v. Hudlostone* (1825), 4 B. & C. 922.

**5950. — — —.]—Notice to quit may be given**

to a tenant by parol, & where there are two tenants of premises held in common, notice to one is sufficient.—**DOE d. MACARTNEY (LORD) v. CRICK** (1805), 5 Esp. 196, N. P.

**5951. — — —.]—ROE d. ROCHESTER (DEAN & CHAPTER) v. PIERCE** (1809), 2 Camp. 96, N. P.  
*Annotations:—Reid. Smith v. Birmingham & Staffordshire Gas Light Co.* (1834), 1 Ad. & El. 526. *Mentd. Arnold v. Poole Corpn.* (1842), 2 Dowl. N. S. 574.

**5952. — — —.]—A written agreement for a quarterly letting, made while 7 & 8 Vict. c. 76, s. 4, was in force, was put in, which was signed by deft. but not by pltf.:—Held: this was evidence of a parol demise by pltf.; & it was put an end to by a parol notice to quit.—BIRD v. DEFONVIELLE** (1846), 2 Car. & Kir. 415, N. P.

**5953. Exception to rule—Agreement providing for written notice.]—Where power is given to a party to determine a lease on giving a notice in writing, he cannot determine it by giving a parol notice.—LEGG d. SCOT v. BENION** (1738), Willes, 43; 125 E. R. 1047.

**D. Notice to Quit on Contingency.**

**5954. How far valid.—To quit on obtaining another situation.]—If tenant from year to year give his landlord notice that he will quit upon a contingency, & does not quit when the contingency happens, he is not liable to an action on Distress for Rent Act, 1737 (c. 19), for double rent.—FARRANCE v. ELKINGTON** (1811), 2 Camp. 591, N. P.

**5955. — To quit "if breach of covenant shall be committed."]**—Now it is obvious, that the two notices directed by the proviso are, in their nature, essentially different. It is one thing to say, "you have committed a breach, & therefore I will turn you out at the end of a month." It is quite another thing to say, "if you shall at any time hereafter commit a forfeiture, I will turn you out at the expiration of a month after such forfeiture." Where an act has been done, or omitted to be done by the grantee, whereby a forfeiture has been incurred, it is in the power of the grantor to waive the forfeiture, or to take advantage of it; & the object of requiring a notice to be given seems to be, that a month's time may be allowed to the grantee to remove his goods after the grantor has definitely elected to vacate the grant, at a fixed definite day. But the notice that has been given in this case binds the landlord to nothing; if a further breach of covenant is committed, he may waive it, or not, at his election; the grantee does not know whether he is to quit or not, or at what time he is to quit. To hold this notice to be sufficient, would be in effect to deprive pltf. of the whole benefit of the clause in question. We think, therefore, that the notice was insufficient (**TINDAL, C.J.**).—**MUSKETT v. HILL** (1839), 5 Bing. N. C. 694; 7 Scott, 855; 9 L. J. C. P. 201; 132 E. R. 1267.

*Annotations:—Reid. Ahearn v. Bellman, Sedgwick v. Ahearn* (1879), 48 L. J. Q. B. 681. *Mentd. Weston v. Woodcock* (1839), 5 M. & W. 587; *Marker v. Kenrick* (1853), 13 C. B. 138; *Watson v. Spratley* (1854), 10 Exch. 222; *Martyn v. Williams* (1857), 1 H. & N. 817; *McMahon v. Lennard* (1858), 6 H. L. Cas. 970; *Newby v. Harrison* (1861), 9 W. R. 849; *Bailey v. Stephens* (1862), 12 C. B. N. S. 91; *Heap v. Hartley* (1889), 42 Ch. D. 461; *Smelting Co. of Australia v. I. R. Comrs.*, [1896] 2 Q. B. 179; *British Actors Film Co. v. Glover*, [1918] 1 K. B. 299.

*See, also*, No. 5926, *ante*.

**E. Notice as to Part of Premises.**

**5956. How far valid.]—Where a farm was leased for twenty-one years, at a rent of £180 per annum**

**PART XXIII. SECT. 5, SUB-SECT. 1.—D.**

**h. How far valid.—Notice served during pendency of ejectment for nonpayment of rent.]—HALL v. FLANAGAN** (1877), 1 R. 11 C. L. 470.—IR.

consisting, as described in the lease, of the Town Barton, & its several parcels described by name, at the rent of £83, other closes named at other rents of £5, £5, & £1; the Shippen Barton, & its several parcels described by name, at £86; with a power reserved to either party to determine the lease at the end of fourteen years, on giving two years' previous notice:—*Held*: a notice by the landlord to his tenant to quit "Town Barton, etc. agreeably to the terms of the covenant between us on the expiration of the fourteenth year of your term," given in due time, was sufficient. A notice to quit a part only of premises leased together is bad.—*DOE d. RODD v. ARCHER* (1811), 14 East, 245; 104 E. R. 595.

*Annotations*:—*Consd. Re Bebbington's Tenancy, Bebbington v. Wildman*, [1921] 1 Ch. 559. *Mentd. Giddins v. Dodd* (1856), 20 J. P. 580.

**5957.** —.]—Where a house lands & tithes are held under a parol demise at a joint rent, a notice to quit, "the house, lands, & premises with the appurtenances," includes the tithes, & is sufficient to put an end to the tenancy.

The landlord cannot determine the tenancy of the land without at the same time determining it as to the tithes (*LE BLANC, J.*).—*DOE d. MORGAN v. CHURCH* (1811), 3 Camp. 71, N. P.

**5958.** —.]—Deft. leased about twenty acres of land for five years, at a yearly rent, from the owner in fee simple, under a memorandum of agreement, & immediately afterwards sub-let about six acres, part of the premises, to another person on a yearly tenancy. At the conclusion of the term, deft. continued possession of the whole, & during the first year after the term expired the lessor conveyed to pltf. the six acres which deft. had sub-let, & agreed with pltf., but without the consent of deft., as to the amount of rent to be apportioned to this part of the premises out of the rent which deft. paid. Although notice of the conveyance & agreed apportionment of rent was afterwards given to deft., he never recognised pltf. as his landlord, but continued to pay rent for the whole premises to his lessor, who handed over the agreed portion to pltf. Pltf. gave deft. notice to quit the sub-let premises six months before the expiration of a year's tenancy; & deft. forwarded this notice, with a further notice to quit from himself, to his sub-tenant. At the end of the year the sub-tenant gave up possession of his premises to pltf., but deft. wrote to the latter claiming to hold the same as tenant to the original lessor, & requiring possession. Deft. then did certain acts upon the premises which had been in his sub-tenant's occupation, for which pltf. brought this action of trespass:—*Held*: pltf.'s notice to deft. to quit part only of the premises demised to him was invalid; his passing on the notice to his tenant did not preclude his disputing it; & the action could not be maintained.—*PRINCE v. EVANS* (1874), 29 L. T. 835; 38 J. P. 213.

*Annotation*:—*Consd. Re Bebbington's Tenancy, Bebbington v. Wildman*, [1921] 1 Ch. 559.

**5959.** —.]—*Re BEBBINGTON'S TENANCY, BEBBINGTON v. WILDMAN*, No. 5979, *post*.

#### F. Other Cases.

**5960. Person to whom premises to be given up—Necessity for statement.**—By a memorandum of agreement, dated June 23, 1842, between A., as agent for & on behalf of the churchwardens of the parish of St. M., not naming them, of the

one part, & B. of the other part, it was agreed, provided a licence could be obtained from the lord of the manor, & upon B. putting the premises into repair, that the churchwardens should grant a lease to B. for twenty-one years from Midsummer Day then next, under the clear yearly rent of £30. Such lease to contain covenants for payment of rent & taxes, & to repair, insure, not to commit waste, etc., & all other usual & proper covenants, etc., & B. agreed to accept such lease, & execute a counterpart, etc., & that, until such lease & counterpart should be granted, the said yearly rent should be payable & recoverable by distress or otherwise, in like manner as if such lease & counterpart had been executed:—*Held*: the tenancy thereby created, whether a tenancy from year to year, which the ct. thought it was, or a tenancy at will, was properly put an end to by a notice to quit & deliver up possession, given by persons acting as agents for C. & D. who were churchwardens at the time the agreement was made & B. let into possession; notwithstanding the notice purported also to have been given on behalf of the churchwardens & overseers in office when the notice was served, & did not state to whom the possession was to be delivered up.—*DOE d. BAILEY v. FOSTER* (1846), 3 C. B. 215; 15 L. J. C. P. 263; 7 L. T. O. S. 208; 136 E. R. 86.

*Annotation*:—*Mentd. Ford v. Ager* (1863), 8 L. T. 546.

**5961. — Effect of inaccurate statement.**—Notice to quit to a tenant of lands originally devised to the rector & churchwardens of a parish, & their successors in trust, signed by the rector & churchwardens, requiring him to deliver up the premises to the rector & churchwardens for the time being, is ill.—*DOE d. BROOKS v. FAIRCLOUGH* (1817), 6 M. & S. 40; 105 E. R. 1157.

**5962. Invalid notice—Party giving not estopped from impugning.**—*Re BEBBINGTON'S TENANCY, BEBBINGTON v. WILDMAN*, No. 5979, *post*.

#### SUB-SECT. 2.—CONSTRUCTION OF INCORRECT NOTICE.

**5963. Terms clear in themselves—Strained interpretation not adopted.**—Notice was given to a tenant from year to year, holding from Martinmas to Martinmas, to quit, "on May 13 next, or upon such other day or time as the current year for which you now hold " "will expire." The notice was dated & served on Oct. 21:—*Held*: bad.

If there be an absolute inconsistency we may perhaps reject a part; but here the current year would in fact expire in the Nov. following the notice. We cannot make such a notice good by putting a strained interpretation on terms which are quite clear in themselves (*LORD DENMAN, C.J.*).—*DOE d. RICHMOND CORPN. v. MORPHETT* (1845), 7 Q. B. 577; 14 L. J. Q. B. 345; 5 L. T. O. S. 196; 9 Jur. 776; 115 E. R. 606.

*Annotation*:—*Distd. Wride v. Dyer*, [1900] 1 Q. B. 23.

**5964. Notice construed in accordance with intention of parties—Inconsistency.**—*DOE d. RICHMOND CORPN. v. MORPHETT*, No. 5963, *ante*.

**5965. — Notice served Michaelmas, 1795—To quit Lady Day, 1795—Good notice for Lady Day, 1796.**—A notice delivered to a tenant at Michaelmas, 1795, to quit at "Lady Day which will be in the year 1795":—*Held*: a good notice to quit at Lady Day, 1796.—*DOE d. BEDFORD*

#### PART XXIII. SECT. 5, SUB-SECT. 2.

**5964 i. Notice construed in accordance with intention of parties—Inconsistency.**

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—Notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be

good & effective in law.—*HARIHAR BANERJI v. RAMNATHI ROY* (1918), 1 L. R. 46 Calc. 458.—*IND.*

G G

*Sect. 5.—Form and construction of notice: Sub-sect. 2. Sect. 6: Sub-sect. 1, A., B. & C.]*

(DUKE) v. KIGHTLEY (1796), 7 Term Rep. 63; 101 E. R. 856.

*Annotation:—*Reid. Batten v. Harrison (1802), 3 Bos. & P. 1.

**5966. — Notice served September 28—To quit "at Lady Day next or end of current year."**—A notice dated Sept. 27, & served on Sept. 28, requiring a tenant to quit "at Lady Day next, or at the end of his current year," must be understood to mean a six months', & not a two days' notice to quit.

He intended to give an effective notice, & it is quite sufficient if the tenant understands what is meant (BAYLEY, J.).—DOE d. HUNTINGTOWER (LORD) v. CULLIFORD (1824), 4 Dow. & Ry. K. B. 248.

*Annotations:—*Consd. *Re* Flounders (1833), 4 R. & Ad. 865; Mills v. Goff (1845), 14 M. & W. 72. *Dtd.* Doe d. Richmond Corp'n. v. Morphet (1845), 7 Q. B. 577. *Fold.* Wide v. Dyer, [1900] 1 Q. B. 23. *Reid.* Doe d. Egremont v. Forwood (1842), 3 Q. B. 627.

**5967. — Notice served October 22—To quit in half year or at end of current year—Tenancy from February 2 to February 2.]**—Land & buildings were held by a yearly tenant, the land from Feb. 2 to Feb. 2, the buildings from May 1 to May 1. The landlord, on Oct. 22, 1833, served him with a notice to quit the land & buildings, "at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding of or in the said premises, or any part or parts thereof respectively, shall expire after the expiration of half a year from the delivery of this notice":—*Held*: as to the lands, the notice was to be considered a notice to quit on Feb. 2, 1835; & the landlord might recover both land & buildings after that day, in ejectment.—DOE d. WILLIAMS v. SMITH (1836), 5 Ad. & El. 350; 2 Har. & W. 176; 6 Nev. & M. K. B. 829; 5 L. J. K. B. 216; 111 E. R. 1198.

*Annotations:—*Distd. Doe d. Richmond Corp'n. v. Morphet (1845), 7 Q. B. 577. *Apprvd.* Wide v. Dyer, [1900] 1 Q. B. 23.

**5968. — Notice served October 21—To quit on May 13 next or at end of current year—Tenancy from Martinmas to Martinmas.]**—DOE d. RICHMOND CORPN. v. MORPHETT, No. 5963, *ante*.

**5969. — Notice served March 24—To quit on June 24 or at end of current year—Tenancy from Lady Day to Lady Day.]**—A tenant held premises on a yearly tenancy from Lady Day to Lady Day. On Mar. 24, 1898, her landlord gave her notice to quit & deliver up the premises "on June 24, 1898, or at the end of your current year's tenancy":—*Held*: the notice must be construed in accordance with the intention of the landlord, & since it was impossible to suppose that it was intended to be a notice to quit on Mar. 25, 1898, when the current year's tenancy expired, it must be taken to be a good notice to quit the premises on Mar. 25, 1899.—WIDE v. DYER, [1900] 1 Q. B. 23; 69 L. J. Q. B. 17; 81 L. T. 453; 64 J. P. 118; 48 W. R. 73; 16 T. L. R. 23; 44 Sol. Jo. 27, D. C.

**5970. Notice for wrong date.**—"Agreeably to the covenants of the lease."—A lease contained a covenant, that the demise should determine at the end of fourteen years, if the lessee should leave & give six calendar months' notice, immediately preceding the end of the fourteen years, which

terminated at Michaelmas. The lessee gave a written notice, that he intended to quit on June 24, 1837, agreeably to the covenants of the lease:—*Held*: the notice was bad, & the former words could not be rejected, or interpreted by the latter; & pltf.'s having acknowledged the receipt of the notice did not cure the defect.—CADDY v. MARTINEZ (1840), 11 Ad. & El. 720; 3 Per. & Dav. 386; 9 L. J. Q. B. 281; 4 J. P. 105; 113 E. R. 587; *previous proceedings* (1838), 2 Jur. 543.

*Annotations:—*Reid. Doe d. Armstrong v. Wilkinson (1840), 12 Ad. & El. 743. *Mentd.* Giddins v. Dodd (1856), 20 J. P. 580.

**5971. Notice insufficient for current year—Whether good for ensuing year.]**—MILLS v. GOFF, No. 5944, *ante*.

## SECT. 6.—WHO MAY GIVE NOTICE OR TO WHOM NOTICE MAY BE GIVEN.

### SUB-SECT. 1.—WHO MAY GIVE NOTICE.

#### A. In General.

**5972. Original landlord—Rent received in names of landlord & partners.]**—A., a brewer, demised a public-house to B., under an agreement that he should hold for one year certain, & that after the expiration of that time, either party might put an end to the tenancy by giving three months' notice to quit; the rent to be payable quarterly. The agreement contained no clause of re-entry. B. took possession, & paid rent to A. who at first gave him a receipt in his own name, & afterwards in the joint names of himself & two partners who were interested with him in the brewery. After he had been in possession three years, A. gave him a notice to quit in his own name alone:—*Held*: in an action of ejectment, A. might recover on his own demise, although the latter receipts for rent were given in the names of himself & partners, & no clause of re-entry was necessary in the agreement.—DOE d. GREEN v. BAKER (1818), 2 Moore, C. P. 189; 8 Taunt. 241; 129 E. R. 375.

**5973. — Lease to third party during continuance of tenancy.]**—WORDSLEY BREWERY CO. v. HALFORD, No. 5671, *ante*.

**Agent of landlord.]**—See Sub-sect. 1, B., *post*.

**5974. Crown commissioners—Notice by some.]**—A lease, dated Oct. 1825, to which the King was a party, was granted by the Comrs. of Woods & Forests, containing a clause that if the Comrs. for the time being should at any time during the term be minded or desirous to determine the demise, & of such their mind & desire should cause "one calendar month's notice in writing under their hands" to be given to the lessee, the lease at the expiration of such notice should cease, determine, & be absolutely void:—*Held*: the lease was determined by a notice signed by two only out of the three Comrs., by virtue of Crown Lands Act, 1829 (c. 50), s. 92.—COOMBES v. DUTTON (1839), 5 M. & W. 469; 8 L. J. Ex. 278; 151 E. R. 198.

**5975. Reversioner — Infant.]**—MADDON d. BAKER v. WHITE, No. 5771, *ante*.

**5976. Limited owner—Right of successors.]**—Deft. held under a lease, granted in 1807, by the then tenant for life, which was admitted to be void as not made in conformity with the leasing power. In 1836, the subsequent tenant for life,

### PART XXIII. SECT. 6, SUB-SECT. 1.—A.

**k. Reversioner.]**—A notice to determine a tenancy must be given by the person legally entitled to the im-

mediate reversion.—LIDDLE v. ROLLESTON, [1919] N. Z. L. R. 408.—N.Z.

**l. Lessor after conveyance of reversion.]**—*Re* MAGANN & BONNER (1896), 28 O. R. 37.—CAN.

**m. Notice by purchaser—Necessity of joinder of vendor.]**—A purchaser who between the payment of the purchase money & the execution of the conveyance, serves in his own name a notice to quit on a tenant of the lands pur-

with one of the lessors of *pltf.*, G., settled the estate, of which the premises demised in 1807 formed part, to such use as G. should appoint. In 1837 G. received rent from *deft.* In Mar. 1838, G. gave *deft.* notice to quit upon Sept. 29, then next, or at the expiration of the current year of the tenancy. In Feb. 1839, G. appointed to E.:—*Held*: in an ejectment, containing a demise by G. on Oct. 1, 1838, & by E. on Nov. 1, 1839, the notice to quit was sufficient to determine the tenancy, & that, whether E. came in under the deed of settlement in 1836, or under the appointment in 1839.—*DOE d. EGREMONT (EARL) v. FORWOOD* (1842), 3 Q. B. 627; 11 L. J. Q. B. 321; 114 E. R. 647.

*Annotations*:—*Mentd.* *Doe d. Egremont v. Courtenay* (1848), 11 Q. B. 702; *Doe d. Biddulph v. Poole* (1848), 11 Q. B. 713; *Woodward v. Watts* (1853), 2 E. & B. 452; *Noble v. Ward* (1867), L. R. 2 Exch. 135; *Morris v. Baron*, [1918] A. C. 1.

**5977. Remainderman—Right of purchaser from remainderman.**—Where a power of leasing requires that a fixed rent & a money heriot payable under peculiar circumstances shall be reserved, a lease granted under the power reserving a larger heriot is void.

A remainderman received rent from the lessee of a void lease, & having given notice to quit conveyed the property by virtue of a power to the lessor of *pltf.*:—*Held*: in ejectment the purchaser might take advantage of the notice given by the remainderman.—*DOE d. EGREMONT (LORD) v. HELLINGS* (1842), 6 Jur. 821.

**5978. Mortgagee of reversion—Mortgagor in possession—Legal estate in mortgagee.**—Notice to a tenant to quit was signed by the mtgees. after mtge. of the reversion. A clause in the mtge. deed provided that if the interest were duly paid by the mtgor., the principal money was not to be called in by the mtgees. until a period after the date of the notice. There was also the usual covenant for quiet enjoyment:—*Held*: notwithstanding this clause, the signature of the mtgee. to the notice was sufficient.—*BURTON v. DICKENSON* (1867), 17 L. T. 264.

See, further, MORTGAGE.

**5979. Purchaser of part of reversion—Division not recognised by tenant—Invalid—Subsequent notice by purchaser of remainder no remedy.**—When a landlord has sold in two lots property that is let on a single tenancy & the tenant has not recognised the division of the tenancy, a notice to quit given by the purchaser of one lot is invalid *ab initio* & cannot be varied by a subsequent notice to quit given by the purchaser of the other lot, even when the second notice is given before the date from which a notice determining the entire tenancy must run in order to be effective.

A landlord or tenant who gives a bad notice is nor precluded or estopped from saying afterwards that it is a bad notice.—*Re BEBINGTON'S TENANCY, BEBINGTON v. WILDMAN*, [1921] 1 Ch. 559; 90 L. J. Ch. 269; 124 L. T. 661; 37 T. L. R. 409; 65 Sol. Jo. 343.

**5980. Joint reversioners—After severance of reversion—Notice to quit entire holding—Subsequent contract of sale by one reversioner.**—Where the reversion on an agricultural holding held by a tenant from year to year, is severed

without any legal apportionment of the rent, a valid notice to quit the entire holding, given by both reversioners is not nullified by a subsequent contract by one reversioner to sell his part of the holding.—*ROCHESTER & CHATHAM JOINT SEWERAGE BOARD v. CLINCH*, [1925] Ch. 753; 134 L. T. 139.

**Notice by servant of corporation—Whether authority under seal necessary.**—See CORPORATIONS, Vol. XIII., p. 412, Nos. 1320, 1321.

### B. Agents.

**Without authority.**—See AGENCY, Vol. I., p. 327, Nos. 432–438.

**General agent.**—See AGENCY, Vol. I., p. 327, No. 442.

**5981. Agent appointed by mortgagor & mortgagee of reversion—Express authority.**—K., being beneficially interested in the reversion, joined with the trustee, who was legally entitled, in mtgng it to *pltf.*; & K., by the mtge. deed, with the approbation of *pltf.*, testified by *pltf.*'s executing the deed, appointed G. to be receiver, agent, & attorney of K., to demand & collect rents, to adjust accounts, to sue or distrain for rent, give notice to quit, & eject on refusal, & to do all that K. could have done if the deed had not been made. K., the trustees, & *pltf.*, executed the deed:—*Held*: G. was an agent lawfully authorised to give the notice required by 4 Geo. 2, c. 28, s. 1.—*POOLE v. WARREN* (1838), 8 Ad. & El. 582; 3 Nev. & P. K. B. 693; 1 Will. Woll. & H. 518; 3 Jur. 23; 112 E. R. 959.

*Annotation*:—*Mentd.* *Edwards v. Camerons Ry.* (1850), 16 L. T. O. S. 197.

**Agent of one of several joint lessors.**—See AGENCY, Vol. I., p. 327, No. 441.

**Agent of lessors & their successors.**—See AGENCY, Vol. I., p. 327, No. 440.

**Agent to receive rents & let.**—See AGENCY, Vol. I., p. 328, No. 454.

**Steward of corporation.**—See AGENCY, Vol. I., p. 328, Nos. 443, 444.

**Sub-agent.**—See AGENCY, Vol. I., p. 394, No. 972.

**Rating—Time for.**—See AGENCY, Vol. I., p. 402, Nos. 1027–1030.

**What amounts to.**—See AGENCY, Vol. I., p. 410, Nos. 1078, 1079.

### C. Receivers.

**5982. Appointed by court.**—It was objected that the notice to quit was not given by the landlord nor by any agent of his thereunto lawfully authorised. It being given by the receiver appointed by the ct. alone:—*Held*: the receiver was an agent for the landlord, lawfully authorised for this purpose.—*WILKINSON v. COLLEY* (1771), 5 Burr. 2694; 98 E. R. 414.

*Annotations*:—*Apld.* *Poole v. Warren* (1838), 3 Nev. & P. K. B. 693. *Consd.* *Jones v. Phillips* (1868), L. T. 3 Q. B. 567. *Reid.* *Lake v. Smith* (1805), 1 Bos. & P. N. R. 174; *Page v. More* (1850), 15 Q. B. 684. *Mentd.* *Swinfen v. Bacon* (1860), 30 L. J. Ex. 33.

**5983. With general authority to let.**—It seems that a receiver appointed by the Ct. of Chancery, with a general authority to let the lands to tenants from year to year, has also authority to determine such tenancies by a regular notice to

chased, cannot by such notice validly determine the tenancy. In such circumstances the notice to quit, to be valid, should be signed by both the vendor & purchaser or at all events by the purchaser as the expressly authorised agent of the vendor.—*GRAHAM v. McILWAIN*, [1918] 2 L. R. 353.—*IR.*

### PART XXIII. SECT. 6, SUB-SECT. 1.—C.

**5983 i. Appointed by court—With general authority to let.**—D. was appointed receiver in a partition suit pending in the High Ct. by an order which gave him power to let & set the immovable property. Without

special leave of the ct., he served a notice to quit on certain tenants of the estate who claimed to hold a permanent lease:—*Held*: the order appointing him did not give him power to serve such notice without the special leave of the ct.—*DROBOMOVY GUPTA v. DAVIS* (1887), 1 L. T. 14 Cal. 323.—*IND.*

*Sect. 6.—Who may give notice or to whom notice may be given: Sub-sect. 1, C. & D.; sub-sect. 2. Sect. 7: Sub-sects. 1 & 2, A. (a) & (b).]*

quit.—*DOE d. MARSACK v. READ* (1810), 12 East, 57; 104 E. R. 23.

*Annotations:—Apld.* *Doe d. Manvers v. Mizem* (1837), 2 Mood. & R. 56. *Consd.* *Jones v. Phipps* (1868), L. R. 3 Q. B. 567. *Refd.* *Evans v. Mathias* (1857), 7 E. & B. 590. *Mentd.* *Doe d. Campbell v. Hamilton* (1849), 13 Q. B. 977.

**5984. Receiver of charity estates—Agent for trustees.**—A notice to "quit & deliver up possession to me, the receiver of the charity estates of R." & signed by B. as such receiver, is a good & sufficient notice from the trustees of such estates; the appointment by them of the individual receiver being proved.—*PEEL v. WHITING* (1844), 8 J. P. 777.

**Appointed under mortgage deed—With power to give notice.**—*See AGENCY*, Vol. I., p. 327, No. 439. *See, further, RECEIVERS.*

#### D. Co-Owners.

**5985. Notice by some on behalf of others—Whether sufficient—Joint tenant.**—*LINGEN v. PAYN* (1817), J. Bridg. 128; 123 E. R. 1250.

**5986.** ————]—The counts in a declaration in ejectment, need not so correspond with the notice to quit so as to make it necessary, where there are several lessees who sign the notice to quit, that there should be a joint demise by all.

The notice ought to be signed by all the persons having title in the premises (*LORD KENYON*).—*DOE d. JOLLIF E v. SYBOURN* (1798), 2 Esp. 677, N. P.

*Annotation:—Refd.* *Doe d. Rhodes v. Robinson* (1837), 1 Jur. 356.

**5987.** ————]—If four joint tenants jointly demise from year to year, such of them as give notice to quit may recover their several shares in ejectment on their several demises.—*DOE d. WHAYMAN v. CHAPLIN* (1810), 3 Taunt. 120; 128 E. R. 49.

*Annotations:—Distd.* *Doe d. Aslin v. Summersett* (1830), 1 B. & Ad. 135. *Refd.* *Re Viola's Indenture of Lease*, *Humphrey v. Stenbury*, [1909] 1 Ch. 244.

**5988.** ————]—*GOODTITLE d. KING v. WOODWARD*, No. 5992, *post*.

**5989.** ————]—A notice to quit, signed by one of several joint tenants, on behalf of the others, is sufficient to determine a tenancy from year to year, as to all.—*DOE d. ASLIN v. SUMMERSSETT* (1830), 1 B. & Ad. 135; 8 L. J. O. S. K. B. 369; 109 E. R. 738.

*Annotations:—Consd.* *Doe d. Kindersley v. Hughes* (1840), 7 M. & W. 139. *Distd.* *Re Viola's Indenture of Lease*, *Humphrey v. Stenbury*, [1909] 1 Ch. 244. *Mentd.* *Dodd v. Acklom* (1843), 6 Man. & G. 672; *Belaney v. Kelly* (1871), 24 L. T. 738.

**5990.** ————]—(1) Four trustees were joint tenants of a house under a deed of trust & notice to quit was served upon the tenant, but signed by three of them only:—*Held*: the notice was sufficient to put an end to the connection between all the parties as landlord & tenant.

(2) A notice to quit is sufficiently served upon a tenant, if it can be shown that it came to his hands before the six months previous to the

expiration of his year of holding, though the notice had been served only by having been put under the door of the tenant's house.—*ALFORD v. VICKERY* (1842), Car. & M. 280, N. P.

**5990a.** ————]—**Proviso enabling "lessees" to determine.**—*Re VIOLA'S INDENTURE OF LEASE*, *HUMPHREY v. STENBURY*, No. 6841, *post*.

**5991.** ————]—**Partners.**—Where the landlords are partners in trade, a notice to quit, signed by one, on behalf of himself & the rest, will bind the tenant.—*DOE d. ELLIOTT, CALL & LAMBERT v. HULME* (1828), 2 Man. & Ry. K. B. 433; 6 L. J. O. S. K. B. 345.

*Annotation:—Mentd.* *Dodd v. Acklom* (1843), 6 Man. & G. 672.

**5992. Notice by agent of some joint tenants—Under authority—Subsequent ratification.**—To entitle joint tenants to recover in ejectment against a tenant from year to year, the notice to quit must be signed by all the joint tenants at the time it is served; but if the notice be given by an agent it is sufficient, if his authority be subsequently recognised.

Where such notice was given by an agent under a written authority, which at the time of the service of the notice had been signed only by some of the several joint tenants, but afterwards was signed by all the others:—*Held*: the subsequent recognition was sufficient to give validity to the authority from the beginning, & the notice to quit was therefore sufficient.—*GOODTITLE d. KING v. WOODWARD* (1820), 3 B. & Ald. 689; 106 E. R. 813.

*Annotations:—Dbtd. & Distd.* *Doe d. Mann v. Walters* (1830), 10 B. & C. 626. I cannot say that I am satisfied with the reasons given for the decision in that case (*PARKER, J.*). *Consd.* *Doe d. Lyster v. Goldwin* (1841), 1 Gal. & Dav. 463. *Refd.* *Re Bebbington's Tenancy*, *Bebington v. Wildman*, [1921] 1 Ch. 559.

**5993.** ————]—A notice to quit, given by a person authorised by one of several lessors, joint tenants, determines the tenancy as to all.—*DOE d. KINDERSLEY v. HUGHES* (1840), 7 M. & W. 139; H. & W. 147; 10 L. J. Ex. 185; 151 E. R. 711.

*Annotation:—Mentd.* *Belaney v. Kelly* (1871), 24 L. T. 738.

#### SUB-SECT. 2.—TO WHOM NOTICE MAY BE GIVEN.

**5994. Co-tenants—Notice to one.**—*DOE d. MACARTNEY (LORD) v. CRICK*, No. 5950, *ante*.

**5995.** ————]—**Tender of compensation.**—Defts., co-tenants, were let into possession of land under an agreement to give up possession at any time on payment of a fair equivalent for the crop:—*Held*: a tender to one co-tenant only, of compensation for the crop was a sufficient tender to the others so as to entitle landlord to maintain ejectment.—*LODDIGES v. LISTER* (1860), 1 L. T. 548.

**5996. Sublessee—Notice by lessor—In name of lessee.**—Where tenant from year to year underlet part of the premises, & then gave up to his landlord the part remaining in his own possession, without either receiving a regular notice to quit the whole, or giving notice to quit to his sub-

#### PART XXIII. SECT. 6, SUB-SECT. 1.—D.

**5985 i. Notice by some on behalf of others—Whether sufficient—Joint tenant.**—Where the relation of joint landlords continues, the tenancy of the lessees cannot be put an end to, except by all lessors acting together.—*GOPAL RAM MOHURI v. DHAKESWAR PERSHAD NARAIN SINGH* (1908) 1 L. R. 35 Calc. 807,—*IND*.

**5985 ii.** ————]—*POLLOCK v.*

*KELLY* (1856), 6 I. C. L. R. 367; 8 Ir. Jur. 360.—*IR*.

n. ————]—A notice to quit signed by one of two owners of the property with the approval of the other, such approval being known to the tenant, will be sufficient, although not expressed to be on behalf of any one except the person giving it.—*BURROWS v. MICKELSON* (1904), 14 Man. L. R. 739.—*CAN*.

o. ————]—*EBRAHIM PIR*

*MAHOMED v. CURSETJI SORABJI DE VITRE* (1887), 1 L. R. 11 Bom. 644.—*IND*.

p. ————]—*WALKER v. HENDRY*, [1925] S. C. 855.—*SCOT*.

#### PART XXIII. SECT. 6, SUB-SECT. 2.

**5994 i. Co-tenants—Notice to one.**—*Semble*: service of notice to determine a lease upon one of two joint tenants is sufficient.—*HARRETT v. MERCHANTS BANK* (1879), 26 Gr. 409.—*CAN*.

lessee, or even surrendering that part in the name of the whole, supposing that anything short of a regular notice to quit from the landlord to his immediate tenant would after such sub-letting have determined the tenancy in the whole; yet the landlord cannot entitle himself to recover against the sub-lessee, there being no privity of contract between them, upon giving half a year's notice to quit in his own name, & not in the name of the first lessee; for as to the part so underlet, the original tenancy still continued undetermined.—**PLEASANT (LESSEE OF HAYTON) v. BENSON** (1811), 14 East, 234; 104 E. R. 590.

*Annotation:—Mentd.* London & Westminster Loan & Discount Co. v. Drake (1859), 6 C. B. N. S. 798.

**5997. Successor in possession—Presumed assignee of lessee.]—**Where A. had been tenant of certain premises, & upon his leaving them B. took possession:—*Held*: in the absence of any evidence to the contrary, it might be presumed that he came in as assignee of A., although he never paid rent, & notice to quit was rightly given to B.—**DOE d. MORRIS v. WILLIAMS** (1826), 6 B. & C. 41; 9 Dow. & Ry. K. B. 30; 108 E. R. 368.

*Annotation:—Mentd.* Hibbs v. Ross (1866), L. R. 1 Q. B. 534.

**5998. — Widow of tenant—No other personal representative known.]—**A tenant from year to year died, & a regular notice to quit was served on the widow, who remained in possession:—*Held*: the landlord might recover in ejectment, unless it were shown that some other person, & not the widow, was the exor. or administrator of the tenant; & it was not incumbent on the landlord to show that the widow was either extrix. or administratrix.—**REES d. MEARS v. PERROT** (1830), 4 C. & P. 230.

**5999. — Son of deceased tenant—Personal representative unknown.]—**HERTFORD (MARQUIS) v. WATTS (1859), 33 L. T. O. S. 94.

**6000. Rent collector.]—**Notice to quit given to a mere collector of rents:—*Held*: not good.—**PEARSE v. BOULTER** (1860), 2 F. & F. 133.

**6001. Cestui que trust—Provision for notice to representatives & assigns.]—**A testator being entitled to a customary freehold held of a manor, according to the custom of which tenants could not grant leases for longer than a year & a day without the licence of the lord, devised the tenement by will to trustees upon trust for his widow for life, with remainder to his son. Testator died in Dec. 1877, having on June 15, 1877, with the licence of the lord, let the premises in question to the two defts. T. & S. on a repairing lease for twenty-one years from Dec. 25, 1876, at a yearly rent of £130, determinable at the end of fourteen years by one year's notice to the lessor, his representatives or assigns, expiring with that year. On Dec. 21, 1889, S., one of defts., gave testator's widow, who had been permitted by the trustees to receive the rents, directly, notice of defts.' intention to quit the premises on Dec. 25, 1890; & on Aug. 13, 1890, the widow purported to leave the premises for a term of seven years to defts., but without the licence of the lord, at a rent of £100, & with less onerous covenants. The widow died, & the trustees of the will brought this action, claiming that the original lease of June 15, 1877, had never been duly determined, & the new lease of Aug. 13, 1890, was inoperative:—*Held*: the notice of Dec. 21, 1889, was bad, not having been served on the "representatives or assigns" of the

lessor, & the widow, the life tenant, had not in any way been constituted the agent of the trustees to receive such notice.—**EASTON v. PENNY** (1892), 67 L. T. 290; 41 W. R. 72; 8 T. L. R. 779.

## SECT. 7.—SERVICE OF NOTICE.

### SUB-SECT. 1.—IN GENERAL.

**6002. Direction to tenant—Whether necessary—Delivery proved.]—****DOE d. MATTHEWSON v. WRIGHTMAN**, No. 5901, *ante*.

### SUB-SECT. 2.—HOW EFFECTED.

#### A. On Agent of Tenant.

##### (a) In General.

**6003. Presumption of delivery to tenant.]—**Where the tenant of an estate holden by the year has a dwelling-house at another place, the delivery of a notice to quit to his servant at the dwelling-house, is strong presumptive evidence that the master received the notice.—**JONES d. GRIFFITHS v. MARSH** (1791), 4 Term Rep. 404; 100 E. R. 1121.

*Annotations:—Distd.* Doe d. Burrows v. Lucas (1804), 5 Esp. 153. *Consd.* Nicholson v. Tanham (1870), 18 W. R. 523. *Refd.* M'Gregor v. Kelly (1849), 18 L. J. Ex. 391; Morris v. Royal British Bank (1856), 1 C. B. N. S. 67.

**6004. —.]—****TANHAM v. NICHOLSON**, No. 6013, *post*.

**6005. Rebuttal of presumption.]—****TANHAM v. NICHOLSON**, No. 6013, *post*.

##### (b) Sufficiency of Service.

**6006. On tenant's wife—At demised premises.]—**Service of notice to quit upon the tenant's wife at the house demised ordered to be good service.—**PULTENEY v. SHELTON** (1799), 5 Ves. 260, n.; 31 E. R. 576, L. C.

*Annotations:—Mentd.* Lathropp v. Marsh (1800), 5 Ves. 259; Jones v. Green (1829), 3 Y. & J. 298.

**6007. —.]—**(1) In ejectment against S. & F., where it is shown that B., not a party to the cause, came into possession of the premises under an unperformed contract of sale, & that S. & F. held of him, notice to quit, served upon S. & F. is sufficient.

(2) Notice to quit, served upon F.'s wife on the premises held by F., is sufficient as to F.'s premises.—**ROE d. BLAIR v. STREET** (1834), 2 Ad. & El. 329; 4 Nev. & M. K. B. 42; 111 E. R. 127; *sub nom.* **DOE d. BLAIR v. FAIRFAX**, 3 L. J. K. B. 123.

*Annotations:—As to (2) Refd.* Nicholson v. Tanham (1870), 18 W. R. 523. *Generally, Mentd.* Doe d. Davenport v. Rhodes (1843), 11 M. & W. 600; Doe d. Bowman v. Lewis (1844), 13 M. & W. 241.

**6008. —.]—**If a notice to quit is served on the tenant's wife at the house, accompanied by a statement that the paper delivered is a "notice of discharge," it is sufficient.—**SMITH v. CLARK** (1840), 9 Dowl. 202; Woll. 44; 5 J. P. 44. *Annotation:—Refd.* Nicholson v. Tanham (1870), 18 W. R. 523.

**6009. On officers of corporation.]—**An ejectment against the bailiffs *pro tempore* of a corporation cannot be maintained by proving payment of rent for the premises by the annual predecessors of defts. in the same office for several years before, & service of the notice to quit on defts., the existing bailiffs; for the payment of such rent by the

## PART XXIII. SECT. 7, SUB-SECT. 2.—

### A. (b).

#### a. On tenant's widow—No personal

*representative.*—Service of a notice to quit on a tenant's widow, the person in possession, is sufficient, in the absence of a legal personal repre-

sentative of deceased tenant, to determine the tenancy which had been in him.—**SWEENEY v. SWEENEY** (1876), 1 R. 10 C. L. 375.—**IR.**

*Sect. 7.—Service of notice: Sub-sect. 2, A. (b), B. & C.; sub-sects. 3 & 4. Sect. 8: Sub-sect. 1.]*

bailliffs in succession is merely evidence of a tenancy in the corporation. But, at any rate, such tenancy may be determined by a notice to the corporation to quit, served on its officers; after which the owner of the premises may distrain the cattle of any persons trespassing on his ground, or bring his action against them, or maintain ejectment against any person in the actual possession of the premises.—*DOE d. CARLISLE (EARL) v. WOODMAN* (1807), 8 East, 228; 103 E. R. 329.

**6010. On servant of tenant—Tenant not informed till within six months of expiration.]—**Service of a notice to quit on a servant at the tenant's dwelling house is sufficient although the tenant be not informed of it till within half a year of its expiration.—*DOE d. NEVILLE v. DUNBAR* (1826), Mood. & M. 10, N. P.

*Annotation:—Reid. Nicholson v. Tanham* (1870), 18 W. R. 523.

**6011. — Addressed in wrong name.]—***DOE d. EXETER CORPN. v. MITCHELL* (1837), 1 Jur. 795.

**6012. — On demised premises—Proviso in agreement for service at usual place of abode.]—***LADDY v. KENNEDY*, No. 5738, ante.

**6013. — — Implied authority to receive notice—Rebuttal of implication.]—**The service of a notice to quit made at the house of the tenant upon a person whose duty it would be to deliver the notice to the tenant, is sufficient to sustain ejectment, although in fact the notice was never delivered to the tenant. The presumption in such a case is that it did reach the tenant himself. In such a case the question is not whether the servant performed his duty in delivering it to his master, but whether the servant was to be considered as the agent of the master to restore the notice. If he was, the service of the notice will effectually bind the master.

T. lived in a house where his two sons & his daughter also resided. T. was imbecile. The house was managed by his daughter, the farming business by his two sons. A notice to quit, addressed to the father, was served at the house by delivery to the daughter. She put it on the dresser in the kitchen, & afterwards burnt it. One of the sons knew of its existence, but was not shown to have known its exact terms, though he was aware of its nature:—*Held: this was a service sufficient to entitle the landlord to maintain ejectment against the father.*

Effective service of notice on a servant at the dwelling house situated in the demised premises is a service on the tenant. The law considers that servant to be an implied agent of the tenant for that particular purpose. The only evidence by which that could be rebutted would be by producing evidence to show that such implied agency was not correctly implied & the inference of agency not correctly drawn from the facts & that consequently there was no agency (*HATHERLEY, L.C.*).—*TANHAM v. NICHOLSON* (1872), L. R. 5 H. L. 561.

**6014. — —.]—***LONDON SCHOOL BOARD v. PETERS* (1902), 18 T. L. R. 509.

**6015. On bailiff—Question for jury.]—***DOE d. ORFORD (EARL) v. KEMP* (1843), 1 L. T. O. S. 107.

**6016. On attorney—Of administrator of person paying rent.]—**A., in May, 1823, demised premises to B. for eighty years, with a proviso for re-entry in case the lessee, his exors., etc., should exercise

or carry on, or permit to be exercised or carried on, the business, amongst others, of a victualler or publican. B., in Nov. 1823, mortgaged to C., & in June, 1829, the mtge. term was assigned to D., & ultimately became vested in E. After B. had assigned to C., & when he had no reversion, but a mere equity of redemption, he, by indenture granted an underlease for seventy-six years to F., with a proviso for re-entry similar to that contained in the original lease from A. Some of the mesne assignments were made subject to this underlease. In ejectment by the legal representatives of E. for a breach of the covenant in the original lease, in using the premises as a public-house or beershop:—*Held: the payment to, & acceptance by, E. of rent under the underlease by B. to F., merely created a tenancy from year to year; & such tenancy was well determined by a notice to quit served upon the attorney of the administratrix of the person who had paid the rent to the lessors of pltf., & under whom deft. claimed.*—*DOE d. PRIOR v. ONGLEY* (1850), 10 C. B. 25; 20 L. J. C. P. 26; 15 L. T. O. S. 434; 138 E. R. 11.

#### *B. At Tenant's House.*

**6017. Proof of delivery to tenant—Necessity for.]—**The mere leaving of a notice to quit at the tenant's home, without further proof of its being delivered to a servant, & explained, or that it came to the tenant's hands, is not sufficient to support an ejectment.—*DOE d. BUROSS v. LUCAS* (1804), 5 Esp. 153, N. P.

*Annotation:—Reid. Nicholson v. Tanham* (1870), 18 W. R. 523.

**6018. — —.]—***ALFORD v. VICKERY*, No. 5990, ante.

**6019. Proof of delivery to servant—With explanation—Necessity for.]—***DOE d. BUROSS v. LUCAS*, No. 6017, ante.

**6020. Delivery to last known address—Tenant disappeared.]—**A lease of premises for twenty-one years contained a proviso that it should be lawful for the landlord or his assigns to put an end to the demise at the end of the first fourteen years by delivering to the tenant or his assigns six calendar months' previous notice in writing of his intention to do so. In an action by the assignee of the reversion to recover possession of the premises on the ground that the demise had been duly determined by notice under the proviso, it appeared that the lessee had disappeared some years previously, after having mortgaged the premises by way of underlease, that his address could not be found, & that written notice to determine the tenancy directed to him had been sent to his last known address, & had also been delivered to the mtgee. & to the occupier of the premises:—*Held: the action could not be maintained, as there had been no service of the notice on the lessee, & as he had not assigned the premises no other service would satisfy the terms of the proviso.*—*HOGG v. BROOKS* (1885), 15 Q. B. D. 256; 50 J. P. 118, C. A.

**6021. — By registered post.]—**A year's notice to quit a holding to which Agricultural Holdings Act, 1883 (c. 61), applies, made necessary & sufficient by sect. 33 of that Act, is a notice under the Act within sect. 28 of the Act, & may be served upon the person to whom it is to be given by being sent through the post in a registered

#### **PART XXIII. SECT. 7, SUB-SECT. 2.—** **B.**

**r. By registered letter—Refusal of addressee to receive letter.]—***JOSENDRO*

*CHUNDER GHOSE v. DWARKA NATH KARMOKAR* (1888), 1 L. R. 15 Calc. 681.—*IND.*

**t. Delivery to daughter—Unknown to tenant.]—**Where the notice does not

reach the tenant or become known to him, delivery to his daughter does not constitute legal service on him.—*NICHOLSON v. TANHAM* (1870), 18 W. R. 523.—*IR.*

letter addressed to him at his last known place of abode in England.—*VAN GRUTTEN v. TREVENEN*, [1902] 2 K. B. 82; 71 L. J. K. B. 544; 87 L. T. 344; 50 W. R. 516; 18 T. L. R. 575; 46 Sol. Jo. 482, C. A.

See, also, Nos. 5738, 6006–6008, *ante*, Nos. 6022, 6045, *post*.

#### C. Other Cases.

**6022. On one of several joint tenants—On premises demised—Evidence that notice reached other joint tenants.**—Notice to quit served on one of two tenants on the premises, who held under a joint demise, is evidence that the notice reached the other who lived elsewhere.—*DOE d. BRADFORD v. WATKINS* (1806), 7 East, 551; 2 Smith, K. B. 517; 103 E. R. 213.

*Annotation*:—*Reid*, Rutland v. Wythe (1843), 10 Cl. & Fin. 419.

**6023. On sub-lessee.**—*DOE d. ORFORD (EARL) v. KEMP* (1843), 1 L. T. O. S. 107.

#### SUB-SECT. 3.—TIME OF SERVICE.

**6024. Notice by post—Delivered same day—Received following day.**—Between nine & ten o'clock on Mar. 25, a tenant put into a post office in London a letter containing a notice to quit on the following Michaelmas, & addressed to the place of business in London of his landlord's agent. The agent was at his place of business until between six & seven o'clock in the evening, & did not receive the letter, but found it on the following morning:—*Held*: a sufficient notice to determine the tenancy, the jury having found that the letter was delivered on Mar. 25, after the agent left.

The jury have found that the notice arrived at the agent's place of business at a time when someone ought to have been there to receive it (*WILDE, B.*).—*PAPILLON v. BRUNTON* (1860), 5 H. & N. 518; 29 L. J. Ex. 265; 2 L. T. 326; 157 E. R. 1285.

*Annotations*:—*Reid*, Sidebotham v. Holland, [1895] 1 Q. B. 378. *Mentid*, Calisher v. Forbes (1871), 7 Ch. App. 109.

**6025. Presumed delivery—In course of post.**—If a letter properly directed, containing a notice to quit, is proved to have been put into the post-office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post-office, & was received by the person to whom it was addressed (*per CUR.*).—*GRESHAM HOUSE ESTATE CO. v. ROSSA GRANDE GOLD MINING CO.*, [1870] W. N. 119.

#### SUB-SECT. 4.—PROOF OF SERVICE.

**6026. Indorsement on duplicate—By attorney serving—Subsequent death of attorney.**—Where it was the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants & to indorse on duplicates of such notices the fact & time of service: & on one occasion, the attorney himself prepared a notice to quit to serve on a tenant, took it out with him together with two others prepared at the same time, & returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant; & two of them

were proved to have been delivered by him on that occasion:—*Held*: on the trial of an ejectment, after the attorney's death, the indorsement so made by him was admissible evidence to prove the service of the third notice.—*DOE d. PATTESHALL v. TURFORD* (1832), 3 B. & Ad. 890; 1 L. J. K. B. 262; 110 E. R. 327.

*Annotations*:—*Consd.* Stapylton v. Clough (1853), 2 E. & B. 933. *Reid*, Chambers v. Bernasconi (1834), 1 Cr. M. & R. 347; Brain v. Preece (1843), 11 M. & W. 773; R. v. Dukinfield (1848), 11 Q. B. 678; R. v. St. Mary, Warwick (1853), 1 E. & B. 816; Massey v. Allen (1879), 13 Ch. D. 558; *Re Djambl* (Sumatra) Rubber Estates (1912), 107 L. T. 631. *Mentid*, Poole v. Dicus (1835), 1 Bing. N. C. 649; Ray v. Jones (1836), 2 Gale, 220; Marks v. Lahed (1837), 3 Bing. N. C. 408; R. v. Cope (1837), 7 C. & P. 720; Clark v. Wilmot (1841), 1 Y. & C. Ch. Cas. 53; Pickering v. Ely (Bp.) (1843), 2 Y. & C. Ch. Cas. 249; R. v. Worth (1843), 4 Q. B. 132; Sussex Peccage Case (1844), 11 Cl. & Fin. 85; Doe d. Padwick v. Skinner (1848), 3 Exch. 84; Doe d. Kluglake v. Bewiss (1849), 7 C. B. 456; Doe d. Padwick v. Witcomb (1851), 6 Exch. 601; Edle v. Kingsford (1854), 14 C. B. 759; Lawlins v. Rickards (1860), 28 Beav. 370; Bright v. Legerton (1861), 2 Do. H. F. & J. 606; Smith v. Blakey (1867), L. R. 2 Q. B. 326; Sturla v. Freesia, Pollini v. Gray (1880), 5 App. Cas. 623; Mellor v. Walmesley [1905] 2 Ch. 164; Mercer v. Denne, [1905] 2 Ch. 538; Mills v. Mills (1920), 36 T. L. R. 772.

**6027. Accompanying oral declaration of substituted service—Subsequent death of person serving—Whether declaration admissible.**—In order to prove notice to quit to have been served upon R., a tenant from year to year, it was proposed to show that the notice had been served on W., R. being absent, & had reached R. It was shown that J., a person deceased, was ordinarily employed for the landlord, to serve notices to quit; that a notice requiring R. to quit had been handed to J., who had brought back the duplicate, & had signed an indorsement stating service on R., & further, that J. had then orally stated that he had delivered the notice to W.:—*Held*: J.'s oral declaration was not admissible, as not appearing to have been made in the ordinary course of his business.—*STAPYLTON v. CLOUGH* (1853), 2 E. & B. 933; 2 C. L. R. 266; 23 L. J. Q. B. 5; 22 L. T. O. S. 100; 18 Jur. 60; 2 W. R. 60; 118 E. R. 1016.

*Annotation*:—*Reid*, Smith v. Blakey (1867), L. R. 2 Q. B. 326.

**6028. Admission by tenant.**—The regular service of a notice to quit was held to have been properly inferred from the circumstance of the tenant's speaking about "the notice to quit which he had received," & engaging a valuer to value his rights as an outgoing tenant.—*DOE d. SIMPSON v. HALL* (1843), 5 Man. & G. 795; 6 Scott, N. R. 689; 12 L. J. C. P. 239; 131 E. R. 781; *sub nom.* SIMPSON v. HALL, 1 L. T. O. S. 79.

**Proof of notice.**—*See Sect. 10, post.*

#### SECT. 8.—WAIVER OF NOTICE.

##### SUB-SECT. 1.—IN GENERAL.

**6029. May be presumed—From conduct of parties.**—If, by agreement, the relation of landlord & tenant subsist between two parties for one year, *e.g.* from Lady Day to Lady Day; & if, before the ensuing Michaelmas Day, the landlord give a regular notice to his tenant to quit possession upon the next Lady Day, a waiver of such notice & a continuance of the tenancy may be presumed, from the subsequent conduct & demeanour of the parties.—*FLECKNOE v. PURSELL* (1833), 2 L. J. C. P. 177.

#### PART XXIII. SECT. 7, SUB-SECT. 4.

**a. Publication in newspaper—Whether sufficient proof of service.**—Proof of service of a notice to quit on a tenant, which is confined to proving

that such a notice, addressed to the tenant, was published in a local newspaper under circumstances which made it highly probable that the notice in question came to the knowledge of the

tenant, is not, without more, such proof of service, as will suffice to terminate the tenancy.—*CHANDMAL v. BACHRAJ* (1883), 1 L. R. 7 Bom. 474.—**IND.**

**Sect. 8.—Waiver of notice: Sub-sects. 2 & 3, A., B., C., D., E. & F.]**

**SUB-SECT. 2.—CONSENT OF PARTIES.**

**6030. Necessity for.]**—Though payment & acceptance of rent accruing after the expiration of a notice to quit amounts to a waiver of the notice a demand of such rent does not necessarily operate as a waiver; & it is a question for the jury, & not for the ct., whether, under the circumstances of the case, the notice has been waived.

In the case of determination of tenancy by notice to quit, the tenancy is put an end to by the agreement of the parties, which determination of the tenancy cannot be waived without the assent of both (MAULE, J.).—**BLYTH v. DENNETT** (1853), 13 C. B. 178; 22 L. J. C. P. 79; 20 L. T. O. S. 209; 138 E. R. 1165.

**Annotations:—***Consd.* **Tayleur v. Wildin** (1868), L. R. 3 Exch. 303. *Refd.* **Dendy v. Nicholl** (1858), 4 C. B. N. S. 376; **Santley v. Wilde**, [1899] 1 Ch. 747; **Freeman v. Evans**, [1922] 1 Ch. 36.

**6031. — Consent of both parties.]**—The effect of waiving a notice to quit given to a yearly tenant is to create a new tenancy; & consequently, a guarantor of the rent under the original tenancy is not liable for rent becoming due after the time when the notice would have expired.

It is clear that, whether the notice to quit is given by the landlord or the tenant, the party to whom it is given is entitled to insist upon it & it cannot be withdrawn without the consent of both (KELLY, C.B.).—**TAYLEUR v. WILDIN** (1868), L. R. 3 Exch. 303; 37 L. J. Ex. 173; 18 L. T. 655; 32 J. P. 630; 16 W. R. 1018.

**Annotations:—***Consd.* **Freeman v. Evans**, [1922] 1 Ch. 36. *Refd.* **Holme v. Brunskill** (1878), 3 Q. B. D. 495; **Santley v. Wilde**, [1899] 1 Ch. 747; *Re* **Perrett & Bennett-Stanford's Arbitration**, [1922] 2 K. B. 592; **Simpson v. Bailey**, [1924] 2 K. B. 666.

**6032. —**—It is obvious that after the notice [to quit] had been served no subsequent withdrawal of it which was not by mutual consent of the parties could have prevented the tenancy from determining on that date, & deft. from thereupon being not a tenant properly so called, but a mere tenant on sufferance, or possibly a trespasser (LORD COLERIDGE, J.).—**HUNT v. BLISS**, [1919] as reported in W. N. 331.

**Annotations:—***Refd.* **Davies v. Bristow**, Penrhos College v. Butler, [1920] 3 K. B. 428. *Mentd.* **Ellen v. Goldstein** (1920), 89 L. J. Ch. 586.

**SUB-SECT. 3.—WHAT AMOUNTS TO WAIVER.**

**A. In General.**

**6033. Question of fact.]**—**JONES v. SHEARS**, No. 6056, *post*.

**6034. —**—**BLYTH v. DENNETT**, No. 6030, *ante*.

**B. Demand of Rent.**

**6035. Mere demand—Without acceptance.]**—**BLYTH v. DENNETT**, No. 6030, *ante*.

**PART XXIII. SECT. 8, SUB-SECT. 2.**

**6031 I. Necessity for—Consent of both parties.]**—A valid notice to quit cannot be waived by the party giving it, so as to restore the tenancy determined by it, except by acts or conduct of both parties, which amount to the creation of a new tenancy.—*Re* **MAGEE v. SMITH** (1894), 10 Man. L. R. 1.—**CAN.**

**PART XXIII. SECT. 8, SUB-SECT. 3.—C.**

**6036 I. Rent accrued due after expiration of notice.]**—A distress for rent after the expiration of six months from

the termination of the tenancy, is not a waiver of the notice to quit.—**DOR d. SHOULDHAM v. LAWLOR** (1811), Ir. Clr. Rep. 302.—**IR.**

**PART XXIII. SECT. 8, SUB-SECT. 3.—D.**

**6038 I. Receipt after expiration of notice.]**—**SMITH v. MACFARLANE** (No. 2) (1904), 5 Terr. L. R. 508.—**CAN.**

**6038 II. —**—The effect of the acceptance of a cheque marked "Rent to Nov. 1, 1917" is a waiver of a notice to the tenant to quit & deliver up the demised premises on Aug. 1,

**C. Distress.**

**6036. Rent accrued due after expiration of notice.]**—A distress taken for rent accrued after the expiration of a notice to quit, is a waiver of the notice.—**ZOUCH d. WARD v. WILLINGALE** (1790), 1 Hy. Bl. 311; 126 E. R. 183.

**6037. Rent due after verdict in ejectment.]**—After verdict in ejectment against a tenant for not quitting pursuant to notice, a subsequent distress by the landlord for rent due after the verdict, does not waive the notice to quit. Nor is it any ground for setting aside the verdict, or staying execution.—**DOE d. HOLMES v. DARBY** (1818), 8 Taunt. 538; 2 Moore, C. P. 581; 129 E. R. 492.

**D. Acceptance of Rent.**

**6038. Receipt after expiration of notice.]**—If a landlord receive rent due after the expiration of a notice to quit, it is a waiver of that notice.—**GOODRIGHT d. CHARTER v. CORDWENT** (1795), 6 Term Rep. 219; 101 E. R. 520

**Annotation:—***Refd.* **Ward v. Day** (1863), 4 B. & S. 337.

**6039. —**—**BLYTH v. DENNETT**, No. 6030, *ante*.

**6040. —**—A tenant whose tenancy had been determined by notice to quit wrote to his lessor enclosing money as & for rent accrued due since the expiry of the notice. The lessor sent on the letter & enclosure to her solrs., who replied "our client does not recognise you as her tenant, & we will retain the money for the time on account of use & occupation of her premises but not as rent":—*Held*: notwithstanding the terms of that letter, the acceptance & retention of the money operated as a waiver of the notice & a recognition of a continuance of the tenancy.—**HARTELL v. BLACKLER**, [1920] 2 K. B. 161; 89 L. J. K. B. 838; 123 L. T. 171, D. C.

**Annotations:—***N.F.* **Davies v. Bristow**, Penrhos College v. Butler, [1920] 3 K. B. 428; *Shuter v. Hersh*, [1922] 1 K. B. 438. *Refd.* **Felce v. Hill** (1923), 92 L. J. K. B. 974.

**6041. — One day's rent.]**—Under an agreement in 1889 defts., a telephone co., supplied to plffs. the use of a telephone wire & apparatus for three years at a rent payable quarterly. Upon the expiration of the term the parties continued the agreement by mutual consent. On Dec. 30, 1893, being the last day of a quarter, defts. gave plffs. a notice determining the agreement forthwith, & stating their intention to disconnect the wire & remove the apparatus, & at the same time they demanded rent "up to Dec. 31," being one day beyond the quarter. This rent was duly paid to & accepted by defts. Upon a motion by plffs. for an injunction to restrain defts. from interfering with the wire & apparatus:—*Held*: the agreement created the relation of landlord & tenant, & therefore the acceptance by defts. of rent for a day beyond that on which the notice determining the contract was given operated as a waiver of the notice; & accordingly, an injunction was granted restraining defts. from acting on their notice.—**KEITH PROWSE & CO. v. NATIONAL TELEPHONE CO.**, [1894] 2 Ch. 147; 63 L. J. Ch.

1917.—**SMITH v. SMITH** (1918), 52 N. S. R. 196; 40 D. L. R. 509.—**CAN.**

**b. Receipt of sum corresponding to original rent—Pending adjourned ejectment proceedings.]**—Complainant applied to justices for an ejectment order against deft., who rented a house from him. The proceedings were adjourned for six months, & during the interval complainant received from deft. sums corresponding to the original rent:—*Held*: the acceptance of such sums was not a waiver of the notice to quit.—**SAMMON v. CAWLEY** (1919), 53 L. L. T. 224.—**IR.**

373; 70 L. T. 276; 58 J. P. 573; 42 W. R. 380; 10 T. L. R. 263; 8 R. 776.

*Annotations*.—*Consd.* Civil Service Co-op. Soc. v. McGrigor's Trustee, [1923] 2 Ch. 347. *Mentd.* Cochran v. Exchange Telegraph Co. (1896), 65 L. J. Ch. 334.

**6042.** — *Unless otherwise explained.*—The mere acceptance of rent by a landlord, for occupation subsequent to the time when the tenant ought to have quitted according to the notice given him for that purpose, is not of itself a waiver on the part of the landlord of such notice but matter of evidence only to be left to the jury, under the circumstances of the case.

If the landlord accepts it [rent] only as compensation for the double rent which the Statute says he shall have a right to, it is a waiver of that only; it does not waive his right to possession of the premises (*ASHHURST, J.*).—*DOE d. CHENY v. BATTEN* (1775), 1 Cowp. 243; 98 E. R. 1066.

*Annotations*.—*Consd.* Zouch d. Ward v. Willingale (1790), 1 Hy. Bl. 311; Ryal v. Rich (1808), 10 East, 48; Evans v. Wyatt (1880), 43 L. T. 176. *Refd.* Soulsby v. Neving (1808), 9 East, 310; Croft v. Lumley (1858), 6 H. L. Cas. 672; Abrahams S.S. Co. v. Westville Shipping Co., [1923] A. C. 773.

**6043.** — *Question of fact.*—*DOE d. CHENY v. BATTEN*, No. 6042, *ante*.

**6044.** — *By agent—Without authority.*—*DOE d. ASH v. CALVERT*, No. 5902, *ante*.

**6045.** — *Year's rent in one sum—Rent formerly paid quarterly.*—*LONDON SCHOOL BOARD v. PETERS* (1902), 18 T. L. R. 509.

**6046.** *Stipulation against waiver—On receipt for rent—Agreement stamp not required.*—A receipt for rent, stipulating that acceptance of rent shall not operate as a waiver of a previous notice to quit, does not require an agreement stamp under Stamp Act, 1815 (c. 184).—*DOE d. WHEBLE v. FULLER* (1835), Tyr. & Gr. 17.

#### E. Second Notice.

**6047.** *Whether former notice waived—Not as preliminary to action for ejectment.*—A landlord gave a notice to quit different parts of a farm at different times, which the tenant neglected to do in part, in consequence of which the landlord commenced an ejectment; & before the last period mentioned in the notice was expired, the landlord, fearing that the witness by whom he was to prove the notice would die, gave notice to quit at the respective times in the following year, but continued to proceed with his ejectment:—*Held*: the second notice was no waiver of the first.—*DOE d. WILLIAMS v. HUMPHREYS* (1802), 2 East, 237; 102 E. R. 360.

**6048.** — *Notice demanding double value.*—If after the expiration of a notice to quit, the landlord gives the tenant a fresh notice that unless he quit in fourteen days he will be required to pay double value, the second notice is no waiver of the first.—*DOE d. DIGBY v. STEEL* (1811), 3 Camp. 115, N. P.

**6049.** — *Former notice to assignor of tenant.*—But a second notice to deft. to quit at Michaelmas, 1811, is a waiver as to him of a former notice given to the original lessee, from whom he claimed by assignment, to quit at Michaelmas, 1810.—*DOE d. BRIERLY v. PALMER* (1812), 16 East, 53; 104 E. R. 1009.

*Annotation*.—*Refd.* Doe d. Banks v. Revett (1852), 18 L. T. O. S. 224.

**6050.** — *Tenant disclaiming tenancy—After receipt of first notice.*—*DOE d. BANKS v. REVETT* (1852), 18 L. T. O. S. 224.

#### F. Other Cases.

**6051.** *Agreement.*—A landlord of premises about to sell them gave his tenant notice to quit on Oct. 11, 1806, but promised him not to turn him out, unless they were sold; & not being sold till Feb. 1807, the tenant refused on demand to deliver up possession; & on ejectment brought:—*Held*: the promise, which was performed, was no waiver of the notice, nor operated as a licence to be on the premises otherwise than subject to the landlord's right of acting on such notice if necessary; & therefore the tenant, not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit.—*WHITEACRE d. BOULT v. SYMONDS* (1808), 10 East, 13; 103 E. R. 680.

*Annotation*.—*Fold.* London School Board v. Peters (1902), 18 T. L. R. 509.

**6052.** — *—*—*LONDON SCHOOL BOARD v. PETERS* (1902), 18 T. L. R. 509.

**6053.** — *To continue tenancy for further year—Breach of condition in new agreement—Notice revived.*—A tenant of a farm required that his rent might be reduced; the landlord refused; whereupon the tenant gave a notice to quit at Michaelmas, 1834. It was afterwards agreed that he should continue to hold on at a reduced rent, the notice continuing in force, until Michaelmas, 1835. Before that time arrived, the tenant offered to continue on as tenant at a certain rent, whereupon the landlord's agent wrote a letter, stating that the landlord had directed him to inform the tenant, that he could only consent to his offer as to the rent, from Michaelmas next to Michaelmas, 1836; provided he, the lessor, "could not find a tenant for the farm at the rent it appeared to him, the agent, to be worth, by Aug. 1." One C. having applied for the farm, the tenant refused to allow him to go over it, & C. made no offer:—*Held*: it was an implied condition of the agreement, that the tenant should allow persons applying for the farm to go over it; & that condition not having been performed by him, the contract was at an end.

In the construction of this, which is a parol contract, I think it was a necessarily implied condition, that the tenant should allow the person who might be desirous of taking it to come upon the farm to inspect it (*LORD ABINGER, C.B.*).—*DOE d. HERTFORD (MARQUIS) v. HUNT* (1836), 1 M. & W. 690; 2 Gale, 102; Tyr. & Gr. 1028; 5 L. J. Ex. 241; 150 E. R. 689.

**6054.** *Authorising tenant to pay charge on estate—Annuity.*—An authority from a landlord to his tenant to pay a charge upon the estate, in respect of a period subsequent to the expiration of the notice to quit, is not a waiver of the notice; nor is it an admission, that the person to whom it is addressed is filling the character of tenant at that period, because the tenant would be liable to answer for the amount in an action for mesne profits.—*DOE d. BATH v. SCOTT* (1827), 6 L. J. O. S. K. B. 110.

**6055.** *Tenant holding over—Whether necessarily waiver—Evidence of renewed tenancy.*—A tenant holding over after notice to quit given by the landlord, is not liable to a distress, without some evidence of a renewal of the tenancy.—*JENNER v. CLEGG* (1832), 1 Mood. & R. 213.

*Annotations*.—*Distd.* Williams v. Stiven (1846), 9 Q. B. 14. *Refd.* Hurley v. Hanrahan (1867), 15 W. R. 990.

**6056.** — *—*—*Question of fact.*—In *assumpsit* for rent of coal, the issue being whether or not



first year the lessor of ptf. told him that he should want the land in the spring, & deft. agreed to give it up then:—*Held*: there was no necessity for proving a formal notice to quit.—*DOE v. LYNDE & MERRITT* (1846), 2 U. C. R. 410.—*CAN.*

*Sect. 11.—Dispensing with notice. Part XXIV.*  
*Sect. 1: Sub-sect. 1.]*

as it was not good as a notice to quit, & could not operate as a surrender by note in writing within Stat. of Frauds, being to take effect in future.—*DOE d. MURRELL v. MILWARD* (1838), 3 M. & W. 328; 1 Horn & H. 79; 7 L. J. Ex. 57; 150 E. R. 1170.

*Annotations:—***Reld.** *Bessell v. Landsberg* (1845), 14 L. J. Q. B. 355; *Re Bebbington's Tenancy*, *Bebington v. Wild man*, [1921] 1 Ch. 559. **Mentd.** *Parker v. Briggs* (1893), 37 Sol. Jo. 452.

**6074. — Ultimate refusal—Entry of landlord.]—**Tenant from year to year gave his landlord notice to quit, ending at a time within half a year. The landlord at first acquiesced, but ultimately refused to accept the notice; the tenant quitted according to his notice, & the landlord entered & did some repairs:—**Held:** the tenancy was not determined.—**BESSELL v. LANDSBERG** (1845), 7 Q. B. 638; 14 L. J. Q. B. 355; 9 Jur. 576; 115 E. R. 630.

*Annotation:—***Reld.** *Phene v. Popplewell* (1862), 12 C. B. N. S. 334.

**6075. — Power of landlord.]—**If a tenant from year to year give a notice to quit, not expiring

with the year, the landlord, if the notice be in writing, & signed by the tenant, may, if he pleases, treat this irregular notice as a surrender of the tenancy.—**ALDENBURGH v. PEAPLE** (1834), 6 C. & P. 212, N. P.

*Annotation:—***Reld.** *Doe d. Murrell v. Milward* (1838), 3 M. & W. 328.

**6076. Verbal agreement for conditional dispensation—Furnished lodging.]—**Pltf. verbally agreed to let to deft. furnished apartments for two years certain, at £120 *per annum*. Pending the negotiation for the tenancy, & before the terms had been fully settled, pltf. signed a written paper as follows: "I shall be happy to allow Mr. B. to leave the apartments without any notice, if he finds anything that may at all lead him to suspect that there is any embarrassment in his landlord":—**Held:** such paper was admissible in evidence without any stamp; & the embarrassment of pltf.'s circumstances having been proved, deft. might quit the apartments without notice.—**BETHELL v. BLENCOWE** (1841), 3 Man. & G. 119; 3 Scott, N. R. 568; 10 L. J. C. P. 243; 133 E. R. 1081.

*Annotation:—***Mentd.** *Howard v. Smith* (1841), 3 Man. & G. 254.

## Part XXIV.—Determination of Term.

### SECT. 1.—FORFEITURE.

#### SUB-SECT. 1.—CONSTRUCTION OF FORFEITURE CLAUSES.

**Construction of contracts & deeds generally.]—**See CONTRACT, Vol. XII., pp. 607 *et seq.*; DEEDS, Vol. XVII., pp. 242 *et seq.*

**6077. Most favourably to lessee.]—****GRYGG v. MOYSES**, No. 6132, *post*.

**6078. —.]—**Proviso in a lease, giving power of re-entry if the lessee "shall do or cause to be done any act, matter, or thing contrary to & in breach of any of the covenants," does not apply to a breach of the covenant to repair, the omission to repair not being an act done within the meaning of the proviso.

It is a general rule of construction that the words of a covenant must be taken most strongly against the covenantor, & that rule applies more strongly to a proviso for re-entry, which contains a condition that destroys or defeats the estate (**LORD TENTERDEN, C.J.**).—**DOE d. ABDY v. STEVENS** (1832), 3 B. & Ad. 299; 110 E. R. 112; *sub nom.* **DOE d. ABDY v. JEAPES**, 1 L. J. K. B. 101.

**6079. Strictly construed—Conditions odious in law.]—**The words of the devise cannot make a condition; for a condition is a thing odious in law, which shall not be created without sufficient words (*per CUR.*).—**MACHEL & DUNTON'S CASE** (1587), 2 Leon. 33; 74 E. R. 335; *sub nom.* **MICHELL v. DUNTON**, Gouldsb. 74; Owen, 54, 91.

*Annotations:—***Apld.** *Martindale v. Martin* (1593), Cro. Eliz. 288. **Reld.** *Isherwood v. Oldknow* (1816), 3 M. & S. 382; *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1.

**6080. —.]—**When one demands a rent upon a condition, there he ought to be sure, as it were, to hit the bird in the eye; the just sum to be demanded, or not to re-enter, for conditions are odious in the law, & are therefore to be taken strictly (**COKE, C.J.**).—**MOODIE v. GARNANCE**

(1617), 3 Bulst. 153; *Moore, K. B.* 848; 1 Roll. Rep. 330, 367; 81 E. R. 131.

**6081. Fair construction—Neither favour nor disfavour.]—**In the construction of covenants of this sort, they are neither entitled to favour or disfavour, whether they are to make a forfeiture or to continue an estate (**LORD ELLENBOROUGH, C.J.**).—**GOODTITLE d. LUXMORE v. SAVILLE** (1812), 10 East, 87; 104 E. R. 1022.

*Annotation:—***Apld.** *Wooler v. Knott* (1876), 1 Ex. D. 124.

**6082. —.]—**Provisoes for re-entry in a lease are to be construed like other contracts: not with the strictness of conditions at common law.

I do not think provisos of this sort are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, & should in my opinion be construed as other contracts. The parties agree to a tenancy on certain terms, & there is no hardship in binding them to those terms. In my view o. cases of this sort the provisos ought to be construed according to fair & obvious construction without favour to either side (**LORD TENTERDEN, C.J.**).—**DOE d. DAVIS v. ELSAM** (1828), Mood. & M. 189, N. P.

*Annotations:—***Apprvd.** *Croft v. Lumley* (1855), 5 E. & B. 648. **Reld.** *Doe d. Lloyd v. Ingley* (1846), 15 M. & W. 465; *Saunders & Waine v. Merewether* (1865), 11 Jur. N. S. 655. **Mentd.** *Doe d. Mayhew v. Asby* (1839), 2 Per. & Dav. 302; *Clift v. Schwabe* (1846), 7 L. T. O. S. 342.

**6083. — Natural & usual sense.]—**The words used being clear & definite, a strong case was requisite to show that they bore any but the ordinary meaning; here, however, so far from a sufficient reason being given for assigning them limited construction only, there was clear ground for upholding them in their ordinary sense (**LORD LYNCHURST, C.B.**).

The safe & proper rule is, that words shall be taken in their natural & usual sense, unless som

#### PART XXIV. SECT. 1, SUB-SECT. 1.

**m. Strictly construed.]—****MATT v. PERL** (1871), 2 V. R. (M.) 27.—**AUS.**

**n. —.]—****TAYLOR v. JERMYN**

(1865), 25 U. C. R. 86.—**CAN.**

**o. —.]—****SYED AHMAD SAHIB SHUTTARI v. MAGNESITE SYNDICATE,**

**I. TD.** (1915), 1 L. R. 39 Mad. 1049.—**IND.**

**p. —.]—****STEWART v. RUTHERFORD** (1863), 35 Sc. Jur. 307.—**SCOT.**

stronger reason be assigned for giving them another (ALDERSON, B.).—DOE d. BRIDGMAN v. DAVID (1834), 1 Cr. M. & R. 405; 5 Tyr. 125; 149 E. R. 1137; *sub nom.* DOE d. WILLIAMS v. DAVIES, 6 C. & P. 614; 4 L. J. Ex. 10.

*Annotations*.—*Mentd.* Baylis v. Le Gros (1853), 31 L. T. O. S. 215; Stevens v. Copp (1868), L. R. 4 Exch. 20; Horsey Estate v. Steiger, [1899] 2 Q. B. 79.

**6084.** —.]—DOE d. MUSTON v. GLADWIN, No. 6500, *post*.

**6085.** — Ordinary rules for construction of covenant.]—(1) A lessee tenders money in payment of rent due, & requires that it shall be accepted as rent; the lessor refuses so to accept it, but says that he will accept it as compensation for past occupation, & (each party still continuing to assert what is his own intention on the matter) takes up the money. *Qu.*: whether this amounts to a waiver of a previous right of re-entry on a forfeiture for breach of covenant. *Qu.*: whether a waiver will operate upon breaches not known at the time. *Semble*: where a clause of re-entry is "if the lessee shall make default of or in the performance of all or any of the other covenants," etc., a non-observance of negative covenants will entitle the lessor to re-enter.

(2) I think that the condition ought to be construed with this amount of strictness, that it ought clearly to appear the condition was meant to include & did incorporate the covenant on the breach whereof the right to re-enter is claimed; but that the question whether the covenant itself is broken . . . is to be determined by reference to the rules which prevail in construing ordinary contracts between party & party (CHANNEILL, B.).—(CROFT v. LUMLEY (1858), 6 Il. L. Cas. 672; 27 L. J. Q. B. 321; 31 L. T. O. S. 382; 22 J. P. 639; 4 Jur. N. S. 903; 6 W. R. 523; 10 Il. R. 1459, H. L.

*Annotations*.—*As to* (1) *Consd.* Price v. Worwood (1859), 4 H. & N. 512; Davenport v. R. (1877), 3 App. Cas. 115; James v. Young (1884), 27 Ch. D. 652; Hannan v. Ainslie, [1904] 1 K. B. 698; Hartell v. Blacklock, [1920] 2 K. B. 161. *Refd.* Dendy v. Nicholl (1858), 4 C. B. N. S. 376; Wurd v. Day (1864), 5 B. & S. 359; Clough v. L. & N. W. Ry. (1871), L. R. 7 Exch. 26; Tolesman v. Portbury (1871), L. R. 6 Q. B. 245; Morrison v. Universal Marine Insce. (1873), L. R. 8 Exch. 197; Lancashire Waggon Co. v. Nuttall (1879), 40 L. T. 291; Keith, Prowse v. National Telephone Co., [1894] 2 Ch. 147; Wulfsberg v. Weardale S.S. (1916), 85 L. J. K. R. 1717; The Kin Tyo Loong v. Seth (1920), 89 L. J. P. C. 113; R. v. Paulson, [1921] 1 A. C. 271; Abram S.S. Co. v. Westville Shipping Co., [1923] A. C. 773. *Generally.* *Mentd.* Hill v. Cowdery (1856), 1 H. & N. 360; Mumford v. Oxford, Worcester & Wolverhampton Ry. (1856), 1 H. & N. 34; Jeffries v. Alexander (1860), 8 H. L. Cas. 595; Arison v. Holmes, Penny v. Arison (1861), 1 John. & H. 530; Benham v. Keane (1861), 1 John. & H. 685; Ackroyd v. Smithies (1885), 54 L. T. 130; *Re* Cotgrave, *Mynors v. Cotgrave*, [1903] 2 Ch. 705; Davies v. Bristow, Penrhos College v. Butler, [1920] 3 K. B. 428.

**6086.** Without regard to proviso for re-entry.]—A lease was granted to two partners, B. & H., as joint tenants. The lessees covenanted that they, their exors., administrators, or assigns, or any or either of them, would not, during the term, assign, underlet, or part with the possession of the demised property to any person or persons without the written consent of the lessor; & there was a proviso for re-entry on the breach of any of the covenants. The partners dissolved partnership, & agreed that the partnership property should be made over to B., & that the leasehold property should be assigned to him with the consent of the lessor, if such consent could be obtained, & recited, as the fact was, that A. had given up sole possession of the leaseholds to B. Consent was not obtained, & no assignment of the leasehold was executed, but B.,

from the time of the dissolution, remained in sole possession:—*Held*: there had been no breach of the covenant, & the proviso for re-entry had not come into operation.

In my opinion we must in the first place construe the covenant without regard to the proviso for re-entry, for its construction must be the same in an action for damages for breach of the covenant as in an action for the recovery of the land on the ground that the proviso for re-entry has come into operation by reason of such breach (JESSEL, M.R.).

I agree that, although it is a question of forfeiture, we must construe the covenant fairly, ascertain its meaning without regard to forfeiture, & then see whether, upon that ascertained meaning, a forfeiture has been incurred (COTTON, L.J.).—BRISTOL CORPN. v. WESTCOTT (1879), 12 Ch. D. 461; 41 L. T. 117; 27 W. R. 841, C. A.

*Annotations*.—*Consd.* Horsey Estate v. Steiger, [1898] 2 Q. B. 259. *Refd.* Gentile v. Faulkner (1899), 68 L. J. Q. B. 848; Langton v. Henson (1905), 92 L. T. 805.

**6087.** Literal construction—Unless reason to contrary.]—Lease for years by indenture rendering rent, & lessee covenants with lessor that he will pay the rent, & will not assign without leave of lessor, provided that if the rent be in arrear, or if all or any of the covenants hereinafter contained on the part of lessee shall be broken, it shall be lawful for lessor to re-enter; & there were no covenants on the part of lessee after the proviso, but only a covenant by lessor that lessee paying, etc., & performing all & every the covenants hereinbefore contained on his part to be performed, etc., should quietly enjoy:—*Held*: lessor could not re-enter for breach of the covenant not to assign, for the proviso is restrained by the word hereinafter to subsequent covenants, & though there were none such, yet the ct. could not reject the word.

I believe the safest rule for the construction of these instruments is to construe them according to the letter, unless we can see a decisive reason for departing from it (LORD ELLENBOROUGH, C.J.).—DOE d. SPENCER v. GODWIN (1815), 4 M. & S. 265; 105 E. R. 833.

*Annotations*.—*Consd.* Doe d. Abdy v. Stevens (1832), 3 B. & Ad. 299. *Refd.* Strickland v. Maxwell (1834), 4 Tyr. 346.

**6088.** — "Covenants hereinafter contained"—No such covenants inserted—Breach of preceding covenants.]—DOE d. SPENCER v. GODWIN, No. 6087, *ante*.

**6089.** — Proviso against positive acts—Omission to act not included.]—DOE d. ABDY v. STEVENS, No. 6078, *ante*.

**6090.** — Proviso meaningless—No construction.]—A lease contained the following proviso: "If (.), the lessee, "shall, either by his own act or acts, or by bkpcy., writ of extent, or of execution by *fieri facias*, or other ct of law, or by any other means, whereby, either voluntarily or without or against his consent, whereunder the premises demised, or any part thereof, would, in case this proviso did not exist, be liable to be seized by the sheriff or any other person, or in case (.) shall at any time or times hereafter make breach or default in the performance of the covenants," etc., "then, & in any or either of the cases, this present indenture & the term hereby created shall thenceforth cease & determine; & it shall & may be lawful to & for E.," the lessor, to re-enter & expel the lessee. On ejectment, brought upon forfeiture supposed to have accrued by execution of a *fi. fa.* issued against the lessee:—*Held*: the proviso was insensible.—

**Sect. 1.—Forfeiture: Sub-sects. 1 & 2, A. (a) & (b) i.]**

DOE d. WYNDHAM v. CAREW (1841), 2 Q. B. 317; 1 Gal. & Dav. 640; 11 L. J. Q. B. 5; 6 Jur. 457; 114 E. R. 124.

**6091. — Proviso in event of bankruptcy—Technical flaw in bankruptcy proceedings.]—**A lease for years contained a proviso for re-entry, in case the lessee "should at any time during the term commit any act of bkpcy., whereupon a commission or fiat in bkpcy. should issue against him, & under which he should be duly found & declared a bkpt." The lessee, being a trader, committed an act of bkpcy., on which a fiat issued against him, & he was by the comrs. found & declared a bkpt.; but the petitioning creditor's debt on which the fiat was founded was proved by A. & B., as partners, whereas it was due to A., B., & C., as partners:—*Held*: the lessee was not duly found & declared a bkpt., within the meaning of the proviso.—DOE d. LLOYD v. INGLEBY (1846), 15 M. & W. 465; 153 E. R. 933.

*Annotation*:—*Consd. Horsey Estate v. Steiger*, [1899] 2 Q. B. 79.

**6092. Language of whole considered—Local & personal statute—Leases in pursuance thereof.]—**By a local Act of Parliament, & a lease made in pursuance thereof, A. granted to B. lands, with liberty to lay waggon ways for the carriage of coals, for the term of 60 years, & such further term as B. his exors., etc., should work certain coal mines; proviso (both in the Act & the lease), that if B. ceased to work the mines, or failed in any one year to carry a certain quantity of coals to a depository called C., A. might re-enter. By a subsequent Act the quantity to be carried was increased; proviso, that if B. did not yearly carry such increased quantity to C. "or to some other place near thereto, to be used as a depository for coals instead thereof," A. might re-enter:—*Held*: by the last proviso, the first was virtually repealed; & B. carrying the increased quantity to a depository near to C. was excused from carrying coals to C.

In construing such local Acts of Parliament, we are to look not at the preamble, or at the words of any one particular clause, alone, but at the language of the whole; & if in the preamble, or in any one clause, we find expressions less large & extensive than we find in other parts, & upon a view of the whole we can see that the larger & more extensive expressions used in other parts best show what the intention of the legislature was; then it is our duty to give effect to the larger expressions, notwithstanding the more limited phrases which may be found in other places. We must look at the whole Act, & form our judgment upon it as a whole (LORD TENTERDEN, C.J.).—DOE d. BYWATER v. BRANDLING (1828), 7 B. & C. 643; 1 Man. & Ry. K. B. 600; 6 L. J. O. S. K. B. 162; 108 E. R. 863.

*Annotation*:—*Reid. R. v. O'Connell* (1843), 2 L. T. O. S. 248.

**Avoidance at option of lessor.]—See Sub-sect. 3, post.**

**SUB-SECT. 2.—RIGHT OF RE-ENTRY.**

**A. When Right Arises.**

**(a) In General.**

**6093. Act working forfeiture nullified by subsequent act.]—**A forfeiture cannot be enforced in

respect of an act, which of itself might work a forfeiture, but which, by a subsequent act, is rendered void. Thus, where a lease contained a clause of forfeiture in case the tenant should assign that lease, & the tenant did assign it to trustees, for the benefit of his creditors, & upon this deed, treated as an act of bkpcy., a commission issued against the tenant:—*Held*: this assignment, turning out to be void, was not sufficient to entitle the landlord to enforce it as a ground of forfeiture.—DOE d. LLOYD v. POWELL (1820), 5 B. & C. 308; 8 Dow. & Ry. K. B. 35; 108 E. R. 115; *sub nom.* DOE v. LLOYD, 4 L. J. O. S. K. B. 159.

*Annotations*:—*Reid. Re O'Sullivan, Ex p. Baller* (1892), 61 L. J. Q. B. 228; *Re Riggs, Ex p. Lovell*, [1901] 2 K. B. 16; *Stein v. Pope*, [1902] 1 K. B. 595.

**6094. Where demise not under seal.]—**(1) A demise may contain a clause of forfeiture, though it be not under seal.

(2) Where there are clauses, some of which contain words of agreement or covenant & others contain words of agreement or covenant & also words of condition, the deed shall be construed so as to give effect to both. Accordingly, where by demise, not under seal, certain things were "stipulated" & other things "stipulated & agreed" between the parties & there was a clause stating that it was "stipulated & conditioned" that the tenant should not underlet:—*Held*: the latter words were words of condition; & the tenant having underlet, he had incurred a forfeiture.—DOE d. HENNIKER v. WATT (1828), 8 B. & C. 308; 1 Man. & Ry. K. B. 694; 6 L. J. O. S. K. B. 185; 108 E. R. 1057.

**6095. — Agreement for lease.]—**If a tenant holds under an agreement for a lease, which specifies the covenants to be inserted in the lease, with a right of entry, for breach of them, an ejectment may be sustained on any breach, though no lease has ever been executed.—DOE d. OLDERSHAW v. BREACH (1807), 6 Esp. 106, N. P.

*Annotation*:—*Mentd. Doe d. Tilt v. Stratton* (1828), 4 Bing. 446.

**6096. — — —.]—**In an agreement between A. & B., & not under seal, expressed to be made "in consideration of the rents & covenants to be reserved & contained in the lease agreed to be granted," it was provided that, as soon as B. should have executed certain specified repairs, etc., A. would lease certain premises to him, his exors., etc., for thirty-five years from a day passed, at the yearly rent of £15; such lease to contain certain specified covenants on the part of B. as to rent & other matters, & also all other usual & proper covenants, & especially a proviso for re-entry for non-payment of rent or non-performance of covenants; & it was further agreed that, until the lease should be granted, *pltf.*, his exors., etc., should have the same powers & remedies for recovering & enforcing payment of the rent & performance of the covenants as fully as if the lease had been actually granted; the repairs to be completed by a given day." Then followed this proviso, "provided always that, if the rent should be in arrear, etc., or if B., his exors., etc., should make default in the observance & performance of the covenants & conditions on his or their part herein contained, then & in either of the said cases it shall be lawful for B., his exors., etc., to enter the premises, etc., & same to have again & enjoy as in his or their former estate, & B. & all

**PART XXIV. SECT. 1, SUB-SECT. 2.—**

**A. (a).**

**q. After necessary proceedings.]—**DOE d. KING'S COLLEGE v. KENNEDY

(1848), 5 U. C. R. 577.—**CAN.**

**r. No right in stranger.]—**Upon a lease purporting to be made by W. as attorney for H., reserving a right

of re-entry "by the said W. into the demised premises," not saying as such attorney:—*Held*: no right of entry was reserved, for there can be no re-

other occupiers thereof & thereout to remove, & thenceforth these presents & everything herein contained shall cease & be void." B. was let into the premises, & paid rent. The repairs not having been done by the time agreed on:—*Held*: (1) A. was entitled to re-enter; (2) an agreement creating a present demise, void as a lease by Real Property Act, 1845 (c. 106), s. 3, may still enure as an agreement.—*HAYNE v. CUMMINGS* (1864), 16 C. B. N. S. 421; 4 New Rep. 61; 10 L. T. 341; 10 Jur. N. S. 773; 143 E. R. 1191.

*Annotation* :—Generally, **Mentd.** Magnhild S.S. v. McIntyre,  
[1920] 3 K. B. 321.

6097. ————— Incorporating covenants from prior lease.—Insertion of new covenant in agreement.—By an agreement in writing, but not under seal, pltf. agreed to let & deft. to hire on lease for twenty-one years a house, etc., on the following terms: the rent to be £55 *per annum*, the lease to commence from Mar. 25 next, & to contain an extract of the covenants in the original lease which pltf. is bound under: that the proposed lease shall not be sold, parted with, or any portion of the property underlet without the consent in writing of pltf. In the original lease were six covenants by the lessee, with a proviso for re-entry on the breach of any of them; but there was no covenant not to underlet without the consent of the landlord. Deft. entered & paid rent, & underlet the premises without the consent of pltf., who thereupon brought ejectment, & was nonsuited:—*Held*: the nonsuit was right; deft. held as tenant from year to year, on such of the terms of the agreement as were applicable to that tenancy; the agreement incorporated the six covenants in the original lease, & the proviso for re-entry on the breach of any one of those covenants; but the agreement could not be read as applying the proviso for re-entry to the new clause as to not underletting; & on the authority of *Shaw v. Coffin*, No. 6108, *post*, on mere words of agreement a condition could not be created.—*CRAWLEY v. PRICE* (1875), L. R. 10 Q. B. 302; 33 L. T. 203; 23 W. R. 874.

*Annotation* :—**Mentd.** Austen v. Allen (1832), You, 585.

**6098. Alternative remedy available.—Increased rent payable on breach.**—A clause in a lease stipulated that if any of the trades, occupations or things thereafter covenanted not to be carried on or done upon the demised premises, should be carried on or done, the lessees should pay to the lessors the further net yearly rent of £25 by equal quarterly payments. The lease contained the usual covenants for payment of rent & taxes, to repair, etc.; & also a covenant that the lessee would not carry on or be suffered to carry on certain named trades, or any offensive, noisome, or noisy trade or business whatsoever. The lease also contained the following clause: "Provided always, & these presents are upon this express condition, that if the net yearly rent of £30 hereinbefore reserved, or the further rent of £25 (in case same shall become payable) or any part thereof, respectively shall be in arrear for twenty-one days, or if & whenever there shall be a breach of any of the covenants hereinbefore contained on the part of the lessee,

etc., then it shall be lawful for the lessors, etc., into & upon the premises, or any part thereof in the name of the whole, to re-enter, & same to have again, repossess & enjoy as in their first & former estate, anything hereinbefore contained to the contrary notwithstanding":—*Held*: the covenant for the payment of an additional rent was an alternative remedy, at the option of the lessors, & did not prevent them availing themselves of their right of re-entry upon a breach by the lessee of his covenant not to carry on an offensive trade.—*WESTON v. METROPOLITAN ASYLUM DISTRICT MANAGERS* (1882), 9 Q. B. 1). 404; 51 L. J. Q. B. 399; 46 L. T. 580; 30 W. R. 623, C. A.

**6099. Act not within terms of lease—Affixing poster on premises.]—**Under a lease the landlord had only a right of re-entry upon the non-performance of the covenants by the tenant or on non-payment of rent. The tenant committed no breach of covenant, but during the tenancy he affixed on the premises an election poster, which was removed by the landlord, who maintained that he had a right to do so. In an action by the tenant against the landlord for damages for trespass & for an injunction :—*Held* : the landlord had no right to enter upon the premises except in the event of non-payment of rent or breach of covenant, & the tenant was therefore entitled to a declaration to that effect & to damages for the trespass. —*YEILLOLY F. MORTLEY* (1910), 27 T. L. R. 20, D. C.

(b) *Breach of Condition on Which Term Granted.*  
i. *In General.*

**6100. Fulfilment to be on "pain of forfeiture."]**—This clause in an indenture of lease, "& the lessee shall continually dwell upon, etc., under pain of forfeiture," is a condition; & if broken, the lessors may re-entr. (*CHICKLEY'S CASE* (1553), 1 Dyer, 77 a; 73 E. R. 169.)

*Annotation* :— **Mentd.** Portington's Case (1613), 10 Co. Rep. 35 a.

**6101.** - --.|-*Qu.*: if where one of the parties to a lease agree that he will do an act *sub pœnda forisfacture* his interest therein, it shall be construed mutually, & thereby form a condition instead of a covenant. — *THOMAS v. WARD* (1590), (Gro. Eliz. 202 : 78 E. R. 458).

6102. —. —. If a lessee covenant that he will not do a certain act on pain of forfeiture, it is a condition to defeat the estate. — *WHITCHOT v. FOX* (1616), Cro. Jac. 392; 1 Roll. Rep. 389; 79 E. R. 340; *sub nom.* *FOX v. WHITCHOCKE*, 2 Bulst. 290.

**Annotations:** — **Consd.** *Bally v. Wells* (1769), *Wilm.* 341.  
**Distd.** *Re Stephenson, Poole v. Stephenson*, [1915] 1 Ch.  
802. **Refd.** *Tongue v. Pitcher* (1690), 3 Lev. 295; *Tovey*  
*v. Pitcher* (1692), *Carth.* 177; *Rockingham v. Oxenden*  
(1711), 2 Salk. 578; *Dowell v. Dew* (1842), 1 Y. & C. Ch.  
Cas. 345.

6103. Not to cut timber---Breach by sub-lessee.]  
—ANON. (1503), Dal. 49 (12); Moore, K. B. 49;  
123 E. R. 203.

6104. Permitting removal of goods—Parol refusal.—No physical prevention.]-In replevin, deft. avowed taking the cattle damage feasant. Pltf. pleaded in bar a devise to one, I., of the lands in which, etc., for sixty years, who demised them to

servation of a right of re-entry to a stranger to the legal estate.—HYNDMAN v. WILLIAMS (1859), 8 C. P. 293.—CAN.

t. *On clear breach of covenant.*]—  
WATSON v. MOGGEY (1904), 15 Man.  
L. R. 241; 1 W. L. R. 438.—CAN.

a. —.]—SASKATCHEWAN ELBOW  
WHEAT LAND CO. v. GOMBAR (1909),  
11 W. L. R. 520.—CAN.

b. —.] — EDWARD v. LOW (OR REID) (1871), 9 Macph. (Ct. of Sess.) 782.—SCOT.

**PART XXIV. SECT. 1, SUB-SECT. 2.—**  
**A. (b) i.**

**6100 1.** *Fulfillment to be on pain of forfeiture.*—**BAKER'S CREEK CONSOLIDATED G. M. CO. v. HACK** (1894), 15 N. S. W. Eq. 207; 10 N. S. W. W. N. 217.—**AUS.**

6100 ii. —.—.—BOULTON v. MURPHY  
(1839), 5 O. S. 731.—CAN.

6100 ill. —.—.]—SHELDON v. SHEL-  
DON (1863), 22 U. C. R. 621.—CAN.

6100 *lv.* —.]—BALDWIN v. WAN-  
ZER. BALDWIN v. CANADIAN PACIFIC  
RY. CO. (1892), 22 O. R. 612.—CAN.

6100 v. — —.]—SHORT v. TURFFON-  
TEIN ESTATES, LTD. (1906), T. S. 997.  
—S. AF.

Sect. 1.—Forfeiture: Sub-sect. 2, A. (b) i. & ii.]

pltf. for one year. Deft. replied, a feoffment in fee after the making the will, to the use, amongst other uses, of I. for sixty years after the death of the deviser, with a proviso, if I. should disturb T. & others, etc., so that they could not quietly enjoy the tenements the deviser conveyed to them, etc., or if I. should not permit the exors. of the deviser to have & remove, etc., all the goods & chattels, etc., of him the deviser, which should then be in his mansion house, or if he should do anything to impede & frustrate the intention of the deviser expressed in his will, the use should cease & be void; & further pleaded, that I. entered into a house where certain goods of the deviser were, & took them; & that the exors. came & requested I. to let them take away the goods, but that I. would not permit the exors. to take them away: but that he altogether prevented & hindered them from so doing; & then deft. concluded his replication by averring that the use to I. ceased. On demurrer, judgment was given for pltf.:—**Held:** (1) the words of the proviso are sufficient, to make the use limited to I. for years, cease; (2) a denial by parol is not any breach of the condition, but there ought to be some act done: as after request made by the exors. shutting the door against them, or laying his hands upon them.—**FRAUNCES'S CASE** (1609), 8 Co. Rep. 89 b; 77 E. R. 609.

**Annotations:**—As to (2) **Refd.** *Lancashire v. Kellingworth* (1700), 1 Com. 116; *Anon.* (1715), 1 Com. 228. **Generally, Refd.** *Tracey v. Dutton* (1621), Cro. Jac. 617; *West v. Blakeway* (1841), 2 Man. & G. 729. **Mentd.** *Hicks v. Goates* (1616), Cro. Jac. 390. R. v. Hampden (1637), 3 State Tr. 826; *Fry's Case* (1672), 1 Vent. 199; *Williams v. Fry* (1673), 1 Mod. Rep. 86; *Malloon v. Fitzgerald* (1683), 3 Mod. Rep. 29; *Whately v. Rodeo* (1698), 1 Lut. 804; *Burleton v. Humfroy* (1755), Amb. 256; *Le Bret v. Papillon* (1804), 4 East, 502; *Doed, Kenrick v. Beauclerk* (1809), 11 East, 657; *Castledine v. Mundy* (1832), 4 B. & Ad. 90; *Doe d. Taylor v. Crisp* (1838), 1 Per. & Dav. 37; *Clavering v. Ellison* (1856), 3 Drew. 451; *Kiallmark v. Kiallmark* (1856), 26 L. J. Ch. 1; *Scallcock v. Harston* (1875), 1 C. P. D. 106; *Jeffreys v. Jeffreys* (1901), 84 L. T. 417.

**6105. Whether condition apportionable—Possession of part of premises resumed by lessor—With consent of lessee.**—**CULCOE v. SHARP** (1608), Noy, 126; 74 E. R. 1090.

**Annotation:**—**Refd.** *Hodgkins v. Thornbury* (1675), 3 Keb. 557.

**6106. — Reversion vesting in coparceners.**—(1) A lease of lands, etc., by A. to B., contained a general covenant by B. to repair, & a further covenant that A. might give notice to B. of all defects & want of repair, & if B. did not repair the defects within two months, A. might enter & do the repairs himself, the expense of which B. was to repay at the time of paying his next rent, & if he did not do so, A. might distrain on him for the expense, as in case of rent arrear. There was also a power to A. to re-enter upon breach of any covenant. The premises being out of repair, A. gave B. notice to repair within six months, & that, if B. did not repair within that time, he would perform the repairs, & charge B. with the expense. The premises were not repaired within the six months. During that time, a negotiation was entered into by A. & B.; & after the expiration of the six months, A. gave notice to B., that, if he did not agree to certain terms in three days, A. would hold him to the covenants in his lease. B. did not agree:—**Held:** A. could not recover in ejectment for a forfeiture, he having elected to perform the repairs & distrain on B. for the

expense, & the general power to re-enter not being revived by the three days' notice.

(2) **Semble:** where a power of re-entry for breach of covenant is reserved in a lease, & the reversion descends to coparceners at common law, one alone cannot maintain ejectment for breach of the covenant.—**DOE d. DE RUTZEN v. LEWIS** (1830), 5 Ad. & El. 277; 2 Har. & W. 162; 6 Nev. & M. K. B. 764; 5 L. J. K. B. 217; 111 E. R. 1170.

**Annotations:**—As to (2) **Consd.** *Doe d. Campbell v. Hamilton* (1849), 13 Q. B. 977. **Generally, Refd.** *Doe d. Mayhew v. Asby* (1839), 10 Ad. & El. 71.

**6107. Clause not amounting to condition—Agreement to surrender portion of premises.**—In an agreement to let, in which there was no clause of re-entry, the following stipulation was held to be a covenant, & not a condition operating in defeasance of estate: "It is also hereby agreed & clearly understood, that in case A., or his heirs, exors., & assigns, should want any part of the land to build, or otherwise, or cause to be built, then T., or his heirs, exors., or assigns, shall & will give up that part or parts of the land as shall be requested by A., by his making an abatement in proportion to the rent charged, & also to pay for so much of the fence, at a fair valuation, as he shall have occasion from time to time to take away, by his giving or leaving six months' notice of what he intends to do."—**DOE d. WILSON v. PHILLIPS** (1824), 2 Bing. 13; 9 Moore, C. P. 46; 2 L. J. O. S. C. P. 103; 130 E. R. 208.

**Annotation:**—**Mentd.** *Liddy v. Kennedy* (1871), L. R. 5. H. L. 134.

**6108. — Agreement not to underlet.**—The following words in an agreement for letting do not create a condition: "A. (the tenant) hereby agrees that he will not underlet the premises without the consent in writing of the landlord."—**SHAW v. COFFIN** (1863), 14 C. B. N. S. 372; 2 New Rep. 29; 143 E. R. 490.

**Annotation:**—**Fold.** *Crawley v. Price* (1875), L. R. 10 Q. B. 302.

**6109. Breach arising through act of law.**—Land was demised for one thousand years by indenture in 1793 to A. & B., the latter described as visitor & guardian of the poor of the parish of C., their successors & assigns, under 22 Geo. 3, c. 83, for the purpose of erecting a poorhouse thereon, & occupying & cultivating same for the use & benefit of such poorhouse, & of the poor of C. & such other parishes as should be united therewith for the purposes of the Act. Proviso for re-entry if C. & all the other parishes which should or might at any time be so united should of themselves discontinue to adopt the provisions of the statute. Further proviso that, if, during this demise, the legislature should repeal 22 Geo. 3, c. 82, so that the poor of the several parishes should no longer be permitted to remain under the care of the visitor & guardians of such parishes, it should be lawful for the visitor & guardians, their successors & assigns, yielding up the land to the lessors, to pull down the poor houses & carry away the materials. The house was built; & C. & other parishes adopted the provisions of the Act; & C. continued to follow them till the making of the after-mentioned order; but the other parishes seceded from the union. In 1836 the Poor Law Comrs. incorporated parish C. in the Hambledon Union, & ordered all the paupers to be removed to the union workhouse; after which

**6109 i. Breach arising through act of law.**—**CARRICK v. MILLER** (1868), L. R. 1 Sc. & Div. 356. **SCOT.**

c. Condition must be clear.]—

**FETHERSTON v. BICE** (Alta.) [1917] 1 W. W. R. 224.—**CAN.**

d. —.—**PARAMESHRI v. VITTAPPA SHANBAGA** (1902), 1 L. R. 26 Mad.

157.—**IND.**

• No express proviso for re-entry.]—**FREEMAN v. BOYLE** (1788), 2 Rldg. Parl. Rep. 69.—**IR.**

no paupers were received into the poorhouse of C., but persons requiring only outdoor relief; & the parish officers issued a notice proposing to let part of the house & the land:—*Held*: no forfeiture under the first proviso.—*DOE d. GRANTLEY (LORD) v. BUTCHER* (1840), 6 Q. B. 115; 115 E. R. 44.

**6110.** —.]—Land was demised to trustees for parish R., they covenanting to build a workhouse thereon, & to use, occupy, possess & enjoy the premises for the sole use, maintenance & support of the poor of R., & not to convert the building or the land, or employ the profits thereof, to any other use, intent or purpose whatsoever. Proviso for re-entry on breach of the covenant. The house was built & together with the land used agreeably to the covenant. Afterwards Poor Law Amendment Act, 1834 (c. 76), passed; & the Poor Law Comrs. incorporated parish R. in a union, & removed all the paupers to the union workhouse. The workhouse of R. became uninhabited, & was locked up; & the land was let at a rack rent, which was applied in aid of the poor rates. On ejectment brought, three years afterwards, for breach of the covenants:—*Held*: no breach of the covenant appeared. *Seem*: a breach caused by the compulsory operation of the statute would have been thereby excused.—*DOE d. ANGLESEA (LORD) v. RUGELEY (CHURCHWARDENS)* (1844), 6 Q. B. 107; 13 L. J. M. C. 137; 3 L. T. O. S. 160; 8 J. P. 694; 8 Jur. 615 115 E. R. 41.

**6111.** —.]—Declaration: that deft. in 1840 demised by deed certain premises to plff. for a long term of years, & deft. covenanted that "neither he nor his assigns would, during the term, permit any messuage, etc., to be built on a paddock fronting the demised premises"; alleging as breaches, (a) that deft. during the term permitted a railway station to be built on the paddock; (b) that deft. assigned the paddock to a railway co., who erected the railway station on the paddock. Plea: that after the making of the lease the railway co. required to take the paddock under powers given them by an Act of Parliament of 1862, for purposes for which they were by the Act empowered to take same; that the paddock was land which the co. were empowered to take compulsorily for the purposes of the undertaking authorised by the Act; & that the co. under the powers so conferred did compulsorily purchase & take the paddock, & that the assignment by deft. to the co. was the assignment in completion of such compulsory purchase; that the co. afterwards built on the paddock the erections complained of, which were erections reasonably required for the purposes of the undertaking authorised by the Act. Replication: that though the erections were reasonable, it was not necessary or compulsory for the co. to build them. On demurrers to the plea & replication:—*Held*: deft. was entitled to judgment: for deft. was discharged from his covenant by the subsequent Act of Parliament, which compelled him to assign to the railway co., & so put it out of his power to perform the covenant, on the principle of the maxim, *lex non cogit ad impossibilia*; & it could make no difference whether the co. were only empowered, or were compelled to build the station on the paddock.—*BAILY v. DE CRESPIGNY* (1869), L. R. 4 Q. B. 180; 10 B. & S. 1; 38 L. J. Q. B. 98; 19 L. T. 681; 33 J. P. 164; 17 W. R. 494.

*Annotations*:—*Distd. Mills v. East London Union* (1872), L. R. 8 C. P. 79. *Apld. Newington L. B. v. Cottingham L. B.* (1879), 12 Ch. D. 725; *Budd-Scott v. Daniell* (1902), 87 L. T. 392; *Re Shipton, Anderson & Harrison's Arbitra-*  
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*tion*, [1915] 3 K. B. 676; *Metropolitan Water Board v. Dick, Kerr*, [1918] A. C. 119. *Reid. M. S. & L. Ry. v. Anderson*, [1898] 2 Ch. 394; *Kroll v. Henry*, [1903] 2 K. B. 740; *Re Bradford Tramways & Omnibus Co., Courtenay's Case* (1904), 68 J. P. 362; *Grimsdick v. Sweetman*, [1909] 2 K. B. 740; *Enlayde v. Roberts* (1916), 86 L. J. Ch. 149; *Matthey v. Curling*, [1922] 2 A. C. 180. *Mentd. Re Arthur, Arthur v. Wynne* (1880), 14 Ch. D. 603; *Kirby v. Harrogate School Board*, [1896] 1 Ch. 437; *Nickoll & Knight v. Ashton, Edridge*, [1901] 2 K. B. 126; *Long Eaton Recreation Grounds Co. v. Mid. Ry.*, [1902] 2 K. B. 574; *Metropolitan Water Board v. Solomon*, [1908] 2 Ch. 214; *Horlock v. Real*, [1916] 1 A. C. 486; *Leiston Gas Co. v. Leiston-Cum-Sizewell U. C.*, [1916] 2 K. B. 428; *Blackburn Bobbin Co. v. Allen*, [1918] 2 K. B. 467; *Naylor, Benzon v. Krainsche Industrie Gesellschaft*, [1918] 1 K. B. 331; *Bank Line v. Capol*, [1919] A. C. 435; *Hulton v. Chadwick, Taylor* (1919), 122 L. T. 66; *Denholm v. Shipping Controller* (1920), 124 L. T. 378.

**6112. Execution of repairs—To satisfaction of lessor's surveyor—What is sufficient satisfaction.** —A lessee was to incur a forfeiture, if he did not do certain repairs "to the satisfaction of the surveyor" of the lessor. He did the repairs, but the lessor's surveyor was not satisfied. In ejectment for the forfeiture:—*Held*: if those who tried the cause thought the surveyor ought to have been satisfied, that would be sufficient, & there would be no forfeiture incurred.—*DOE d. BAKER v. JONES* (1848), 2 Car. & Kir. 743.

**6113. Payment of rates—Necessity for prior demand—Notice to tenant of assessment.** —Where a landlord is entitled to retake possession of premises on breach of a covenant, in a lease, by the tenant, to pay rates, it is not necessary that the rates should have been demanded of the tenant before the landlord resumes possession under such proviso in the lease, nor that the tenant should have received notice of the assessment of such rates.—*DAVIS v. BURRELL* (1851), 10 C. B. 821; 17 L. T. O. S. 51; 15 Jur. 658; 138 E. R. 325.

*Annotations*:—*Reid. Jones v. Foley* (1891), 60 L. J. Q. B. 464. *Mentd. Kershaw, Leese v. Stockport Overseers*, [1923] 2 K. B. 129; *Gill v. Mellor, Gill v. Monday*, [1924] 1 K. B. 97.

**Provisoes—When amounting to condition.** —*See DEEDS*, Vol. XVII., p. 406, Nos. 2140–2148.

**When amounting to covenants.** —*See DEEDS*, Vol. XVII., pp. 406, 407, Nos. 2149–2157.

**When amounting to qualification of preceding covenant.** —*See DEEDS*, Vol. XVII., pp. 407, 408, Nos. 2158–2164.

## ii. Non-Payment of Rent.

**6114. Right of re-entry an auxiliary proviso—To secure payment.** —By the Royal Proclamations dated Aug. 6, 1914, & subsequently, which were made pursuant to 4 & 5 Geo. 5, c. 11, certain payments, which included rent, were postponed at first until Sept. 4, 1914, & then to a later date. On Aug. 25, 1914, a writ was issued claiming arrears of rent for one year, the last quarter's rent due being that payable at Midsummer, 1914. Plff. also claimed possession of the premises under a provision in the agreement of tenancy for re-entry if any quarter's rent were in arrear for twenty-one days. It was contended for deft. that the right of re-entry had always been considered as a security for the payment of the rent, & that as admittedly the payment of this rent was postponed, so also was the enforcement of the security:—*Held*: the right of re-entry on non-payment of rent had always been treated as an auxiliary proviso to secure the payment of the rent, & as, when the writ was issued no rent was payable, the right of re-entry no longer then subsisted.—*DURELL v. GREAD* (1914), 84 L. J. K. B. 130; 31 T. L. R. 22; *sub nom. DURRELL v. GREAD*, 112 L. T. 126; 59 Sol. Jo. 7.

**Sect. 1.—Forfeiture: Sub-sect. 2, A. (b) ii. & iii., & (c).]**

**6115. Valid condition.]**—If in a lease for years be words, & the lessee do provide, that if the rent be behind, that then the lessor shall re-enter, there I agree that this makes a condition (GAWDY, J.).—**PEMBROOK (EARL) v. BARKLEY** (1601), Gouldsb. 130; Poph. 116; 75 E. R. 1044.

**Annotation:—Mentd.** Woodward v. Fox (1691), 2 Vent. 267.

**6116. When right implied—Exclusion of implied right by express right.]**—Covenants in law may be qualified by express covenants, but if a man made a lease for years upon condition to pay £20, in this case an entry by the law is implied for default of payment; but yet if it added that, if it be behind he may enter & retain till he is satisfied of the £20 now in this case this had taken away the implied covenant & condition (HUTTON, J.).—**TRENCHARD v. HOSKINS** (1624), Win. 91; Litt. 203; 124 E. R. 76.

**Annotations:—Consd.** Gainsford v. Griffith (1667), 2 Keb. 201, 213. **Refd.** Howell v. Richards (1809), 11 East, 633; Sicklemore v. Thistleton (1817), 6 M. & S. 9. **Mentd.** Swift v. Heirs (1639), March, 31; Browning v. Wright (1799), 2 Bos. & P. 13; Graves v. Weld (1833), 5 B. & Ad. 105; Spencer v. Harrison (1879), 5 C. P. D. 97.

**6117. Possession of part of premises resumed by landlord—With consent of lessee—Condition not apportionable.]**—A man gives land in tail, or leases it for life, or for years, rendering rent, with a condition of re-entry for default of payment, there if he leases part of the land to the donor, or lessor, or it the donor or lessor enter in part of the land, he cannot re-enter for the rent arrear after; for the condition is wholly suspended; for a condition cannot be apportioned nor divided.—**ANON.** (1542), Bro. N. C. 61; 73 E. R. 865.

**6118. ———.]**—**BRITMAN v. STANFORD** (1584), Owen, 41; 74 E. R. 885.

**Annotation:—Refd.** Rawlins's Case (1588), 4 Co. Rep. 52 a.

**6119. Tenancy under award.]**—An award that A. shall enjoy a house paying rent to B. is not a condition, upon the non-performance of which the estate shall cease.—**PARSONS (OR FROWDE) v. PARSONS (OR FROWDE)** (1591), Cro. Eliz. 211; 78 E. R. 467.

**6120. Refusal of payment to stranger—No written authority from landlord.]**—Re-entry for non-payment of rent to a suspected stranger, without written authority, good.—**SOUCH'S CASE** (1583), Cro. Eliz. 22; 78 E. R. 288.

**6121. Non-payment on day—Unless refusal.]**—**DALTON v. HAMOND** (1600), Moore, K. B. 622; Cro. Eliz. 779; 72 E. R. 799; *sub nom.* **HOBART v. HAMMOND**, 4 Co. Rep. 27 b.

**Annotations:—Mentd.** Willows' Case (1608), 13 Co. Rep. 1; Godfreys' Case (1614), 11 Co. Rep. 42 a; Boll v. Warden (1740), Willes, 202; Graham v. Sime (1801), 1 East, 632; Attree v. Scutt (1805), 6 East, 476; Garland v. Jekyll (1824), 2 Bing. 273; Fraser v. Mason (1883), 11 Q. B. D. 574; Johnstone v. Spencer (1886), 30 Ch. D. 581.

**6122. Condition to perform all covenants, payments, etc.]**—(1) A demand of rent pleaded, without showing how long he came before or staid after the last hour, is good.

(2) Non-payment of rent is breach of a condition to perform all covenants, payments, etc.—

**THOMSON v. FIELD** (1618), Cro. Jac. 499; 79 E. R. 426.

**6123. "Lessee paying his rent."]**—*Seemble*: a lease containing the words "the lessee paying his rent," or "so long as the lessee shall pay the rent" is not avoided by non-payment.—**WAKEMAN v. WAKER** (1675), as reported in 1 Freem. K. B. 413; 89 E. R. 307.

**Annotations:—Mentd.** Smith v. Ashton (1675), 1 Freem. Ch. 308; Winter v. Loveden (1696), 1 Ld. Raym. 267; Bagot v. Oughton (1726), Fortes. Rep. 332; Goodtitle v. Funnican (1781), 2 Doug. K. B. 565; Pomory v. Partington (1790), 3 Term Rep. 665; Doe d. Bartlett v. Rendle (1814), 3 M. & S. 99.

**6124. "So long as lessee shall pay rent."]**—**WAKEMAN v. WAKER**, No. 6123, *ante*.

**6125. No express agreement to pay rent.]**—If, by a written agreement, A. agrees to let, & B. to take a messuage from a day past, for a term of ten days, "at & under the rent of £80." This is an agreement by B. to pay a rent of £80; & therefore if there be a power of re-entry in case of a breach of "any of the agreements therein contained," A. has a power of re-entry for non-payment of rent, although there is no express agreement to pay the rent.—**DOE d. RAINS v. KNELLER** (1829), 4 C. & P. 3, N. P.

**6126. Yearly tenancy—Created by tenant holding over.]**—A proviso in a lease for re-entry on non-payment of rent, is a condition which attaches to the yearly tenancy, created by the tenant holding over & paying rent after the expiration of the lease.—**THOMAS v. PACKER** (1857), 1 H. & N. 669; 26 L. J. Ex. 207; 28 L. T. O. S. 274; 21 J. P. 182; 3 Jur. N. S. 143; 5 W. R. 316; 156 E. R. 1370.

**6127. Rent not payable—Temporary suspension by statute.]**—**DURELL v. GREAD**, No. 6114, *ante*.

**Non-payment as disclaimer of lessor's title.]**—*See* Nos. 6146–6153, *post*.

**Reservation of rent.]**—*See* Part XV., Sect. 3, *ante*.

### iii. No Sufficient Distress on Premises.

**6128. Whether distress must be visible.]**—If a man make a lease, rendering rent upon condition, that if the rent be behind, & no sufficient distress upon the land, that then the lessor may re-enter; if the rent be behind, & there be a piece of lead or other thing hidden in the land, & no other thing there to be distrained, the lessor may re-enter; for the distress ought to be open & to be come by; for if it should be otherwise said a sufficient distress, one might enclose money, or other things within a wall, & thereby the lessor should be excluded of his re-entry (*per* CUR.).—**HOODIE & WINSOMB'S CASE** (1586), Godb. 110; 78 E. R. 67.

**Annotation:—Refd.** Smith v. Doe d. Jersey (1821), 2 Brod. & Bing. 473.

**6129. ——— Duty to search premises.]**—(1) Though a lessee set up an adverse claim to the property in the premises he holds under the lease yet that does not incapacitate him from maintaining possession under the lease.

(2) A clause of forfeiture in a lease, in case no sufficient distress be found on the premises must

### PART XXIV. SECT. 1, SUB-SECT. 2.— A. (b) ii.

**6115 i. Valid condition.]**—**CORNOCK v. DODDS** (1872), 32 U. C. R. 625.—**CAN.**

**6115 ii. ———.]**—**DOE d. CHIPMAN v. ROE** (1876), 3 Png. 470.—**CAN.**

**1. Demand not necessary.]**—Where rent is made payable at a particular place, or in default right of re-entry, on default made, no demand is necessary before re-entry.—**LAWSON v.**

**HILL** (1870), 4 S. A. L. R. 153.—**AUS.**

**2. No forfeiture after termination of lease.]**—**CAMPBELL v. BAXTER** (1864), 15 C. P. 42.—**CAN.**

**h. Rent due before reversion—Reversioner not entitled to forfeiture.]**—Rent which has accrued due does not pass to a purchaser of the reversion, unless expressly assigned to him, nor does he obtain in Ontario any right of re-entry for a breach of covenant to

pay rent which took place before the conveyance of the reversion to him.—**BROWN v. GALLAGHER & Co.** (1914), 31 O. L. R. 323; 6 O. W. N. 296; 19 D. L. R. 682.—**CAN.**

### PART XXIV. SECT. 1, SUB-SECT. 2.— A. (b) iii.

**k. No necessity to realise portion of distress.]**—If the goods on the demised premises are not sufficient to satisfy half a year's rent, the landlord

be strictly pursued; & in case of a distress being made every part of the premises must be searched.—*REES d. POWELL v. KING & MORRIS* (1800), For. 19; 145 E. R. 1100.

*Annotation*:—*As to* (2) *Refd.* *Smith v. Doe d. Jersey* (1819), 7 Price, 379.

**6130.** ———.]—(1) In ejectment for forfeiture of a lease of a house by reason of there being no distrainable goods to countervail the rent, it is not sufficient to show that there were no goods on the ground floor, but the search must extend throughout the premises.

(2) The receipt by the superior landlord from an undertenant of rent due to the tenant is not a waiver of a forfeiture subsequent to the day the rent became due, & previous to the day of payment.—*PRICE v. WORWOOD* (1859), 4 H. & N. 512; 28 L. J. Ex. 329; 33 L. T. O. S. 149; 5 Jur. N. S. 472; 7 W. R. 506; 157 E. R. 941.

*Annotation*:—*Generally, Refd.* *Toleman v. Portbury* (1870), 22 L. T. 33.

**6131. Re-entry if rent unpaid for specified time—Distress sufficient during part of time—What length of time sufficient.**—*ANON.* (1586), Godb. 67; 78 E. R. 41.

**6132.** ———.]—Upon a special verdict the case was, one let lands for years rendering 50s. rent *per annum*, at the four feasts, viz. Michaelmas, etc. Proviso, that if the rent be arrear by the space of a year after the day of payment, it being lawfully demanded, & no distress to be found there *per totum tempus prædict.* he might re-enter. The rent was arrear for a year; the jury found a demand, & that there was not any distress on the last day of the year upon the premises, & that the lessor entered, & let to pltf.: whether the lessor's entry was lawful was the question. Without argument the ct. resolved for deft., that the condition is not broken, if there be a distress there at any time of the year; for *per totum tempus prædict.* shall be taken for any part of the year; & a condition shall be taken most favourably for the lessee: but here the words are plain. Wherefore it was adjudged for deft.—*GRYGG v. MOYSES* (1600), Cro. Eliz. 764; 78 E. R. 995.

**6133.** ———.]—Under a proviso in a lease for the entry of the landlord, in case the rent should be in arrear for fourteen days, & no sufficient distress found upon the premises, he is entitled to recover in ejectment, on proof of half a year's rent due at Lady Day, & no distress on the premises on some day in May; the demise being laid on May 2, & the declaration served on June 6; deft. giving no evidence to rebut the inference, that there was no sufficient distress on the premises within the terms of the proviso; as by showing that there was a sufficient distress on the premises in May up to the day of the demise inclusive; or on June 6, when the declaration was served, if that were material with reference to 4 Geo. 2, c. 28. On such proof by pltf. 4 Geo. 2, c. 28, dispenses with proof of a demand of the rent on

the day it became due.—*DOE d. SMELT v. FUCHAU* (1812), 15 East, 286; 104 E. R. 852.

*Annotation*:—*Refd.* *Doe d. Lawrence v. Shawcross* (1825), 3 B. & C. 752.

**6134.** ———.]—**One quarter—Accumulation of arrears for three quarters—Distress sufficient for two quarters.**—A lease of a house contained a covenant by the lessee to pay rent on the usual quarter days, & a proviso for re-entry "if & whenever" any one quarter's rent should be in arrear for twenty-one days & no sufficient distress could be levied. There being three quarters' rent in arrear at Lady Day, 1890, the lessor, on Apr. 25, 1890, distrained, & after sale of the distress there remained due more than a quarter's rent. The lessor on May 25 issued a writ for recovery of possession of the premises:—*Held*: the effect of the words "if & whenever" in the proviso was to give the lessor a right of re-entry as often as at any moment of time the two conditions named in the proviso existed, & as these conditions existed when the writ was issued the action was maintainable, & pltf. was entitled to recover possession of the demised premises.—*SHEPHERD v. BERGER*, [1891] 1 Q. B. 597; 60 L. J. Q. B. 395; 64 L. T. 435; 55 J. P. 532; 39 W. R. 330; 7 T. L. R. 332, C. A.

(c) *Breach of Negative Covenants.*

**6135. Whether re-entry clause applicable.**—*DOE d. PALK v. MARCHETTI*, No. 6750, *post*.

**6136.** ———.]—*CROFT v. LUMLEY*, No. 6085, *ante*.

**6137.** ———.]—Pltf. demised a dwelling-house to C., who covenanted not to permit a sale by public auction on the premises without the consent in writing of pltf. C. underlet the premises to deft., & also assigned his goods upon the premises to three persons under a bill of sale; they sold the goods by public auction on the premises, bills being posted on the premises. In an ejectment for a forfeiture by a breach of the covenant, the above were all the facts proved, & the pltf. was nonsuited:—*Held*: the nonsuit was right (*KELLY, C.B., MARTIN, & PIGOT, B.B.*), on the ground that there was no evidence that the sale was by the permission of the lessee; (*WILLES, J., & CLEASBY, B.*) on the ground that there was no evidence that the sale had taken place without the consent of pltf., & pltf. was bound to give some evidence of this, though a negative; (*CHANNELL, B., & BRETT, J.*) on both grounds.—*TOLEMAN v. PORTBURY* (1870), L. R. 5 Q. B. 288; 39 L. J. Q. B. 136; 22 L. T. 33; 18 W. R. 579, Ex. Ch.

*Annotations*:—*Consd.* *Wilson v. Twanley*, [1904] 2 K. B. 99; *Berton v. Alliance Economic Investment Co.*, [1922] 1 K. B. 742; *Atkin v. Rose*, [1923] 1 Ch. 522.

**6138.** ———.]—*Scmble*: a power of re-entry on non-performance of covenants does not entitle lessor to re-enter for breach of a negative covenant, such as a covenant not to assign without consent.—*HYDE v. WARDEN* (1877), 3 Ex. D. 72; 47 L. J. Q. B. 121; 37 L. T. 567; 26 W. R. 201, C. A.

*Annotations*:—*Consd.* *Barrow v. Issacs*, [1891] 1 Q. B. 417;

may bring ejectment on the clause of forfeiture, without realising a part by distress.—*DOE d. BOYD v. ROE* (1870), 2 Han. 48.—*CAN.*

#### PART XXIV. SECT. 1, SUB-SECT. 2.—A. (c).

**6135 i. Whether re-entry clause applicable.**—*MAGEE v. RANKIN* (1869), 29 U. C. R. 257.—*CAN.*

**6135 ii.** ———.]—*LEE v. LORSCH* (1875), 37 U. C. R. 262.—*CAN.*

**6135 iii.** ———.]—*LONGHI v. SANSON* (1881), 46 U. C. R. 446.—*CAN.*

**6135 iv.** ———.]—The right of re-entry under a lease applies to the breach of a negative as well as an affirmative covenant, so that there is a right of re-entry for breach of the covenant not to assign or sublet without leave.—*McMAHON v. COYLE* (1903), 23 C. L. T. 225; 5 O. L. R. 618; 2 O. W. R. 265.—*CAN.*

**6135 v.** ———.]—*EDWARDS v. FAIRVIEW LODGE*, [1920] 3 W. W. R. 867.—*CAN.*

**6135 vi.** ———.]—*ABIAKH RAI v. SALIM AHMAD KHAN* (1879), 1 L. R. 2 All. 437.—*IND.*

**6135 vii.** ———.]—Where a right of re-entry is given on the non-performance or non-observance of any covenant, this power may be exercised on the breach of negative as well as positive covenants.—*JOSEPH v. BELGRAVE* (1881), 1 N. Z. L. R. 16 (S. C.).—*N.Z.*

**6135 viii.** ———.]—*WOOD v. MEYER & CHARLTON GOLD MINING CO., LTD.* (1899), 6 O. R. 113.—*S. AF.*

**6135 ix.** ———.]—*WITWATERSRAND TOWNSHIP ESTATE & FINANCE CO., LTD. v. MADRASSA COOWATFOOL ISLAM, LTD.*, [1917] W. L. D. 113.—*S. AF.*

**Sect. 1.—Forfeiture: Sub-sect. 2, A. (c) & (d) i.]**

**Harman v. Ainslie**, [1904] 1 K. B. 698. **Reid. Evans v. Davis** (1878), 10 Ch. D. 747; **Willmott v. Barber** (1880), 15 Ch. D. 96; **Burford v. Unwin** (1885), Cab. & El. 494; **Re Davis & Carey** (1888), 58 L. J. Ch. 143; **Reeve v. Berridge** (1888), 20 Q. B. D. 523; **Bishop v. Taylor** (1891), 60 L. J. Q. B. 556; **Re White & Smith's Contract**, [1896] 1 Ch. 637; **Eastern Telegraph Co. v. Dent**, [1899] 1 Q. B. 835; **Dougherty v. Oates** (1900), 45 Sol. Jo. 119; **Molynaux v. Hawtrey**, [1903] 2 K. B. 487; **Lewis v. Baker**, [1905] 1 Ch. 46.

**6139.** —.]—A lease of premises for fourteen years contained a covenant by the lessees not to assign or part with the possession without the written consent of the landlord; with a proviso for re-entry in case the lessees should fail in the observance or performance of any of the covenants. The landlord, by a letter addressed to W., assented to a transfer of the lease by the lessees to W. on the same terms as those on which the lessees held it, adding, "it will be necessary for you to write me accepting these terms." W. entered into possession without any formal assignment, & afterwards, by the written licence of the landlord, assigned to trustees for W.'s creditors, who, without the consent of the landlord, sold the term to deft. In ejectment on the ground of forfeiture:—**Held**: (1) there had been no breach of covenant by the lessees, as the landlord had given his consent to W. going into possession without a transfer of the lease. (2) *Semle*: the proviso for re-entry applied only to the breach of affirmative covenants.—**WEST v. DOBB** (1870), L. R. 5 Q. B. 460; 10 B. & S. 987; 39 L. J. Q. B. 190; 23 L. T. 76; 18 W. R. 1167, Ex. Ch.

**Annotations**:—As to (2) **Expld. Timms v. Baker** (1883), 49 L. T. 106. **Consd. Harman v. Ainslie**, [1904] 1 K. B. 698. **Reid. Hyde v. Warden** (1877), 3 Ex. D. 72.

**6140.** —.]—**EVANS v. DAVIS**, No. 6454, *post*.

**6141.** —.]—**WESTON v. METROPOLITAN ASYLUM DISTRICT MANAGERS**, No. 6098, *ante*.

**6142.** —.]—A lease contained a covenant by the lessee not to carry on any trade upon the premises other than that of a wine & spirit merchant, & not to assign or underlease the premises without the consent in writing of the lessor. There was a proviso for re-entry if the lessee should not well & truly perform & keep all & singular the covenants, conditions, & agreements thereinbefore contained to be observed, performed, & kept:—**Held**: (1) the words of the proviso for re-entry were wide enough to cover a breach of the negative covenants; (2) letting the premises from year to year is a breach of a covenant not to "underlease."—**TIMMS v. BAKER** (1883), 49 L. T. 106.

**Annotation**:—As to (1) **Reid. Harman v. Ainslie** (1904), 52 W. R. 615.

**6143.** —.]—A lease of a house contained covenants by the lessee to pay the rent, rates, & taxes, to repair, & not to assign or underlet the premises without the lessor's consent: & it contained a proviso that "if the lessee shall commit any breach of the covenant hereinbefore contained, & on his part to be performed," then the lessor may re-enter upon the premises:—**Held**: the proviso for re-entry applied to a breach of the

covenant not to assign or underlet the premises without the consent of the lessor.

In a proviso for re-entry for non-performance of covenant, it seems to me that the word "perform" is used as meaning the fulfilment of the obligation or duty undertaken, & not as referring to the thing to be done or left undone in pursuance of the covenant. . . . Therefore . . . I think the words of this proviso for re-entry are appropriate to the breach of a negative covenant (**COLLINS, M.R.**).—**HARMAN v. AINSLIE**, [1904] 1 K. B. 698; 73 L. J. K. B. 539; 90 L. T. 624; 52 W. R. 615; 20 T. L. R. 356; 48 Sol. Jo. 328, C. A.

**Covenants against assignment.** — See Part XXI., Sect. 1, sub-sect. 2, D., *post*.

**(d) Disclaimer of Title.****i. What Amounts to Disclaimer.**

**Rent generally.**—See Part XV.

**6144. General rule—Clear repudiation of relationship—Claim inconsistent with tenancy.**—(1) A tenant from year to year, who had agreed to buy his landlord's estate, having remained in possession for several years without paying either rent or interest on the purchase money, the agent of the lessor applied to him to give up possession. To which he answered "that he had bought the property, & would keep it, & had a friend who was ready to give him the money for it":—**Held**: this was no disclaimer; because it was not a claim to hold the estate on a ground necessarily inconsistent with the continuance of the tenancy from year to year.

In order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord & tenant; or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it. An omission to acknowledge the landlord as such, by requesting further information, will not be enough (**PARKE, B.**).

(2) If the true construction of the agreement be, that from the date of it, or any other certain time, deft. was to be absolutely a debtor for the purchase-money, paying interest on it, & to cease to pay rent as tenant from year to year, a tenancy at will would probably be created after that time; & the acceptance of such new demise at will would then operate as a surrender of the interest from year to year by operation of law (**PARKE, B.**).—**DOE d. GRAY v. STANION** (1836), 1 M. & W. 695; 2 Gale, 154; Tyr. & Gr. 1065; 5 L. J. Ex. 253; 150 E. R. 614.

**Annotations**:—As to (1) **Follid. Tarte v. Darby** (1846), 15 M. & W. 601. **Apld. Vivian v. Moat** (1881), 16 Ch. D. 730. **Reid. Jones v. Mills** (1861), 10 C. B. N. S. 788; **Ellis v. Wright** (1897), 76 L. T. 522. **Generally, Reid. Hodgson v. Hooper** (1860), 3 E. & E. 149. **Mentd. Ellis v. Rogers** (1885), 29 Ch. D. 661.

**6145.** —.]—Deft. took premises of one H., at a yearly rent, with an agreement for a lease for seven years, or for the lease for lives, under which H. held the property. H. subse-

**PART XXIV. SECT. 1, SUB-SECT. 2.—A. (d) i.**

**6144 i. General rule—Clear repudiation of relationship—Claim inconsistent with tenancy.**—**REED v. BROWN** (1851), 2 All. 366.—**CAN.**

**6144 ii.** —.]—In order that a denial of landlord's title should work a forfeiture of the tenancy, three things are necessary: the tenant must set up title either in himself or in a third party, inconsistent with their mutual relationship, the denial must

be direct & unequivocal & not casual & it must be made to the knowledge of the landlord.—**KIZHAKKEKATH KEMALOOTTI v. PULIKKALAKATH MUHAMED** (1917), 1 L. R. 41 Mad. 629.—**IND.**

**6144 iii.** —.]—**GOPAL JAYVANT SHIRGAONKAR v. SHRINIWAS VITHAL PAI** (1918), 1 L. R. 42 Bom. 734.—**IND.**

**6144 iv.** —.]—**MAHARAJA OF JEYPORE v. RUKMINI PATTAMAHEVI** (1919), L. R. 46 Ind. App. 109.—**IND.**

**1.** —.]—A lease is liable to for-

feiture if the tenant denies the title of the landlord.—**KALLY DASS AHIRI v. MONMOHINI DASSEE** (1897), 1 L. R. 24 Cal. 440; 1 C. W. N. 321.—**IND.**

**m. Lessee giving up to third party—In fraud of landlord.**—B. had leased from pltf. part of the property, & being in possession, gave it up for \$60 to deft., who claimed it as her own:—**Held**: this was clearly a fraud upon pltf. as landlord, by which the lease was forfeited, & deft. could not set up B.'s right under it.—**KYLE v. STOCKS** (1871), 31 U. C. R. 47.—**CAN.**

quently assigned his interest in the premises to the lessors of *ptf.*, & their attorney, under an impression that the seven years had expired, demanded possession. Deft. said, "I hold on lives, & as long as they live I will hold the premises; you know I have an agreement." The attorney then demanded a quarter's rent which was due, but deft. refused to pay it, saying, "I hold under H., & I was directed by him to pay K., who was the superior landlord, & I will do so; for how do I know he will not come and make a demand on me?"—*Held*: no disclaimer of the title of the lessors of *ptf.*

A disclaimer as the word imports must be a renunciation by the party of his character of tenant, either by setting up a title in another, or by claiming title in himself (*TINDAL, C.J.*).—*DOE d. WILLIAMS & JEFFERY v. COOPER* (1840), 1 *Man. & G.* 135; 1 *Scott, N. R.* 36; 9 *L. J. C. P.* 229; 133 *E. R.* 278.

*Annotation*:—*Consd.* *Jones v. Mills* (1861), 10 *C. B. N. S.* 788.

**6146. Refusal to pay rent to devisee under contested will.**—A refusal to pay rent to a devisee in a will which was contested is not such a disavowal of the title as to entitle such devisee to maintain an ejectment without giving a previous notice to quit.—*DOE d. WILLIAMS v. PASQUALI* (1793), *Peake*, 259, *N. P.*

*Annotations*:—*Consd.* *Doe d. Gray v. Stanton* (1836), 1 *M. & W.* 695. *Refd.* *Doe d. Calvert v. Frowd*, (1828), 4 *Bing.* 557; *Doe d. Williams v. Cooper* (1840), 1 *Scott, N. R.* 36.

**6147. — Until title of claimant established.**—Deft. held premises under a tenant for life, on whose death possession was claimed, & rent demanded, by the heir-at-law of the deviser; whereupon deft. wrote to the attorney of the heir-at-law, stating, that he held as tenant to J., the husband of the tenant for life, in right of his wife; that he had never considered claimant as the landlord of the house; that he should be ready to pay the arrears to any person who should be proved to be heir-at-law; but that he must decline taking upon himself to decide upon the claim made on him, without more satisfactory proof, in a legal manner.—*Held*: this letter amounted to a disclaimer of the title of the heir-at-law; & he might maintain ejectment against the tenant, without giving him a previous notice to quit.

If a tenant denies the tenancy, there can be no necessity for notice to end that which he says has no existence (*BEST, C.J.*).—*DOE d. CALVERT v. FROWD* (1828), 4 *Bing.* 557; 1 *Moo. & P.* 480; 6 *L. J. O. S. C. P.* 114; 130 *E. R.* 883.

*Annotations*:—*Expld.* *Doe d. Williams & Jeffery v. Cooper* (1840), 1 *Man. & G.* 135. *Consd.* *Doe d. Phillips v. Rollings* (1847), 4 *C. B.* 188. *Refd.* *Vivian v. Moat* (1881), 16 *Ch. D.* 730.

**6148. — By direction of third party.**—"I have no rent for you because A. has ordered me to pay none." This is evidence of a disclaimer of tenancy.—*DOE d. WHITEHEAD v. PITTMAN* (1833), 2 *Nev. & M. K. B.* 673.

**6149. — Request to pay to superior landlord.**—*DOE d. WILLIAMS & JEFFERY v. COOPER*, *No.* 6145, *ante*.

**6150. — Notice of contested claim.**—Deft. had for several years occupied a cottage as tenant from week to week to one M. After the death of M., deft. continued to pay his rent weekly to certain persons to whom M. had devised the premises. The devise being discovered to be void by reason of Mortmain Act, the heir-at-law of M. by his agent demanded the rent, whereupon deft. said that he had received notice from the other

party, & would not pay any more rent until he knew who was the right owner:—*Held*: this did not amount to a disclaimer or repudiation of the title of the heir-at-law, so as to entitle him to eject deft. without any notice to quit. *Seem*: a tenancy from week to week can only be determined by a week's notice.—*JONES v. MILLS* (1861), 10 *C. B. N. S.* 788; 31 *L. J. C. P.* 66; 8 *Jur. N. S.* 387; 142 *E. R.* 664.

*Annotations*:—*Refd.* *Bowen v. Anderson*, [1894] 1 *Q. B.* 164; *Simmons v. Crossley*, [1922] 2 *K. B.* 95; *Queen's Club Garden Estates v. Bignell*, [1924] 1 *K. B.* 117.

**6151. — Parol denial of right to rent.**—(1) B. had concurred, with other members of his family, in letting land to C. as tenant from year to year, & it was agreed that the rent should be paid to D. as agent for the family. B., to whom alone the land really belonged, demanded rent of C., who said, "You are not my landlord." B. then demanded possession, which C. refused to give up:—*Held*: if the jury were satisfied that the fair meaning of this was, that C. asserted that B. & himself were not in the relation of landlord & tenant, this was a disclaimer; & C. was not entitled to notice to quit.

(2) If in ejectment the lessor of *ptf.* rely on a disclaimer, it will be no objection to his recovering, that the disclaimer was on the day of the demise laid in the declaration.—*DOE d. BENNETT v. LONG* (1841), 9 *C. & P.* 773, *N. P.*

**6152. — Claim for reduction of rent—Temporary increase for specific purpose.**—Certain parish lands had been let to the labouring inhabitants at a forehand rent of 4s. per acre: the lands having been afterwards inclosed, the churchwardens & overseers for the time being increased the rent to 12s. per acre, for the purpose of raising a fund to pay the expenses of the inclosure. The tenants, having paid this increased rent for many years, conceiving that the inclosure expenses had been paid off, insisted that they were entitled to hold the land at the original rent of 4s. an acre, & refused to pay the 12s.:—*Held*: this did not amount to a disclaimer of the landlords' title, so as to enable them to eject the tenants without notice.—*HUNT v. ALLGOOD* (1861), 10 *C. B. N. S.* 253; 30 *L. J. C. P.* 313; 4 *L. T.* 215; 25 *J. P.* 614; 7 *Jur. N. S.* 1123; 9 *W. R.* 536; 142 *E. R.* 448.

**6153. — Refusal to pay increased rent.**—In an action of ejectment it was proved that *ptfs.*, who claimed to be landlords of certain tenements, had given notice to *defts.*, as their tenants, that the rent of the tenements would be raised, & that *defts.* had thereupon written a letter stating that they "disputed *ptfs.*' alleged right to raise the rent but were willing & offered to pay what was due in respect of the customary rent of 11s. a year, being all that they were liable to pay in respect of the property":—*Held*: this letter was a repudiation of the relation of landlord & tenant, & an assertion of a right to hold the tenements upon payment of a customary rent in the sense of a quit rent, & *ptfs.* were entitled to eject, upon proving their title, without proving a valid notice to quit.—*VIVIAN v. MOAT* (1881), 16 *Ch. D.* 730; 50 *L. J. Ch.* 331; 44 *L. T.* 210; 29 *W. R.* 504.

—*Compare* Sub-sect. 2, A. (b) ii., *ante*.

**6154. Payment of rent to third party.**—The mere payment by the tenant to a third person of the rent reserved by his lease does not amount to a disclaimer of the title of the landlord, so as to operate as a forfeiture of the lease.—*DOE d. DILLON v. PARKER* (1820), *Gow*, 180.

*Annotation*:—*Refd.* *Jones v. Mills* (1861), 10 *C. B. N. S.* 788.

*Sect. 1.—Forfeiture: Sub-sect. 2, A. (d) i., ii. & iii., (e), (f) & (g), B., C. & D.; sub-sect. 3.]*

**6155. Lessee claiming freehold—In action for debt.]—**ANON. (1585), Godb. 105, pl. 124; 78 E. R. 64.

*Annotation:—*Refd. Doe d. Graves v. Wells (1839), 10 Ad. & El. 427.

**6156. — By making feoffment.]—**A lessee for years may make a feoffment notwithstanding the presence of the lessor; for the lessee has the possession & may dispose of it; but it is an extinguishment of the lease & the lessor may enter for the forfeiture.—*READ v. ERINGTON* (1594), Cro. Eliz. 321; 78 E. R. 571.

*Annotation:—*Mentd. Doe d. Atkyns v. Horde (1777), 2 Cowp. 689.

**6157. — By parol.]—**(1) A tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, & claiming the fee as his own.

(2) A demise in ejectment laid on a day on which the forfeiture of a lease was incurred, to commence from two days previous, is good.—*DOE d. GRAVES v. WELLS* (1839), 10 Ad. & El. 427; 2 Per. & Dav. 396; 8 L. J. Q. B. 265; 3 Jur. 820; 113 E. R. 162.

*Annotations:—*As to (1) Refd. Archbold v. Scully (1861), 9 H. L. Cas. 361. As to (2) Follid. Doe d. Bennett v. Long (1841), 9 C. & P. 773.

**6158. Acknowledging title of stranger—By attornment.]—**THROGMORTON v. WHELPDALE (1769), Bull. N. P. 7th ed. 96.

*Annotation:—*Consd. Doe d. Gray v. Stanion (1836), 1 M. & W. 695.

**6159. — Delivery of possession of premises—To support hostile title.]—**A tenant for a term of years under a lease, delivered up possession of the premises & the lease, in fraud of his landlord, to a person who claimed under a hostile title, with the intention of enabling him to set up his hostile title, not with the intention that he should hold under the lease:—*Held: the term was forfeited.*—*DOE d. ELLERBROCK v. FLYNN* (1834), 1 Cr. M. & R. 137; 4 Tyr. 619; 3 L. J. Ex. 221; 149 E. R. 1026.

*Annotation:—*Distd. Doe d. Graves v. Wells (1839), 10 Ad. & El. 427.

**6160. — To trustee when trusts executed—After assignment of reversion.]—**ACKLAND v. LUTLEY, No. 6694, *post*.

**6161. Lessee claiming under agreement to purchase.]—**REES d. POWELL v. KING & MORRIS, No. 6129, *ante*.

**6162. — Whether inconsistent with tenancy.]—**DOE d. GRAY v. STANION, No. 6144, *ante*.

**6163. Request for information as to lessor's title—Authority of agent to disclaim.]—**The father of deft., & after his death, deft., had held lands by the permission of & under the father of the lessor of pltf., & after the death of the father of the lessor of pltf., deft. continued to hold the lands. To show that the tenancy was determined, the lessor of pltf. offered in evidence the following letters. The first was a letter written by deft. to pltf., in which, after acknowledging the receipt of a letter from pltf. on the subject of the premises in question, he says, "As the circumstances in it are not within my knowledge, I have placed it in the hands of Messrs. F. & have requested them to communicate with you." The second letter, which was from Messrs. F. to pltf., was as follows: "Earl C. (deft.) has given us a letter from you on the subject of some ground you state to have been let by the late Mr. L. (the father of the lessor of pltf.) in 1811, & which has ever since been in the possession of his lordship's

family. We will thank you to let us have the proofs that it was not the late earl's own." Another letter from Messrs. F. requested further information "as to the late Mr. L. having a right to let the piece of ground in question to Earl C." as it appears to us that the mere fact mentioned in your letter at the utmost only shows that Mr. L. might claim it, & not at all aver that Lord C. admitted it even on the representation of his own agent":—*Held: (1) those letters did not amount to a disclaimer; (2) the letter of deft. did not confer on the agent any authority to bind deft. by making a disclaimer.*

(3) A disclaimer, in such case, must be before the date of the demise. An admission, made after the date of the demise, of a disclaimer, must, to have the effect of determining a tenancy, amount to an admission that such disclaimer took place before the day of demise.—*DOE d. LEWIS v. CAWDOR* (1834), 1 Cr. M. & R. 398; 4 Tyr. 852; 3 L. J. Ex. 239; 149 E. R. 1134.

*Annotations:—*As to (1) Refd. Doe d. Gray v. Stanion (1836) 1 M. & W. 695. Generally, Refd. Doe d. Graves v. Wells (1839), 3 Jur. 820; Harris v. Mulkern (1875), 45 L. J. Q. B. 244.

**6164. Disclaimer of title to part—Forfeiture of part.]—**A disclaimer of the landlord's title to a part of the demised premises entitles the landlord to bring an action for that portion.—*DOE d. PHIPPS v. GOWEN* (1837), 1 Jur. 794.

**6165. Tenancy from year to year—Payment of rent to cestui que trust—Denial of trustees title.]—**Lands being held by G. as tenant from year to year to D., D., who died in 1837, devised same to trustees for the term of one hundred & forty years, upon trust (*inter alia*) to permit his wife E. to take the rents & profits thereof during her life. G. paid the rent to E. the widow, after D.'s death from 1837 to 1840, & on receiving a notice to quit from her in Mar. 1840, stated that he did not think she would turn him out of possession, as she had promised he should continue on as tenant from year to year:—*Held: in an action of ejectment brought by the trustees for the recovery of the premises, this was sufficient evidence of a disclaimer by G. of the title of the trustees, to warrant the jury in finding a verdict for pltf.*—*DOE d. DAVIES v. EVANS* (1841), 9 M. & W. 48; 11 L. J. Ex. 9; 152 E. R. 21.

## ii. From What Time Operative.

**6166. May be retrospective.]—**A disclaimer by a tenant of his tenancy with his landlord may have a retrospective effect, so as to entitle the landlord to recover upon a demise laid in point of date before the disclaimer was pronounced. Thus demand of rent by letter on June 18; answer by letter on the 26, that the tenancy had ceased for several years; ejectment, laying the day of the demise on May 1:—*Held: the ejectment was well brought without a notice to quit.*—*DOE d. GRUBB v. GRUBB* (1830), 10 B. & C. 816; 5 Man. & Ry. K. B. 666; 8 L. J. O. S. K. B. 321; 109 E. R. 652.

**6167. —.]—**DOE d. GRAVES v. WELLS, No. 6157, *ante*.

**6168. — Admission after day of demise.]—**DOE d. LEWIS v. CAWDOR, No. 6163, *ante*.

**6169. Disclaimer on day of demise.]—**DOE d. BENNETT v. LONG, No. 6151, *ante*.

**6170. Three days after day of last demise.]—**DOE d. — v. MONTAGUE (1844), 3 L. T. O. S. 51

## iii. Effect of Disclaimer—Notice to Quit.

**Notice to quit generally.]—**See Part XXIII. *ante*.

**6171. Notice unnecessary—If acts amount to disclaimer.]—**THROGMORTON v. WHELPDALE (1700), Bull. N. P. 7th ed. 96.

*Annotation:—*Reid. Doe d. Gray v. Stanion (1836), 1 M. & W. 695.

**6172. ———.]—**DOE d. WILLIAMS v. PASQUALL, No. 6146, *ante*.

**6173. ———.]—**Payment of rent is *prima facie* evidence of title in the landlord. Where tenant disclaims, no notice to quit necessary.—DOE d. CLUN (BAILIFF & BURGESSES) v. CLARKE (1809), Peake, Add. Cas. 239, N. P.

**6174. ———.]—**A tenant disclaiming the title of his landlord is not entitled to a notice to quit.—DOE d. JEFFERIES v. WHITTICK (1820), Gow, 195, N. P.

**6175. ———.]—**DOE d. CALVERT v. FROWD, No. 6147, *ante*.

**6176. ———.]—**DOE d. GRUBB v. GRUBB, No. 6166, *ante*.

**6177. ———.]—**DOE d. BENNETT v. LONG, No. 6151, *ante*.

**6178. ———.]—**In 1824, J., a pauper of the parish of P., was put into a parish house, under the following memorandum in the parish book, signed by one of the overseers:—"We, the churchwardens & overseers of the poor of the parish of P., do hereby agree to let J. the cottage, situate, etc., at the rent of 1s. 6d. per week; & J. doth hereby agree to quit & give up the cottage to the parish officers at any time on one month's notice." J. continued in possession, without payment of rent, until 1844, when the parish officers gave him a notice to quit, signed by three only of them, which he refused to do. In 1859, J. conveyed the cottage to deft. In ejectment by the parish officers:—*Held*: there having been a disclaimer by J., no notice to quit was necessary.—DOE d. LANSDELL v. GOWER (1851), 17 Q. B. 589; 21 L. J. Q. B. 57; 18 L. T. O. S. 135; 15 J. P. 816; 16 Jur. 100; 117 E. R. 1406.

*Annotation:—*Mentd. Hodgson & Harland (Mitcham Churchwardens & Overseers) v. Hooper (1860), 6 Jur. N. S. 911.

**6179. ———.]—**No notice to quit was necessary for deft.'s disclaimer had never been withdrawn (*per cur.*).—DOE d. BANKS v. REVETT (1852), 18 L. T. O. S. 224.

**6180. ———.]—**JONES v. MILLS, No. 6150, *ante*.

**6181. ———.]—**HUNT v. ALLGOOD, No. 6152, *ante*.

**6182. ———.]—**VIVIAN v. MOAT, No. 6153, *ante*.

(e) On Bankruptcy.

See Sect. 6, *post*.

(f) On Winding up.

See Sect. 8, *post*.

(g) On Execution.

See Sect. 9, *post*.

B. Duration of Right.

**6183. During term.]—**A proviso in a lease to re-enter for a condition broken can only operate during the term & vanishes when that ends.—JOHNS v. WHITLEY (1770), 3 Wils. 127; 95 E. R. 970.

C. Exercise of Right.

See Sub-sect. 4, C., *post*.

D. Waiver of Right.

See Sub-sect. 5, *post*.

SUB-SECT. 3.—AVOIDANCE AT OPTION OF LESSOR.

**6184. Lease expressed to be void on breach of covenant—Lessee unable to treat breach as forfeiture.]—**HANSON v. NORCLIT (1020), W. Jo. 9; 82 E. R. 6.

**6185. ———.]—**A proviso in a lease for years, whereby the rent is payable on a day certain, at the mansion house of lessor, that if the rent shall be unpaid for forty days after the day whereon it is reserved, although not demanded, the lease shall be void, does not make the lease voidable by the lessee by reason of his having oversteaid the forty days allowed for payment; & in debt by lessor on bond given by lessee & deft. in a penal sum, conditioned for payment of rent at the day & place mentioned in lease, pltf. may assign for breach, non-payment of rent at the day & place, without showing a demand of the rent.—REDE v. FARR (1817), 6 M. & S. 121; 105 E. R. 1188; *sub nom.* REID v. PARSONS, 2 Chit. 247.

*Annotations:—*Distd. Arnsby v. Woodward (1827), 6 B. & C. 519. *Consd.* Jones v. Carter (1846), 15 M. & W. 718. *Reid.* Bowser v. Colby (1841), 1 Harc. 109; Grey v. Friar (1853), 4 H. L. Cas. 565; Toleman v. Portbury (1871), 40 L. J. Q. B. 125; New Zealand Shipping Co. v. Soc. des Ateliers et Chantiers de France, [1919] A. C. 1. *Mentd.* Bippinghall v. Lloyd (1833), 5 B. & Ad. 742.

**6186. ———.]—**A lease of coal mines reserved a royalty rent for every ton of coals raised, & contained a proviso that the lease should be void, to all intents & purposes, if the tenant should cease working at any time two years. After the working had ceased more than two years, the lessor received rent:—*Held*: a tenancy from year to year was not thereby created; for the lease was not absolutely void by the cesser to work, but voidable only at the option of the lessor, & he might avoid the lease upon any cesser to work commencing two years before the day of demise in the ejectment.

It does not lie in the mouth of the lessee, who

PART XXIV. SECT. 1, SUB-SECT. 2.—A. (d) iii.

**6171 i. Notice unnecessary—If acts amount to disclaimer.]—**DOE d. CUTHERBERTSON v. SAGER (1840), 6 O. S. 134.—CAN.

**6171 ii. ———.]—**DOE d. GRAHAM v. EDMONDSON (1844), 1 U. C. R. 265.—CAN.

**6171 iii. ———.]—**A disclaimer by a tenant of his landlord's title, at once puts an end to an existing tenancy, & ejectment may be at once maintained without a notice to quit.—DOE d. CLAU v. STEWART (1845), 1 U. C. R. 512.—CAN.

**6171 iv. ———.]—**DOE d. NUGENT v. HESSELL (1845), 2 U. C. R. 194.—CAN.

**6171 v. ———.]—**DOE d. BURRITT v. DUNHAM (1847), 4 U. C. R. 99.—CAN.

**6171 vi. ———.]—**DOE d. MCKENZIE v. FAIRMAN (1850), 7 U. C. R. 411.—CAN.

**6171 vii. ———.]—**CARTWRIGHT v. MCPHERSON (1860), 20 U. C. R. 251.—CAN.

**6171 viii. ———.]—**Re LANDLORD & TENANT ACT, CHADWICK v. KERSCHSTIEN, [1921] 3 W. W. R. 146.—CAN.

**6171 ix. ———.]—**JACK v. ROWE (prior to 1823), Rowe, 526.—IR.

**6171 x. ———.]—**BABA v. VISHVANATH JOSHI (1883), 1 L. R. 8 Bom. 228.—IND.

**6171 xi. ———.]—**AGARCHAND GUMANCHAND v. RAKHMA HANMANT

(1888), 1 L. R. 12 Bom. 678.—IND.

**6171 xii. ———.]—**SRINIVASA AYYAR v. MUTHUSAMI PILLAI (1900), 1 L. R. 24 Mad. 246.—IND.

**6171 xiii. ———.]—**CHINNA NARAYUDU v. HARISCHENDANA DEO (1903), 1 L. R. 27 Mad. 23.—IND.

**6171 xiv. ———.]—**DUFAUR v. KENEALY (1908), 28 N. Z. L. R. 269.—N.Z.

*n. Notice necessary—Disclaimer after action.]—*PERIA KARUPPAN v. SUBRAMANIAN CHETTI (1908), 1 L. R. 31 Mad. 261.—IND.

PART XXIV. SECT. 1, SUB-SECT. 2.—B.

**6183 i. During term.]—**HELY v. CANADA CO. (1873), 23 C. P. 20.—CAN

**Sect. 1.—Forfeiture: Sub-sects. 3 & 4, A.]**

has been guilty of a wrongful act, in omitting to work in pursuance of his covenant, to avail himself of that wrongful act, & to insist, that thereby the lease has become void to all intents & purposes (BAYLEY, J.).—DOE d. BRYAN v. BANCKS (1821), 4 B. & Ald. 401; 106 E. R. 984.

**Annotations:—***Distd.* Arnsby v. Woodward (1827), 6 B. & C. 519. *Apld.* Dakin v. Cope (1827), 2 Russ. 170; Roberts v. Davey (1833), 4 B. & Ad. 664. *Consd.* Doe d. Nash v. Birch (1830), 1 M. & W. 402; Jones v. Carter (1846), 15 M. & W. 718. *Refd.* Doe d. Hemmings v. Durnford (1832), 2 Cr. & J. 667; Malins v. Freeman (1838), 4 Bing. N. C. 395; Bowser v. Colby (1841), 1 Hare, 109; Selby v. Browne (1845), 14 L. J. Q. B. 307; Toleman v. Portbury (1871), 40 L. J. Q. B. 125; Davenport v. R. (1877), 3 App. Cas. 115; James v. Young (1884), 27 Ch. D. 652; New Zealand Shipping Co. v. Soc. des Ateliers et Chantiers de France, [1919] A. C. 1; Elliott v. Boynton, [1924] 1 Ch. 236. *Mentd.* Amott v. Holder (1852), 17 Jur. 318; Cockerell v. Van Diemen's Land Co. (1857), 5 W. R. 312; Hughes v. Palmer (1865), 19 C. B. N. S. 393.

**6187. ———.]—JONES v. CARTER, No. 6242, post.**

**6188. ———.]—Qu.: as to the construction of a proviso in a lease, that, in certain events, the lease shall cease & be void, & the lessor may re-enter.**

The proviso is, that, if the rent shall be in arrear, & there shall be no sufficient distress on the premises, or if Joseph Dakin shall become insolvent, or shall fail to perform any of the covenants, the lease shall cease & be void, & the lessors may re-enter. There would be very great inconvenience in holding, that the effect of such a proviso is to make the lease absolutely void in the cases specified. Upon the most trifling breach of covenant, if, for instance, the rent should be unpaid a few hours beyond the prescribed time, the lease would be at an end; & though the parties should deal together for years afterwards, upon the faith of its being a subsisting lease, neither of them could set it up again. . . . Both on the reason of the thing, & on authority, I am of opinion that the effect of the proviso is to make the lease voidable, & not absolutely void (PLUMER, M.R.).—DAKIN v. COPE (1827), 2 Russ. 170; 38 E. R. 299; *on appeal*, 2 Russ. p. 170, L. C.

**Annotations:—***Refd.* Bowser v. Coleby (1841), 11 L. J. Ch. 132. *Mentd.* Darbey v. Whitaker (1857), 29 L. T. O. S. 351; Day v. Lühke (1868), L. R. 5 Eq. 336; Golden Bread Co. v. Hemmings, [1922] 1 Ch. 162.

**6189. ———. Necessity for act showing election.]—ARNSBY v. WOODWARD, No. 6218, post.**

**6190. ———.]—A. granted to B. a licence to enter upon his lands to search & dig for ores for a term of twenty-one years, with a proviso that if B. ceased to work the mines for six months, or broke any other of the covenants contained in the licence, then the "supposed indenture, & the liberties, licences, powers, & authorities thereby granted shall cease, determine, & be utterly void & of no effect:—Held: the word "void" was to be construed to mean voidable, & some act of A. to show his election to enforce the forfeiture was necessary to put an end to the licence.—ROBERTS v. DAVEY (1833), 4 B. & Ad. 664; 1 Nev. & M. K. B. 443; 2 L. J. K. B. 141; 110 E. R. 606.**

**Annotations:—***Consd.* Davenport v. R. (1877), 3 App. Cas. 115; James v. Young (1884), 27 Ch. D. 652. *Refd.*

**PART XXIV. SECT. 1, SUB-SECT. 3.**

**6189 i. Lease expressed to be void on breach of covenant.—Necessity for act showing election.]—**Where a lease provides for acceleration of rent & forfeiture of the term upon the tenant's goods being taken in execution the term does not, merely on the tenant's goods being taken in execution, become *ipso*

*facto* forfeited & void so as to make a subsequent distress for rent illegal; it is optional with the landlord whether he will declare the term forfeited; the fact that the landlord has taken advantage of the provision accelerating the rent raises no inference, that he intended to put an end to the lease.—McCLOY v. COX, [1921] 2 W. W. R. 790.—CAN.

Elliott v. Boynton, [1924] 1 Ch. 236. *Mentd.* Doe d. Griffiths v. Pritchard (1833), 2 Nev. & M. K. B. 489; Hughes v. Palmer (1865), 19 C. B. N. S. 393.

**6191. ———.]—DOE d. NASH v. BIRCH, No. 6505, post.**

**6192. ———.]—**Although in an indenture by which premises are demised by pltf. to A. by whom they are assigned to deft., it is provided that in the event of there being rent in arrear pltf. shall re-enter as if the indenture had never been made, pltf. is entitled to an action of covenant for the rent reserved which accrued before the re-entry.—HARTSHORNE v. WATSON (1838), 4 Bing. N. C. 178; 6 Dowl. 404; 1 Arn. 15; 5 Scott, 506; 7 L. J. C. P. 138; 2 Jur. 155; 132 E. R. 756; *subsequent proceedings* (1839), 5 Bing. N. C. 477.

**Annotations:—***Apld.* Blore v. Giuliani, [1903] 1 K. B. 356. *Consd.* Elliott v. Boynton, [1924] 1 Ch. 236. *Refd.* Bambergor v. Commercial Credit Mutual Assce. (1855), 24 L. J. C.P. 115. *Mentd.* Marshall v. Mackintosh (1898), 78 L. T. 750.

**6193. ———.]—BOWSER v. COLBY, No. 6307, post.**

**6194. ———.]—TOLEMAN v. PORTBURY, No. 6428, post.**

**6195. ———.]—**A lease of Crown lands for eight years having been granted by resp. under 31 Vict. No. 46, subject to the terms & conditions contained in Colonial Acts of 1863 & 1866, the lessee failed to perform his covenant to cultivate one-sixth of the lands within a year from the allotment thereof. Rent, however, for the whole term of years was subsequently received by the Govt., the latest being in 1873, with full knowledge of the above breach of covenant, but after notification in the *Gazettes* of 1869, 1870 & 1871, that same would be received conditionally & without prejudice to the rights of the Govt. In ejectment brought by resp.:—*Held*: (1) whether or not a valid grant could be made to a selector failing to perform the condition under sect. 8 of the Act of 1863, the same sect. read into the above lease does not render it void, but voidable at the option of the lessor, on breach of condition by the lessee; (2) assuming a forfeiture had accrued, it was waived by the receipt of rent, notwithstanding the notifications; where money is paid & received as rent under a lease, a mere protest that it is accepted conditionally, & without prejudice to the right to insist upon a prior forfeiture, cannot countervail the fact of such receipt.

In a long series of decisions the cts. have construed clauses of forfeiture in leases declaring in terms, however clear & strong, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors (Sir MONTAGUE SMITH).—DAVENPORT v. R. (1877), 3 App. Cas. 115; 47 L. J. P. C. 8; 37 L. T. 727, P. C.

**Annotations:—***As to (1) Consd.* Elliott v. Boynton, [1924] 1 Ch. 236. *Refd.* Quenel Forks Gold Mining Co. v. Ward, [1920] A. C. 222. *As to (2) Apld.* Hartell v. Blackler, [1920] 2 K. B. 161; R. v. Paulson, [1921] 1 A. C. 271. *Refd.* Keith, Prowse v. National Telephone Co., [1894] 2 Ch. 147; Davies v. Bristow, Penrhos College v. Butler, [1920] 3 K. B. 428. *Generally, Mentd.* Blackburn v. Flavell (1881), 30 W. R. 67; Ackroyd v. Smithies (1885), 54 L. T. 130; Jay's Furnishing Co. v. Brand (1914), 112 L. T. 719; Samuel v. Dumas, [1924] A. C. 431.

**6196. ———.]—**An action for possession by a landlord against a tenant under a forfeiture clause

**6189 ii. ———.]—KILKENNY GAS CO. v. SOMERVILLE (1878), 2 L. R. Ir. 192.—IR.**

**a. Lessor's election irrevocable.]—**A condition of forfeiture in a lease is enforceable or not at the option of the lessor, but his election when once exercised is final & irrevocable.—THORBURN v. BUCHANAN (1871), 2 V. R. (Law) 169.—AUS.

in the agreement is not an action against a tenant whose term has expired within Ord. 3, r. 6 (f).

The interest of the tenant does not expire upon breach of the condition to pay rent. It becomes forfeitable; but it is forfeited only at the option of the landlord (MATHEW, J.).—BURNS v. WALFORD, [1884] W. N. 31; Bitt. Rep. in Ch. 208.

**6197.** —.]—When a lease contains a proviso or condition that on breach of any of the covenants such lease "shall cease, determine, & be void to all intents & purposes whatsoever," such words must be construed to mean void at the election of the lessor. Thus, where a lease contained a proviso to the effect that if the lessee should become bkpt. or insolvent the lease "shall cease, determine, & be void," & the lessee having become bkpt., the trustee in the bkpcy. rejected a proof put in by the lessors founded on such lease, upon the ground that on the bkpcy. the lease became void:—*Held*: upon such rejection by the trustee was wrong, & must be reversed.—*Re* TICKLE, *Ex p.* LEATHER SELLERS' Co. (1886), 3 Morr. 126.

**6198.** —.]—A mining lease granted by the Govt. of British Columbia in 1894 & validated by a special Act of the provincial legislature in 1895, provided as follows: "If the said lessee shall cease for the space of two years to carry on mining operations upon such premises . . . then this demise shall become absolutely forfeited & these presents & the term hereby created, & all rights, privileges & authorities hereby granted shall, *ipso facto*, at the expiration of the times aforesaid cease & be void as if these presents had not been made":—*Held*: upon the lessees ceasing for two years to carry on mining operations the lease was voidable at the option of the lessor & not void.—QUESNEL FORKS GOLD MINING Co. v. WARD, [1920] A. C. 222; 89 L. J. P. C. 13; 122 L. T. 206, P. C.

*Annotation*:—*Reid*. R. v. Paulson, [1921] 1 A. C. 271.

#### SUB-SECT. 4.—ENFORCEMENT.

##### A. By Whom Enforceable.

*See, now*, Law of Property Act, 1925 (c. 20), s. 141.

**6199. Assignee of reversion.**—WINTER'S CASE (1572), 3 Dyer, 308 b; 73 E. R. 697; *sub nom.* WYNTER'S CASE, cited 1 Co. Inst. at p. 215 a.

*Annotations*:—*Consd.* Piggott v. Middlesex County Council, [1909] 1 Ch. 134. *Mentd.* Garbrey v. Brown (1588), Gouldsb. 94; Knight's Case (1588), 5 Co. Rep. 54 b; Wade's Case (1601), 5 Co. Rep. 114 a; Fox v. Whitecocke (1614), 2 Bulst. 290; Stukeley v. Butler (1615), Hob. 168; Beare v. Woodley (1629), Cro. Car. 153; Ward v. Everet (1698), 1 Ld. Raym. 422; Orby v. Mohun (1706), Freem. Ch. 291; Talte v. Gosling (1879), 11 Ch. D. 273.

**6200.** — Not in respect of acts committed before assignment.]—(1) A forfeiture by tenant for years in levying a fine, not having been taken advantage of by the entry of the then reversioner to avoid the lease, cannot be taken advantage of, after the reversion has been conveyed away, to recover the estate in ejectment from the tenant, upon the several demises of the grantor & grantee of such reversion.

(2) Must not the necessity of an entry depend upon the wording of the condition? If the words be, that upon the doing of such an act, the reversioner may enter, there must be an entry to avoid

the estate; but if the estate be granted upon condition, that if the grantee do such an act, the estate shall thereupon immediately cease & determine, there no entry is necessary (BAYLEY, J.).—FENN d. MATTHEWS & LEWIS v. SMART (1810), 12 East, 444; 104 E. R. 173.

*Annotations*:—*As to* (2) *Fold*. Moore v. Ullocoats Mining Co., [1908] 1 Ch. 575. *Generally, Mentd.* Liddy v. Kennedy (1871), L. R. 5 H. L. 134.

*See, also*, Part XXII., *ante*.

**6201. One co-heir.**—One co-heir entering & avoiding the tenant's lease shall answer the moiety of the profits to the other co-heir.—DRURY v. DRURY (1630), 1 Rep. Ch. 49; 21 E. R. 504.

**6202. Stranger to legal estate.**—A right of entry cannot be reserved to a stranger to the estate.—DOE d. BARBER v. LAWRENCE (1811), 4 Taunt. 23; 128 E. R. 235.

*Annotation*:—*Fold*. Doe d. Barker v. Goldsmith (1832), 2 Cr. & J. 674.

**6203.** — *Cestui que trust.*—B. bequeathed certain leasehold premises to trustees, on trust to permit & suffer his wife to receive the rents, etc., during her life. Afterwards the surviving trustee & the widow granted a lease of the premises, the rent to be paid to the widow & the lessors to have a power of re-entry upon non-payment of rent; the lease disclosed the title of the widow, who, after the death of the trustee, entered on the premises:—*Held*: being a stranger to the legal estate, the power of re-entry could not be reserved to her, & the lease operated as a lease by the trustee & a confirmation by the widow.—DOE d. BARKER v. GOLDSMITH (1832), 2 Cr. & J. 674; 2 Tyr. 710; 1 L. J. Ex. 256; 149 E. R. 283.

*Annotation*:—*Reid*. Greenaway v. Hart (1854), 14 C. B. 340.

**6204.** — *Mortgagor.*—Where, by lease mtgee. demised, & the extri. of mtgor. demised & confirmed, & a power of re-entry was reserved to them or either of them:—*Held*: it operated as the demise of the mtgee. & the confirmation of the mtgor.'s representative; the re-entry enured to revert the estate in the mtgee.; & a count in ejectment laying the demise jointly in the two, was not sustainable.—DOE d. BARNEY v. ADAMS (1832), 2 Cr. & J. 232; 2 Tyr. 280; 1 L. J. Ex. 105; 149 E. R. 101.

*Annotation*:—*Reid*. Doe d. Campbell v. Hamilton (1849), 13 Q. B. 977.

**6205.** — —.]—In ejectment by landlord against tenant for a forfeiture, it is a good defence that the landlord, after the execution of the lease, conveyed away his title to the premises by mtge.; although it be not shown that any interest on the mtge. is in arrear, or that the mtgee. has made any claim, or otherwise enforced his rights as against either landlord or tenant.—DOE d. MARRIOTT v. EDWARDS (1834), 5 B. & Ad. 1065; 6 C. & P. 208; 3 Nev. & M. K. B. 193; 110 E. R. 1086.

*Annotations*:—*Reid*. Trent v. Hunt (1853), 9 Exch. 14; Liddy v. Kennedy (1871), L. R. 5 H. L. 134; Turner v. Walsh, [1909] 2 K. B. 484.

**6206.** — —.]—A demise by a mtgor. & mtgee. of leasehold premises contained a proviso for re-entry by either of them if the lessee should assign without the mtgor.'s consent. After several assignments with the mtgor.'s consent, the premises were assigned to M. by a deed to which the mtgor. alone was a party, & which contained a proviso for re-entry by the mtgor. on M. assigning without his consent, but which reserved no right

#### PART XXIV. SECT. 1, SUB-SECT. 4.— A.

**6199 i. Assignee of reversion.**—KRISTO NATH KOONDoo v. BROWN

(1886), 1 L. R. 14 Calc. 176.—IND.

*p. Joint lessor separately entitled to his share.*—One of several joint lessors who had become separately entitled to his share of the lands leased,

is entitled to enforce the forfeiture clause in the lease deed separately as regards his share of the lands.—KORAPALU v. NARAYANA (1913), 1 L. R. 38 Mad. 445.—IND.

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of re-entry to S. (assignee of the mtgee.) in a like event. M. paid rent to the mtgor., & subsequently assigned without his consent; whereupon S. & the mtgor. brought ejectment:—*Held*: (1) M. was not estopped from showing that the mtgor. was not the legal reversioner; (2) neither the mtgor. nor S. could recover; the one having only an equitable title to the premises, & the other having no right of re-entry reserved to him.—*SAUNDERS v. MERRYWEATHER* (1805), 3 H. & C. 902; 35 L. J. Ex. 115; 30 J. P. 265; 11 Jur. N. S. 655; 13 W. R. 814; 159 E. R. 790.

**6207.** ————*Jud. Act, 1873 (c. 60), s. 25 (5)*, does not give to a mtgor. in possession of land, subject to a lease, the right to re-enter for breach of the covenants of the lease.—*MATTHEWS v. USHER*, [1900] 2 Q. B. 535; 69 L. J. Q. B. 856; 83 L. T. 353; 49 W. R. 40; 16 T. L. R. 493; 44 Sol. Jo. 606, C. A.

*Annotations*:—*Apld. Molyneux v. Richard*, [1906] 1 Ch. 34. *Refd. Turner v. Walsh*, [1909] 2 K. B. 484. *Mentd. Jolly v. Brown*, [1914] 2 K. B. 109.

*See, now, Law of Property Act, 1925 (c. 20), s. 98.*

**6208. Lessee of part of premises—Purchase of reversion to whole.]—Pltf. being lessee to deft. of part of certain premises, the whole of which had been demised to deft. under a lease, containing a covenant to repair, & also a proviso for avoiding the term, in case deft. should "wilfully fail to perform" any of the covenants, purchased the reversion, & brought ejectment against deft. for non-repair. He stated in his particulars, that he brought his action to recover all the premises except those in his own occupation; but he had given no notice to deft. to repair:—*Held*: he was not bound to bring ejectment for the whole of the premises, & he might maintain the action without giving notice to repair.—*DOE d. HILLS v. MORRIS* (1842) 11 L. J. Ex. 313; 6 Jur. 326.**

**6209. Assignee of right of re-entry—Real Property Act, 1845 (c. 106), s. 6.]—E.**, by indenture, dated May 31, 1852, demised to deft. for ninety-nine years a piece of land & four unfinished dwelling-houses, deft. covenanting that he would on or before June 25 finish the houses "under the direction & to the satisfaction of the surveyor of E." Proviso, that in case of default, E. might enter "into the demised premises or any part thereof in the name of the whole, & repossess, retain & enjoy same as of his former estate." By indenture of July 30, 1852, between E. & pltf., after reciting a lease of Feb. 18, 1852, whereby S. demised to E. certain land, including the land in question, & that E. had made underleases, E. assigned to pltf. the leasehold premises " & also the estate, right, title & interest of him, E. in, to & out of the premises," for the residue of the term of years granted by the aforesaid indenture of lease, subject nevertheless to the underleases. Deft. not having finished the houses in time, the present ejectment was brought. No surveyor had been appointed:—*Held*: (1) the appointment of a surveyor was a condition precedent to the liability of deft. to finish the houses; (2) above sect. did not authorise the assignment of a right of entry for condition broken, but related only to an original right where there had been a disseisin or where the party had a right of entry & nothing but that remained. *Semle*: there existed a right of re-entry, & the forfeiture was waived by the

assignment.—*HUNT v. BISHOP* (1853), 8 Exch. 675; 1 C. L. R. 97; 22 L. J. Ex. 337; 21 L. T. O. S. 92; 155 E. R. 1523.

*Annotation*:—*Refd. Atkin v. Rose*, [1923] 1 Ch. 522.

**6210.** ————*J.*—By indenture of Mar. 31, 1852, E. demised to B. for ninety-nine years a piece of land & four unfinished dwelling-houses; & B. covenanting that he would, on or before June 25, 1852, finish the dwelling-houses under the direction & to the satisfaction of the surveyor of E.; provided that, if default should be made, it should be lawful for E. "into the demised premises, or any part thereof in the name of the whole, & repossess, retain, & enjoy same as of his former estate." By a subsequent indenture of the same date, B. mortgaged the premises in question to pltf. By indenture of July 30, 1852, between E. of the one part, & deft. of the other part, reciting that E. had entered into several underleases affecting the premises, the particulars of which were known to deft., E. assigned to deft. the leasehold premises, " & all the estate, right, title, & interest of him E. in, to, or out of the premises," for the residue of the term of years granted by the aforesaid indenture of lease, subject nevertheless to the underleases therein referred to. B. did not complete the houses on June 25, 1852, & no surveyor was appointed. In July, 1852, B. gave up possession of the premises to deft. Pltf. having brought ejectment as mtgee.:—*Held*: assuming there was a sufficient clause of re-entry, & also a forfeiture of which E. might have availed himself, the indenture of assignment did not show any intention, or use sufficient words, to pass a right of entry to deft., even if such a right is assignable under above sect., which, *semle*, it is not.—*HUNT v. REMNANT* (1854), 9 Exch. 635; 23 L. J. Ex. 135; 22 L. T. O. S. 350; 18 Jur. 335; 2 W. R. 276; 156 E. R. 271, Ex. Ch.

*Annotations*:—*Consd. Davenport v. Smith*, [1921] 2 Ch. 270. *Refd. Williams v. Pinckney* (1897), 67 L. J. Ch. 31; *Atkin v. Rose*, [1923] 1 Ch. 522.

*See, now, Law of Property Act, 1925 (c. 20), s. 4.*

**6211. Remainderman—Lease under power.]—A** lease, made under a power in a settlement, recited the title of the lessor, & showed that he had only an equitable interest. In case of a breach of the covenants of the lease, a right of re-entry was reserved to the lessor and his assigns:—*Held*: the word "assigns" as used in the lease, meant assigns of the settlor; & although the right of re-entry could not well be reserved to the lessor, yet the owners of the reversion under the settlement for the time being were entitled to take advantage of it as "assigns."—*GREENAWAY v. HART* (1854), 14 C. B. 340; 2 C. L. R. 370; 23 L. J. C. P. 115; 23 L. T. O. S. 174; 18 Jur. 449; 2 W. R. 702; 139 E. R. 140.

*Annotation*:—*Refd. Yellowly v. Gower* (1855), 11 Exch. 274.

**6212. Right of re-entry may be reserved—By lessor parting with whole interest in term.]—A.**, being possessed of a term of years, demised his whole interest to B., subject to a right of re-entry on a breach of a condition:—*Held*: A. might enter for the condition broken, although he had no reversion.—*DOE d. FREEMAN v. BATEMAN* (1818), 2 B. & Ald. 168; 106 E. R. 328.

*Annotation*:—*Refd. Hyde v. Warden* (1877), 3 Ex. D. 72.

**B. Re-Entry.**

**(a) Necessity for.**

**6213. Condition for absolute determination of tenancy—Re-entry unnecessary.]—FINCH v. RISE-**

**PART XXIV. SECT. 1, SUB-SECT. 4.—B. (a).**

**q. Forfeiture for non-payment of rent.]—There is no forfeiture for non-payment of rent until the lessor re-enters & declares the lease forfeited.—BALAGNO v. LE ROY** (1913), 18 B. C. R. 127.—**CAN.**

LEY (1594), Poph. 53; 79 E. R. 1169; *sub nom.* FINCH v. THROCKMORTON, Cro. Eliz. 221; *sub nom.* FINCH'S CASE, 2 Leon. 134; *sub nom.* ANON., And. 303.

*Annotations*:—**Mentd.** Courtney v. Glanvil (1614), Cro. Jac. 343; Adeson v. Otway (1677), Freem. K. B. 240; Ford v. Grey (1703), 6 Mod. Rep. 44; Long v. Buckenridge (1718), 1 Stra. 106; Doe d. Hayne v. Redfern (1810), 12 East, 96; Newton v. Harland (1840), 1 Man. & G. 644.

**6214.** ———.]—Where one leased for twenty-one years, if the tenant, his exors., etc., should so long continue to inhabit & dwell in the farmhouse, & actually occupy the lands, etc., & not let, set, assign over, or otherwise depart with the lease:—**Held**: the tenant having become bkpt., & his assignees having possessed themselves of the premises & sold the lease, & bkpt. being out of the actual possession & occupation of the farm, the lessor might maintain ejectment without a previous re-entry, the continuance of the term itself being made to depend upon the lessee's actual occupation.—DOE d. LOCKWOOD v. CLARKE (1807), 8 East, 185; 103 E. R. 313.

**6215.** ———.]—FENN d. MATTHEWS & LEWIS v. SMART, No. 6200, *ante*.

**6216. Condition providing for re-entry—Re-entry necessary.**—FINCH v. RISELEY (1594), Poph. 53; 79 E. R. 1169; *sub nom.* FINCH v. THROCKMORTON, Cro. Eliz. 221; *sub nom.* FINCH'S CASE, 2 Leon. 134; *sub nom.* ANON., And. 303.

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**6217.** ———.]—FENN d. MATTHEWS & LEWIS v. SMART, No. 6200, *ante*.

**6218.** ———.]—Where a lease contained a proviso, "That if the rent should be in arrear for twenty-one days after demand made, or if any of the covenants should be broken, then the term thereby granted, or so much thereof as should be then unexpired, should cease, determine, & be wholly void, & it should be lawful to & for the landlord upon the demised premises wholly to re-enter, & same to hold to his own use, & to expel the lessee":—**Held**: this, in the event of a breach of covenant, made the lease voidable & not void, & the landlord was bound to re-enter in order to take advantage of the forfeiture, & he waived it by a subsequent receipt of rent.—ARNSBY v. WOODWARD (1827), 6 B. & C. 519; 9 Dow. & Ry. K. B. 536; 108 E. R. 542; *sub nom.* ARMSBY v. WOODWARD, 5 L. J. O. S. K. B. 199.

*Annotations*:—**Fold.** Bowser v. Colby (1841), 1 Hare, 109. **Refd.** Gibson v. Doey (1857), 27 L. J. Ex. 37; Hughes v. Palmer (1865), 19 C. B. N. S. 393; Liddy v. Kennedy (1871), L. R. 5 H. L. 134; Elliott v. Boynton, [1924] 1 Ch. 236. **Mentd.** Mittelholzer v. Fullarton (1842), 6 Q. B. 989; A.-G. of Victoria v. Glass (1875), L. R. 6 P. C. 375.

## (b) What Amounts to.

### i. In General.

**6219. Any unequivocal act showing intention to determine—Notified to lessee.**—JONES v. CARTER, No. 6242, *post*.

**6220. Re-letting—To underlessee in possession.**—A lessor, finding the demised premises out of repair, intending to take advantage of a clause of forfeiture contained in the lease, entered into an agreement with an undertenant whom he found there to let them to him as a yearly tenant, & subsequently received rent from him:—**Held**: a sufficient re-entry to avoid the lease.—BAYLIS

v. LE GROS (1858), 4 C. B. N. S. 537; 31 L. T. O. S. 215; 22 J. P. 482; 4 Jur. N. S. 513; 140 E. R. 1201.

*Annotation*:—**Refd.** Liddy v. Kennedy (1871), L. R. 5 H. L. 134.

**6221.** ——— **To new tenant—After surrender by lessee.**—PARKER v. JONES, No. 6744, *post*.

**6222. Service of notice on sub-tenants—To pay rent to lessor.**—Action for personal injury from negligence in permitting the grating of a house alleged to be in the possession of defts. to be in bad repair.

Defts. in 1853, let to M., by lease for thirty years, the house & area, with a water tank in & gratings over the area. There was a clause of re-entry on non-payment of the rent. M. occupied the first floor, & sub-let the rest of the house to weekly lodgers, who had the right to take water from the tank, & to make use of the area for that purpose. In Mar. 1856, M. let the first floor to a weekly lodger & left the premises. He did not pay his rent, & in July passed through the Insolvent Ct., when he gave up his lease to the provisional assignee. In July, defts. gave notice to the weekly lodgers to pay their rents to defts. & two of the lodgers did so. On Aug. 4 pltf. was injured by falling through the grating, which was out of repair. On Aug. 7, the inspector of nuisances served the first floor lodger with a notice, dated Aug. 1, to repair the grating. This notice was handed to defts., who repaired the grating. In Nov. defts. called upon the assignees in the usual way, to elect whether they would accept the lease, & the Insolvent Ct., upon the assignees electing to decline, ordered the lease to be delivered to defts., by whom it was received:—**Held**: there was no evidence to show that defts., before the accident, had either in law or fact avoided the lease & re-entered; they had done nothing to estop them from denying that they had done so; & therefore, they were entitled to the verdict.—BISHOP v. BEDFORD CHARITY TRUSTEES (1859), 1 E. & E. 714; 29 L. J. Q. B. 53; 1 L. T. 214; 6 Jur. N. S. 220; 8 W. R. 115; 120 E. R. 1078, Ex. Ch.

**6223. Notice of intention to re-enter.**—MOORE v. ULLCOATS MINING CO., LTD., No. 6238, *post*.

### ii. Actions for Recovery of Possession.

Action for recovery of possession generally, *see* Part XXV., Sect. 4, *post*.

**6224. Action for ejectment.**—In ejectment on a condition of re-entry, proof of actual entry & ouster, is not necessary.—LITTLE v. HEATON (1702), 1 Holt, K. B. 264; 2 Ld. Raym. 750; 1 Salk. 259; 90 E. R. 1044.

*Annotations*:—**Refd.** Tapner d. Peckham v. Merlott (1739), Willes, 177; Goodright d. Hare v. Cator (1780), 2 Doug. K. B. 477; Doe d. Harris v. Masters (1824), 4 Dow. & Ry. K. B. 45; Doe d. Phillips v. Rollings (1847), 4 C. B. 188. **Mentd.** *Re* Morrish, *Ex p.* Hart-Dyke (1882), 22 Ch. D. 410.

**6225.** ———.]—GOODRIGHT d. HARE v. CATOR, No. 6290, *post*.

**6226.** ——— **Though not with intent to avoid lease.**—A right to re-entry is waived by acceptance of the reserved rent, though from a stranger.

Lease for the lives of G., H., & E., & the survivors & survivor of them with a clause of re-entry "in case G., his heirs, or assigns, should become insolvent, & unable in circumstances to go on with the farm," etc. H. became entitled to the premises as special occupant, & afterwards committed felony, was convicted & attained, but no office

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found; the reserved rent was afterwards paid, by the mother of H. & his sister, to the persons entitled to the reversion. On the death of the third life (E.), the reversioner let the premises to one I., & then brought ejectment & recovered possession; & against defts., tenants in possession under a subsequent letting by him, this ejectment was brought on the ground that the lease was still subsisting, with freehold in H.:—**Held:** (1) admitting the conviction of H. to have created insolvency within the terms of the proviso, the acceptance of the reserved rent by the reversioner, even from those who had no title, was a waiver; (2) the bringing of an ejectment against I., would have been a sufficient entry, although not done with the intent to avoid the lease for lives under the proviso for re-entry.—**DOE d. GRIFFITH v. PRITCHARD** (1833), 5 B. & Ad. 765; 2 Nev. & M. K. B. 489; 3 L. J. K. B. 11; 110 E. R. 973.

**Annotations:—***As to* (1) **Refd.** *Dowell v. Dew* (1842), 1 Y. & C. Ch. Cas. 345; *Croft v. Lumley* (1858), 6 H. L. Cas. 672. *As to* (2) **Refd.** *Doe d. Jones v. Williams* (1833), 5 B. & Ad. 783. **Generally, Mentd.** *R. v. Bridger* (1836), Tyr. & Gr. 437; *Shrewsbury v. Scott* (1859), 6 C. B. N. S. 1.

**6227. —**—**J.**—A lease for years not warranted either at common law, or by 32 Hen. 8, c. 28, was made by A. tenant in tail to B. After A.'s death, C. the next entailee in remainder, demanded the arrears of rent accruing in C.'s time. After some negotiation, B. refused to pay the arrears to C. alleging that D., & not C., was entitled to the estate tail:—**Held:** no tenancy was created between C. & B. & C. might maintain ejectment against B. without notice to quit or demand of possession; the setting up of the title of D. amounted to a disclaimer of the title of C.; & for the purposes of the action of ejectment, the entry confessed in the consent rule, was sufficient to determine the lawful possession of B.—**DOE d. PHILLIPS v. ROLLINGS** (1847), 4 C. B. 188; 17 L. J. C. P. 208; 136 E. R. 476.

**Annotation:—****Refd.** *Kennedy v. Liddy* (1867), 15 W. R. 431.

**6228. —**—**J.**—The bringing of the action for ejectment is equivalent to the ancient entry. It is an act unequivocal in the sense that it asserts the right of possession upon every ground that may turn out to be available to the party claiming to re-enter (**WILLES, J.**).—**GRIMWOOD v. MOSS** (1872), L. R. 7 C. P. 360; 41 L. J. C. P. 239; 27 L. T. 268; 36 J. P. 663; 20 W. R. 972.

**Annotations:—****Consd.** *Gentle v. Faulkner* (1899), 68 L. J. Q. B. 848; *Serjeant v. Nash, Field*, [1903] 2 K. B. 304; *Works Comrs. v. Hull*, [1922] 1 K. B. 905. **Refd.** *West v. Rogers* (1888), 4 T. L. R. 229; *Ogan v. Ralfe & Holt* (1903), 67 J. P. Jo. 100; *R. v. Paulson*, [1921] 1 A. C. 271; *Civil Service Co-op. Soc. v. McGrigor's Trustee*, [1923] 2 Ch. 347. **Mentd.** *Evans v. Wyatt* (1880), 43 L. T. 176; *Kirkland v. Briancourt* (1890), 6 T. L. R. 441.

**6229. Service of declaration in ejectment.—On one sub-tenant.]—Qu.:** whether the service of a declaration in ejectment upon one of several sub-tenants of a lessee, followed up by judgment against the casual ejector, & executed against that sub-tenant, is evidence of an election on the part of the lessor, to avail himself of a clause of re-entry contained in the lease.—**LONG v. BILKE** (1840), 1 Man. & G. 87; 1 Scott, N. R. 176; 133 E. R. 258.

**6230. — Not followed by judgment.]—JONES v. CARTER**, No. 6242, *post*.

**6231. Issue of writ for recovery of possession.]—Qu.:** when a lease contains a proviso giving the lessor a right to re-enter in the event of breach of

covenant by the lessee (but not making the lease *ipso facto* void in that event), whether under the present practice the mere commencement of an action by the lessor to recover possession of the property for breach of covenant, or the commencement of such action followed by appearance by the trustees, will, without actual entry, operate to determine the lease.—**Re MORRISH, Ex p. HART DYKE** (1882), 22 Ch. D. 410; 52 L. J. Ch. 570; 48 L. T. 303; 31 W. R. 278, C. A.

**Annotations:—****Consd.** *Ware v. Booth* (1894), 10 T. L. R. 446; *Serjeant v. Nash, Field*, [1903] 2 K. B. 304. **Mentd.** *Lybbe v. Hart* (1885), 29 Ch. D. 8.

**6232. —**—**J.**—Under the present practice it is not necessary that before the issue of a writ in an action to recover possession of premises *pltf.* should in fact re-enter the premises.—**WARE v. BOOTH** (1894), 10 T. L. R. 446.

**6233. —**—**J.**—The lessee of certain premises died intestate on May 24. On June 7 *deft.* was appointed administrator *ad colligenda bona* with power to sell the lease, & on that date he entered into possession of the premises. On June 24 a quarter's rent became due, but was not paid. On Aug. 23 *pltf.*, lessor, commenced an action against *deft.* for recovery of possession of the premises on non-payment of rent, & for rent & mesne profits. Judgment for possession was obtained under R. S. C., Ord. 14, & on Oct. 18 *deft.* went out of possession. The rent of the premises under the lease was £450 a year. While *deft.* was in possession he used reasonable diligence to find a purchaser of the lease or a tenant, but without success, & the only sum received by him in respect of the premises was £26 5s., being rent from a sub-tenant of a part of the premises:—**Held:** *deft.*, having entered into possession, was personally liable to *pltf.* for rent from June 7 to Aug. 23 at the rate of £450 a year, that being the yearly value of the premises, & for mesne profits at the same rate from the latter date to Oct. 18.—**WHITEHEAD v. PALMER**, [1908] 1 K. B. 151; 77 L. J. K. B. 60; 97 L. T. 909; 24 T. L. R. 41; 52 Sol. Jo. 45.

**6234. — Followed by service.]—SERJEANT v. NASH, FIELD & Co., No. 6419, *post*.**

**6235. —**—**J.**—A lease of premises contained a covenant by the lessee to repair, & a proviso for re-entry upon breach of any covenant in the lease. The lessee sub-let to *deft.*, the underlease containing a covenant to repair similar to that in the head lease, & a similar proviso for re-entry. The premises having become out of repair, the lessor issued a writ against the lessee to recover possession. The lessee thereupon assigned the lease, subject to & with benefit of the underlease, to an assignee, who obtained an order, under Conveyancing & Law of Property Act, 1881 (c. 41), s. 14 (2), that all further proceedings in the action should be stayed, & that the assignee should have relief from the forfeiture & should hold the premises according to the old lease without any new lease. The assignee then brought an action against *deft.* for rent due upon the underlease subsequent to the issue & service of the writ to recover possession:—**Held:** though the issue & service of the writ to recover possession operated as a final election by the lessor to determine the lease, the effect of the order for relief was to restore the lease as if it had never become forfeited, & therefore the underlease also remained in existence, & *pltf.* was entitled to recover.—**DENDY v. EVANS**, [1910] 1 K. B. 263;

**6231 i. Issue of writ for recovery of possession.]—STANDARD TRUSTS CO. v. STEELE (DAVID), LTD.**, [1922] 1 W. W. R. 137; *affd.*, 68 D. L. R. 750; [1922] 2 W. W. R. 510.—**CAN.**

79 L. J. K. B. 121; 102 L. T. 4; 54 Sol. Jo. 151, C. A.

*Annotations*.—*Mentd.* Rose v. Spicer, Rose v. Hyman, [1911] 2 K. B. 234; Hurd v. Whaley (1918), 118 L. T. 593.

**6236.** ——— [Without service.]—OGAN v. RAYTE & HOLT (1903), 67 J. P. Jo. 100.

**6237.** ——— [Joined with claim for injunction.]—EVANS v. DAVIS, No. 6454, *post*.

**6238.** ———.]—A notice by the lessor of his intention to re-enter, & demanding possession, is not entry or equivalent to entry, & is not sufficient to determine the lease.

A lease of iron ore mine granted in 1900 contained covenants by the lessees to work the mine properly, not to do any act which might occasion loss or damage to the mine, to keep correct maps & plans & to allow inspection by the lessor & his agents of such maps & plans. It also contained a covenant by the lessees to permit the lessor & his agents at all reasonable times to inspect the mine & its workings & a proviso that on default by the lessees in performing or observing any of the covenants the lessor might re-enter & thereupon the lease should be determined. The lessor died in Jan. 1907. On Apr. 26 his exors.' agent was refused inspection of the mine by the lessors. On Apr. 29 the exors. gave the lessees notice in writing that they had determined the lease & on May 3 they through their agents demanded possession of the mine. On May 4 they issued a writ against the lessees, claiming (a) recovery of possession of the mine; (b) mesne profits; (c) an injunction to restrain the lessees from working the mine so as to occasion loss or damage to it; (d) an order on the lessees to allow inspection of the mine & its workings; (e) a receiver; & (f) damages:—*Held* (1) having regard to the form of the proviso for re-entry in the lease actual re-entry or its equivalent the issue of a writ claiming possession *simpliciter* was necessary in order to determine the lease & the notices of Apr. 29 & May 3 were ineffectual for that purpose; (2) the claim in the writ for possession was inconsistent with the claim for an injunction & the writ was not therefore an unequivocal demand for possession so as to operate as a final election by the exors. to determine the lease.—*MOORE v. ULLCOATS MINING CO., LTD.*, [1908] 1 Ch. 575; 77 L. J. Ch. 282; 97 L. T. 845; 24 T. L. R. 54.

*Annotation*.—*As to* (1) *Refd.* Elliott v. Boynton, [1923] 1 Ch. 422.

**6239.** ———.]—Pltfs. by their writ claimed (a) possession of premises comprised in a lease; (b) damages for breach of covenants contained in the lease; & (c) an *interim* injunction; & served a notice of motion for an injunction to restrain defts. from erecting or permitting to remain erected certain lettering then erected on the front of the premises in breach of the covenants contained in the lease. The breach of covenant by deft. responsible for the breach was admitted, but since the notice of motion was served the breach of covenant had been remedied:—*Held*: the issue of the writ to recover possession was an unequivocal determination of the lease on the part of pltfs. & it was not open to them to move for an injunction on the footing that the lease was still subsisting, & pltfs. must pay the costs of the motion.—*WHEELER v. KEEBLE* (1914), [1920] 1 Ch. 57; 88 L. J. Ch. 554; 63 Sol. Jo. 724; *sub nom.* *WHEELER v. HITCHINGS, LTD.*, 121 L. T. 636.

**6240.** ——— [Against assignee in possession.]—The tenant of pltfs., in breach of a covenant

not to sub-let or assign without their written permission, assigned his tenancy to deft., & subsequently disappeared. On discovering the facts pltfs. brought an action against deft. to eject him as a trespasser:—*Held*: the proceedings, although taken against the assignee, & not against the original lessee, were a sufficient indication by the landlords of their intention to exercise their option to forfeit the tenancy for the breach of the covenant not to assign, & the tenancy of the original lessee, & consequently, that of deft., was thereby determined.—*WORKS COMRS. v. HULL*, [1922] 1 K. B. 205; 91 L. J. K. B. 308; 126 L. T. 349, D. C.

(c) *Effect of.*

**6241.** On landlord's right to sue for breach of covenants—Rent accrued before re-entry.]—*HARTSHORNE v. WATSON*, No. 6192, *ante*.

**6242.** ——— [Rent accrued after re-entry.]—(1) The service by lessor upon lessee of a declaration in ejectment for the demised premises, for a forfeiture, operates as a final election by the lessor to determine the term; & he cannot afterwards, although there has not been any judgment in the ejectment, sue for rent due, or covenants broken, after the service of the declaration.

(2) The lease would be rendered invalid by some unequivocal act, indicating the intention of the lessor to avail himself of the option given to him, & notified to the lessee (*PARKE, B.*).

(3) Though the lease is declared to be void for breach of covenant it is perfectly well settled that the true construction of the proviso is that it shall be void at the option of the lessor . . . & consequently on the one hand, if the lessor exercises the option that it shall continue the lease is rendered valid; if he elect that it shall end the lease must be determined (*PARKE, B.*).—*JONES v. CARTER* (1846), 15 M. & W. 718; 153 E. R. 1040.

*Annotations*.—*As to* (1) *Consd.* Dendy v. Nicholl (1858), 4 C. B. N. S. 376; R. v. Paulson, [1921] 1 A. C. 271. *Refd.* Cockerell v. Van Diemen's Land Co. (1856), 18 C. B. 454. *As to* (2) *Consd.* Dendy v. Nicholl (1858), 4 C. B. N. S. 376; Grimwood v. Moss (1872), L. R. 7 C. P. 360. *Fold.* Moore v. Ullcoats Mining Co., [1908] 1 Ch. 575. *Apld.* Wheeler v. Keeble (1914), *supra*, [1920] 1 Ch. 57. *Consd.* Works Comrs. v. Hull, [1922] 1 K. B. 205. *Refd.* Ware v. Booth (1894), 10 T. L. R. 446; Serjeant v. Nash, Field, [1903] 2 K. B. 304; Civil Service Co-operative Soc. v. McGrigor's Trustee, [1923] 2 Ch. 347; Elliott v. Boynton, [1924] 1 Ch. 236. *As to* (3) *Consd.* Toleman v. Portbury (1871), L. R. 6 Q. B. 245. *Apld.* Clough v. L. & N. W. Ry. (1871), L. R. 7 Exch. 26; Scarf v. Jardine (1882), 7 App. Cas. 345. *Consd.* R. v. Paulson, [1921] 1 A. C. 271. *Apld.* Abram S.S. Co. v. Westville Shipping Co., [1923] A. C. 773. *Refd.* Croft v. Lumley (1858), 6 H. L. Cas. 672; Toleman v. Portbury (1872), L. R. 7 Q. B. 344; Morrison v. Universal Marine Insco. (1873), L. R. 8 Exch. 197; Evans v. Wyatt (1880), 43 L. T. 176; James v. Young (1884), 27 Ch. D. 652; Coatsworth v. Johnson (1885), Cab. & Kl. 543. *Generally, Refd.* Dendy v. Evans (1909), 79 L. J. K. B. 121.

**6243.** On landlord's right of distress.]—Pltfs. in an action for specific performance of an agreement for a lease to deft. co., having under an interim order entered into possession of the demised premises, claimed the right to distrain on the goods of strangers on the premises for past arrears of rent due from deft. co. as lessees:—*Held*: (1) the order had suspended the relationship of landlord & tenant, & there being no tenancy there could be no right to distrain; & (2) the doctrine of *Walsh v. Lonsdale*, No. 568, *ante*, had no application, for there was no tenant holding under the agreement.—*MURGATROYD v.*

PART XXIV. SECT. 1, SUB-SECT. 4.—B. (c).

**6243 i.** On landlord's right of distress.]—*DOE d. SOMERS v. BULLEN* (1848), 5 U. C. R. 369.—*CAN.*

*Sect. 1.—Forfeiture: Sub-sect. 4, B. (c), & C. (a) i., ii., iii., v. & v.]*

**SILKSTONE & DODSWORTH COAL & IRON CO., LTD.,** *Ex p. CHARLESWORTH* (1895), 65 L. J. Ch. 111; 44 W. R. 198; 12 T. L. R. 58; 40 Sol. Jo. 84; *previous proceedings, sub nom. CHARLESWORTH v. OLD SILKSTONE & DODSWORTH COAL & IRON CO. & MURGATROYD, MURGATROYD v. OLD SILKSTONE & DODSWORTH COAL & IRON CO.* (1894), 38 Sol. Jo. 216.

**6244.** — *Rent accrued after issue of writ.*—**SERJEANT v. NASH, FIELD & CO.,** No. 6419, *post.*

*C. Breach of Covenant for Payment of Rent.*

*(a) Demand for Payment.*

*i. Necessity for.*

*Rent, generally, see Part XV., ante.*

**6245.** *General rule.*—**BUSKIN v. EDMUNDS,** No. 6271, *post.*

**6246.** — *—*—**BOROUGHES' CASE,** No. 6268, *post.*

**6247.** — *—*—**HANSON v. NORCLIT** (1620), W. Jo. 9; 82 E. R. 6.

**6248.** — *—*—*Demand must be made where an interest is to be determined.*—**STEWART v. ALLEN** (1677), 2 Mod. Rep. 264; 86 E. R. 1063.

**6249.** — *—*—*When a lease for years is made to be void on non-payment of rent, an actual demand is necessary to avoid it. Aliter, if it is to be void on non-payment of a sum in gross.*—**MASHAM v. GOODERE** (1678), 1 Freem. K. B. 242; 89 E. R. 173.

**6250.** — *—*—*As to demand, a clause of re-entry is required as a security for the rent; demand is requisite, both by common law & statute; a clause of re-entry will never be allowed to operate farther than as a security for rent.*—**HOTLEY v. SCOT** (1773), Loft, 316; 98 E. R. 670; *sub nom. TANKERVILLE (LORD) v. WINGFIELD & PRITCHARD, 3 Bl. 331, n.; 2 Brod. & Bing. 498, n.; 5 Moore, C. P. 346, n.; 7 Price, 343, n.*

*Annotations:—***Refd.** *Smith v. Jersey* (1821), 3 Bl. 290. **Mentd.** *Goodtitle v. Funeau* (1781), 2 Doug. K. B. 565; *Greenaway v. Hart* (1854), 14 C. B. 340.

**6251.** — *—*—*To support an ejectment on a forfeiture of a lease by non-performance of a covenant, if the covenant be to do an act, the lessor of pltf. must give some evidence of the omission of the act; & if the covenant be for payment of rent, the lessor of pltf. must prove a demand of such rent.*—**DOE d. CHANDLESS v. ROBSON** (1826), 2 C. & P. 245, N. P.

*Annotation:—***Mentd.** *Toleman v. Portbury* (1870), 18 W. R. 579.

**6252.** — *—*—*Where land is demised subject to a condition for re-entry on default in payment of the rent, the right of re-entry does not accrue until the rent has been duly demanded.*—**HILL v. KEMPSHALL** (1849), 7 C. B. 975; 13 L. T. O. S. 211; 137 E. R. 386.

*Annotation:—***Expld. & Distd.** *Phillips v. Bridge* (1873), L. R. 9 C. P. 48.

**6253.** *Lease by crown.*—**BOROUGHES' CASE,** No. 6268, *post.*

**6254.** *"So long as lessee shall pay rent."*—*A lease for years, "so long as the lessee shall duly pay the rent," makes a limitation, & not a*

*condition; & so no demand of rent is requisite to avoid it.*—**BALTINGLASS (LADY)** (1671), 1 Freem. K. B. 23; 89 E. R. 21; *sub nom. TUSTIAN v. ROPER, T. Jo. 27; sub nom. TRISTRAM v. ROPER* Vaugh. 28.

*Annotation:—***Mentd.** *Anon.* (1669), 1 Mod. Rep. 8.

*ii. Time of.*

*Time of payment of rent, see Part XV., Sect. 4 sub-sect. 1, ante.*

**6255.** *Last day for payment.*—*Of a demand or tender of a rent reserved payable at a place out of the land, out of which it issues.*

*Although the rent was not demanded on the day it was first due, that is, on the day of the feast of the Annunciation of our Lady nor pltf. read the same day on the land, nor at Hyde, to receive the same rent, yet this is not material, nor shall it hurt his entry, but he may well enter for default of payment the last instant of the last of the 40 days (per CUR.).*—**KIDWELLY v. BRAND** (1550); 1 Plowd. 69; 1 Dyer, 68 a; 75 E. R. 111.

*Annotations:—***Refd.** *Buskin v. Edmunds* (1594), Moore K. B. 598; *Boroughes' Case* (1596), 4 Co. Rep. 72 b; *Hassell d. Hodgson v. Gouthwaite* (1744), Willes, 500; *Rowe v. Young* (1820), 2 Bl. 391. **Mentd.** *Chudleigh's Case, Dillon v. Freine* (1595), 1 Co. Rep. 113 b; *Wade's Case* (1601), 5 Co. Rep. 114 a; *Startup v. Macdonald* (1843), 6 Man. & G. 593; *Taite v. Gosling* (1879), 11 Ch. D. 273.

**6256.** — *—*—**ANON.** (1586), Godb. 67; 75 E. R. 41.

**6257.** — *—*—**DOE d. FORSTER v. WANDLASS** No. 6291, *post.*

**6258.** — *Before sunset & till sunset.*—*If the lessor comes to the land before the last hour, viz. in the morning, or in the afternoon, & demands the rent, & afterwards goes off the land, & is not there at the last instant of the day, same is not a sufficient demand, although that return be presently after the sun is set (per CUR.).*—**WOOD v. CHIVERS** (1573), 4 Leon. 179; 74 E. R. 806.

**6259.** — *—*—*A demand of rent to avoid a lease upon a condition ought to be in the most open place.*

*The demand ought to be made at the setting of the sun the last instant of that day (per CUR.).*—**KNAP v. LEWELCH** (1607), 1 Brownl., 138; 125 E. R. 715.

**6260.** — *—*—**THOMSON v. FIELD,** No. 6122 *ante.*

**6261.** — *—*—**DOE d. WHEELDON v. PAUL,** No. 6278, *post.*

**6262.** — *—*—*By a lease rent was reserved payable on the usual quarter days, provided that if the rent should be in arrear for the space of twenty-eight days next after any of the days appointed for payment after same had been lawfully demanded, it should be lawful for the lessor to re-enter & take possession of the premises without bringing an action of ejectment. The rent being unpaid:—Held: a demand made on the premises at half past ten o'clock on the morning of the last day was not sufficient to entitle the lessor to re-enter without action.*—**ACOCKE v. PHILLIPS** (1860), 5 H. & N. 183; 157 E. R. 1149.

**6263.** *Demand before due date.*—*An agreement of tenancy contained the following clause*

**PART XXIV. SECT. 1, SUB-SECT. 4.—C. (a) 1.**

**62451.** *General rule.*—*A power of re-entry for non-payment of rent in a lease which does not expressly dispense with the necessity for making a demand for the rent, cannot be validly exercised unless there has been a previous common law demand for the rent.*—**SANDHURST & NORTHERN DISTRICT TRUSTEES, EXECUTORS &**

**AGENCY CO., LTD. v. CANAVAN,** [1908] V. L. R. 373.—**AUS.**

**62452.** *ii.* — *—*—**DOE d. CURITT v. McLEOD** (1840), 2 Ont. Dig. 3828.—**CAN.**

**62453.** *iii.* — *—*—*Where a clause would only make a lease voidable at the option of the lessor, not void, to entitle the lessor to determine the lease for non-payment of rent, a formal demand is necessary.*—**FAUGHER v.**

**BURLEY** (1875), 37 U. C. R. 498.—**CAN.**

**62454.** *iv.* — *—*—**BARRY v. GLOVE** (1859), 10 I. C. L. R. 113; 11 Ir. Jur. 260.—**IR.**

**62455.** *v.* — *—*—**SAMUEL v. DUNN,** J. R. N. S. 136.—**N.Z.**

**62456.** *vi.* — *—*—**NICKLE v. ARAPITTE TOA,** [1921] N. Z. L. R. 1049.—**N.Z.**

this agreement is entered into upon the express condition that, if the tenant shall make default in payment of the rent, or any part thereof, within twenty-one days after same shall become due, being demanded, it shall be lawful for the landlord, without giving any notice to quit, & without any other warrant, authority, or proceedings, to re-enter, etc.:—*Held*: to entitle the landlord to avail himself of the right of re-entry, the rent must be in arrear twenty-one days, & a demand, but without the formalities of a common law demand, of payment be then made. A demand within the twenty-one days is insufficient.—*PHILLIPS v. BRIDGE* (1873), L. R. 9 C. P. 48; 43 L. J. C. P. 13; 29 L. T. 692; 38 J. P. 104; 22 W. R. 237.

**6264.** ———.]—By an agreement in writing dated Mar. 7, 1884, made between plffs. & defts., defts. agreed to lease to plffs. the advertisement spaces on the cars of defts. running at N. for three years from Jan. 7, 1884, at £120 payable quarterly from Jan. 7; & the agreement provided that the advertising boards & fittings should be found by plffs.; & it contained a condition that in the event of default by plffs. in payment of any moneys due under the agreement for thirty days after demand in writing, defts. should be at liberty to at once determine the agreement or lease & on the determination thereof the boards were to become the property of defts., who were to have the option of purchasing the other fittings. Plffs. usually paid the rent upon the first day of the month, & plffs. & defts. believed that that was the day fixed by the agreement. Upon Apr. 7, 1885, plffs. not having paid the rent for the past quarter, defts. sent a written demand for the payment of £30, "being one quarter's rent under the advertising agreement, due on Apr. 1," & on May 30 the rent being still in arrear, they wrote to plffs. determining the agreement:—*Held*: the demand of Apr. 7, being inaccurate, was not a demand on which a forfeiture could be founded, & the agreement was not properly determined.—*JACKSON & Co. v. NORTHAMPTON STREET TRAMWAYS Co.* (1886), 55 L. T. 91.

### iii. Place of.

Place of payment of rent, *see* Part XV., Sect. 4, sub-sect. 6, *ante*.

**6265. On demised premises—In open place.]**—If lands & woods are demised together, the rent ought to be demanded at the land, & not the wood, because the land is the more worthy thing, & also more open than the wood; rent ought not to be demanded in any private place of close, as amongst bushes, in a pit, or the like, nor in the open & most usual passage thereof, as at a stile, gate, & the like (*per* CUR.).—*ANON.* (1561), Poph. 58; 79 E. R. 1173.

**6266.** ———.]—*KNAP v. LEWELCH*, No. 6259, *ante*.

**6267.** ———.]—Demand of rent must be made upon the demised premises.—*ANON.* (1583), Cro. Eliz. 15; 78 E. R. 281.

**6268.** ———.]—Queen Elizabeth made a lease of and for years, reserving rent payable at the Exchequer or into the hands of her bailiffs or receivers, with condition to be void by non-payment of rent, & afterwards granted the reversion to another & his heirs:—*Held*: (1) the grantee, to take advantage of the condition, must demand the rent upon the land; & in the case of a common person, if the rent is reserved payable at a place out of the land, to take advantage of the condition, the rent must be demanded at the place

where it is appointed to be paid; (2) the Queen shall take advantage of the condition without any demand; otherwise of her grantee; (3) if the King makes a lease without appointing any place, or into whose hands the rent should be paid, the lessee may pay it either at the receipt of the Exchequer, or into the hands of the King's bailiffs or receivers, authorised to the purpose.—*BOROUGHES' CASE* (1596), 4 Co. Rep. 72 b; 76 E. R. 1043; *sub nom.* *BURROUGH v. TAYLOR*, Cro. Eliz. 462; Moore, K. B. 404; *sub nom.* *ANON.*, Gouldsb. 124.

*Annotation*:—*Is to* (2) *Reffd.* *Hassell d. Hodgson v. Gouthwaite* (1744), Willes, 500.

**6269.** ———.]—In case of rent reserved payable at a certain day, the demand ought to be upon the land only, because the land is the debtor (*per* CUR.).—*STWETON v. CUSHIE* (1603), Yelv. 36; 80 E. R. 27; *sub nom.* *STRETTON v. CUSH*, 1 Brownl. 135; *sub nom.* *SWELNAM v. CUTS*, Moore, K. B. 680; *sub nom.* *SWETMAN v. CUSH*, Cro. Jac. 8.

*Annotation*:—*Consd.* *Doe d. Brook v. Brydges* (1822), 2 Dow. & Ry. K. B. 29. *Mentd.* *Nurse v. Frampton* 1 Salk. 214.

**6270. At place appointed for payment.]**—Demand of rent where it is payable is sufficient.—*WILLIS v. JERMIN* (1590), Cro. Eliz. 167; 78 E. R. 424.

—*Mentd.* *Phillips v. Bury* (1694), Skin. 447.

**6271.** ———.]—Rent made payable at a place off the land is still a rent; & must be demanded at the place.—*BUSKIN v. EDMUNDS* (1595), Cro. Eliz. 415; Moore, K. B. 598; 78 E. R. 657; *sub nom.* *TUSKING v. EDMUNDS*, Moore, K. B. 408; *on appeal*, *sub nom.* *BUSKYN v. EDMUNDS* (1596), Cro. Eliz. 535, Ex. Ch.

*Annotations*:—*Consd.* *Haldane v. Johnson* (1853), 8 Exch. 689. *Reffd.* *Rowe v. Young* (1820), 2 Bl. 391.

**6272.** ———.]—*BOROUGHES' CASE*, No. 6268, *ante*.

### iv. From Whom Demanded.

**6273. From occupier—Underlessee.]**—Where deft. does not reside upon the land, demand of the rent from his under-tenants is sufficient demand in order to maintain ejectment on the usual clause of re-entry in a lease.—*DOE d. BROOK v. BRYDGES* (1822), 2 Dow. & Ry. K. B. 29; 1 L. J. O. S. K. B. 9.

### v. Amount of.

**6274. Exact sum due—At last period for payment.]**—If the rent reserved at two feasts, viz. Michaelmas and Lady Day, & it is arrear at Lady Day, & not demanded at that day, if he may demand all at Michaelmas Day, & it was held he cannot, & a demand in that manner is void for all.—*SCOT v. SCOT* (1587), Cro. Eliz. 73; 2 Leon. 128; 78 E. R. 333.

**6275.** ———.]—The demand of rent must be of the precise sum due, & in pleading it ought to be expressed when it was due, but a variance as to the duration of the demand is not material.—*FABIAN v. WINSTON* (1589), Cro. Eliz. 209; 78 E. R. 465.

**6276.** ———.]—*MOODIE v. GARNANCE*, No. 6080, *ante*.

**6277.** ———.]—**Additional claim for arrears.]**—If a lease for years be made rendering £7 rent *per annum*, & there be £3 behind, & at the next day the lessor demands £10 rent; this is no good demand whereby to take advantage of a condition, because he takes it as an entire sum; but he must demand the £7 which then becomes due, & if he demands the arrears also, that is good

**Sect. 1.—Forfeiture: Sub-sect. 4, B. (c), & C. (a)**  
*i., ii., iii., iv. & v.]*

**SILKSTONE & DODSWORTH COAL & IRON CO., LTD.,** *Ex p.* **CHARLESWORTH** (1895), 65 L. J. Ch. 111; 44 W. R. 198; 12 T. L. R. 58; 40 Sol. Jo. 84; *previous proceedings, sub nom.* **CHARLESWORTH v. OLD SILKSTONE & DODSWORTH COAL & IRON CO. & MURGATROYD**, **MURGATROYD v. OLD SILKSTONE & DODSWORTH COAL & IRON CO.** (1894), 38 Sol. Jo. 216.

**6244.** — **Rent accrued after issue of writ.**—**SERJEANT v. NASH, FIELD & Co.**, No. 6419, *post*.

**C. Breach of Covenant for Payment of Rent.**

**(a) Demand for Payment.**

**i. Necessity for.**

**Rent, generally, see Part XV., ante.**

**6245. General rule.**—**BUSKIN v. EDMUNDS**, No. 6271, *post*.

**6246.** — **—**—**BOROUGHES' CASE**, No. 6268, *post*.  
**6247.** — **—**—**HANSON v. NORCLIT** (1620), W. Jo. 9; 82 E. R. 6.

**6248.** — **—**—**Demand must be made where an interest is to be determined.**—**STEWART v. ALLEN** (1677), 2 Mod. Rep. 264; 86 E. R. 1063.

**6249.** — **—**—**When a lease for years is made to be void on non-payment of rent, an actual demand is necessary to avoid it. Aliter, if it is to be void on non-payment of a sum in gross.**—**MASHAM v. GOODERE** (1678), 1 Freem. K. B. 242; 89 E. R. 173.

**6250.** — **—**—**As to demand, a clause of re-entry is required as a security for the rent; demand is requisite, both by common law & statute; a clause of re-entry will never be allowed to operate farther than as a security for rent.**—**HOTLEY v. SCOT** (1773), Loftt, 316; 98 E. R. 670; *sub nom.* **TANKERVILLE (LORD) v. WINGFIELD & PRITCHARD**, 3 Bli. 331, n.; 2 Brod. & Bing. 498, n.; 5 Moore, C. P. 346, n.; 7 Price, 343, n.

*Annotations:—***Refd.** **Smith v. Jersey** (1821), 3 Bli. 290.  
**Mentd.** **Goodtitle v. Funnecan** (1781), 2 Doug. K. B. 565; **Greenaway v. Hart** (1854), 14 C. B. 340.

**6251.** — **—**—**To support an ejectment on a forfeiture of a lease by non-performance of a covenant, if the covenant be to do an act, the lessor of pltf. must give some evidence of the omission of the act; & if the covenant be for payment of rent, the lessor of pltf. must prove a demand of such rent.**—**DOE d. CHANDLESS v. ROBSON** (1826), 2 C. & P. 245, N. P.

*Annotation:—***Mentd.** **Tolman v. Portbury** (1870), 18 W. R. 579.

**6252.** — **—**—**Where land is demised subject to a condition for re-entry on default in payment of the rent, the right of re-entry does not accrue until the rent has been duly demanded.**—**HILL v. KEMPSTALL** (1849), 7 C. B. 975; 13 L. T. O. S. 211; 137 E. R. 386.

*Annotation:—***Exp'd. & Distd.** **Phillips v. Bridge** (1873), L. R. 9 C. P. 48.

**6253. Lease by crown.**—**BOROUGHES' CASE**, No. 6268, *post*.

**6254.** — **“So long as lessee shall pay rent.”**—**A lease for years, “so long as the lessee shall duly pay the rent,” makes a limitation, & not a**

**condition; & so no demand of rent is requisite to avoid it.**—**BALTINGLASS (LADY) (1671)**, 1 Freem. K. B. 23; 89 E. R. 21; *sub nom.* **TUSTIAN v. ROPER**, T. Jo. 27; *sub nom.* **TRISTRAM v. ROPER**, Vaugh. 28.

*Annotation:—***Mentd.** **Anon.** (1669), 1 Mod. Rep. 8.

**ii. Time of.**

**Time of payment of rent, see Part XV., Sect. 4, sub-sect. 1, ante.**

**6255. Last day for payment.**—**Of a demand or tender of a rent reserved payable at a place out of the land, out of which it issues.**

**Although the rent was not demanded on the day it was first due, that is, on the day of the feast of the Annunciation of our Lady nor pltf. ready the same day on the land, nor at Hyde, to receive the same rent, yet this is not material, nor shall it hurt his entry, but he may well enter for default of payment the last instant of the last of the 40 days (per CUR.).**—**KIDWELLY v. BRAND** (1550), 1 Plowd. 69; 1 Dyer, 68 a; 75 E. R. 111.

*Annotations:—***Refd.** **Buskin v. Edmunds** (1594), Moore, K. B. 598; **Boroughes' Case** (1596), 4 Co. Rep. 72 b; **Hassell d. Hodgson v. Gouthwaite** (1744), Willes, 500; **Rowe v. Young** (1820), 2 Bli. 391. **Mentd.** **Chudleigh's Case**, Dillon v. Freine (1595), 1 Co. Rep. 113 b; **Wade's Case** (1601), 5 Co. Rep. 114 a; **Startup v. Macdonald** (1843), 6 Man. & G. 593; **Taitte v. Gosling** (1879), 11 Ch. D. 273.

**6256.** — **—**—**ANON.** (1586), Godb. 67; 78 E. R. 41.

**6257.** — **—**—**DOE d. FORSTER v. WANDLASS**, No. 6291, *post*.

**6258.** — **Before sunset & till sunset.**—**If the lessor comes to the land before the last hour, viz. in the morning, or in the afternoon, & demands the rent, & afterwards goes off the land, & is not there at the last instant of the day, same is not a sufficient demand, although that return be presently after the sun is set (per CUR.).**—**WOOD v. CHIVERS** (1573), 4 Leon. 179; 74 E. R. 806.

**6259.** — **—**—**A demand of rent to avoid a lease upon a condition ought to be in the most open place.**

**The demand ought to be made at the setting of the sun the last instant of that day (per CUR.).**—**KNAP v. IEWELCH** (1607), 1 Brownl., 138; 123 E. R. 715.

**6260.** — **—**—**THOMSON v. FIELD**, No. 6122, *ante*.

**6261.** — **—**—**DOE d. WHEELDON v. PAUL**, No. 6278, *post*.

**6262.** — **—**—**By a lease rent was reserved payable on the usual quarter days, provided that if the rent should be in arrear for the space of twenty-eight days next after any of the days appointed for payment after same had been lawfully demanded, it should be lawful for the lessor to re-enter & take possession of the premises without bringing an action of ejectment. The rent being unpaid:—Held: a demand made on the premises at half past ten o'clock on the morning of the last day was not sufficient to entitle the lessor to re-enter without action.**—**ACOCKS v. PHILLIPS** (1860), 5 H. & N. 183; 157 E. R. 1149.

**6263.** — **Demand before due date.**—**An agreement of tenancy contained the following clause:**

**PART XXIV. SECT. 1, SUB-SECT. 4.—**  
**C. (a) i.**

**6245 i. General rule.**—**A power of re-entry for non-payment of rent in a lease which does not expressly dispense with the necessity for making a demand for the rent, cannot be validly exercised unless there has been**

**AGENCY CO., LTD. v. CANAVAN**, [1908] V. L. R. 373.—**AUS.**

**6245 ii.** — **—**—**DOE d. CURITT v. MCLEOD** (1840), 2 Ont. Dig. 3828.—**CAN.**

**6245 iii.** — **—**—**Where a clause would only make a lease voidable at the option of the lessor, not void, to en-**

**BURLEY** (1875), 37 U. C. R. 498.—**CAN.**

**6245 iv.** — **—**—**BARRY v. GLOVER** (1859), 10 I. C. L. R. 113; 11 Ir. Jur. 260.—**IR.**

**6245 v.** — **—**—**SAMUEL v. DUNN**, 1 J. R. N. S. 136.—**N.Z.**

this agreement is entered into upon the express condition that, if the tenant shall make default in payment of the rent, or any part thereof, within twenty-one days after same shall become due, being demanded, it shall be lawful for the landlord, without giving any notice to quit, & without any other warrant, authority, or proceedings, to re-enter, etc.:—*Held*: to entitle the landlord to avail himself of the right of re-entry, the rent must be in arrear twenty-one days, & a demand, but without the formalities of a common law demand, of payment be then made. A demand within the twenty-one days is insufficient.—*PHILLIPS v. BRIDGE* (1873), L. R. 9 C. P. 48; 43 L. J. C. P. 13; 29 L. T. 692; 38 J. P. 104; 22 W. R. 237.

**6264.** ———.]—By an agreement in writing dated Mar. 7, 1884, made between *pltf.s.* & *defts.*, *defts.* agreed to lease to *pltf.s.* the advertisement spaces on the cars of *defts.* running at N. for three years from Jan. 7, 1884, at £120 payable quarterly from Jan. 7; & the agreement provided that the advertising boards & fittings should be found by *pltf.s.*; & it contained a condition that in the event of default by *pltf.s.* in payment of any moneys due under the agreement for thirty days after demand in writing, *defts.* should be at liberty to at once determine the agreement or lease & on the determination thereof the boards were to become the property of *defts.*, who were to have the option of purchasing the other fittings. *Pltf.s.* usually paid the rent upon the first day of the month, & *pltf.s.* & *defts.* believed that that was the day fixed by the agreement. Upon Apr. 7, 1885, *pltf.s.* not having paid the rent for the past quarter, *defts.* sent a written demand for the payment of £30, "being one quarter's rent under the advertising agreement, due on Apr. 1," & on May 30 the rent being still in arrear, they wrote to *pltf.s.* determining the agreement:—*Held*: the demand of Apr. 7, being inaccurate, was not a demand on which a forfeiture could be founded, & the agreement was not properly determined.—*JACKSON & Co. v. NORTHAMPTON STREET TRAMWAYS Co.* (1886), 55 L. T. 91.

### iii. Place of.

Place of payment of rent, *see* Part XV., Sect. 4, sub-sect. 6, *ante*.

**6265. On demised premises—In open place.]**—If lands & woods are demised together, the rent ought to be demanded at the land, & not the wood, because the land is the more worthy thing, & also more open than the wood; rent ought not to be demanded in any private place of close, as amongst bushes, in a pit, or the like, nor in the open & most usual passage thereof, as at a stile, gate, & the like (*per CUR.*).—*ANON.* (1561), Poph. 58; 79 E. R. 1173.

**6266.** ———.]—*KNAP v. IEWELCH*, No. 6259, *ante*.

**6267.** ———.]—Demand of rent must be made upon the demised premises.—*ANON.* (1583), Cro. Eliz. 15; 78 E. R. 281.

**6268.** ———.]—Queen Elizabeth made a lease of and for years, reserving rent payable at the Exchequer or into the hands of her bailiffs or receivers, with condition to be void by non-payment of rent, & afterwards granted the reversion to another & his heirs:—*Held*: (1) the grantee, to take advantage of the condition, must demand the rent upon the land; & in the case of a common person, if the rent is reserved payable at a place out of the land, to take advantage of the condition, the rent must be paid at that place, where it is appointed to be paid; (2) the Queen shall take advantage of the condition without any demand; otherwise of her grantee; (3) if the King makes a lease without appointing any place, or into whose hands the rent should be paid, the lessee may pay it either at the receipt of the Exchequer, or into the hands of the King's bailiffs or receivers, authorised to the purpose.—*BOROUGHES' CASE* (1596), 4 Co. Rep. 72 b; 76 E. R. 1043; *sub nom.* *BURROUGH v. TAYLOR*, Cro. Eliz. 462; Moore, K. B. 404; *sub nom.* *ANON.*, Gouldsb. 124.

*Annotation*:—*As to* (2) *Refd.* *Hassell d. Hodgson v. Gowthwaite* (1744), Willes, 500.

**6269.** ———.]—In case of rent reserved payable at a certain day, the demand ought to be upon the land only, because the land is the debtor (*per CUR.*).—*STWETON v. CUSHIE* (1603), Yelv. 36; 80 E. R. 27; *sub nom.* *STRETTON v. CUSH*, 1 Brownl. 135; *sub nom.* *SWELNAM v. CUTS*, Moore, K. B. 680; *sub nom.* *SWETMAN v. CUSH*, Cro. Jac. 8.

*Annotations*:—*Consd.* *Doe d. Brook v. Brydges* (1822), 2 Dow. & Ry. K. B. 29. *Mentd.* *Nurse v. Frampton* (1893), 1 Salk. 214.

**6270. At place appointed for payment.]**—Demand of rent where it is payable is sufficient.—*WILLIS v. JERMIN* (1590), Cro. Eliz. 167; 78 E. R. 424.

*Annotation*:—*Mentd.* *Phillips v. Bury* (1694), Skin. 447.

**6271.** ———.]—Rent made payable at a place off the land is still a rent; & must be demanded at the place.—*BUSKIN v. EDMUNDS* (1595), Cro. Eliz. 415; Moore, K. B. 598; 78 E. R. 657; *sub nom.* *TUSKING v. EDMONDS*, Moore, K. B. 408; *on appeal, sub nom.* *BUSKYN v. EDMUNDS* (1596), Cro. Eliz. 535, Ex. Ch.

*Annotations*:—*Consd.* *Haldane v. Johnson* (1853), 8 Exch. 689. *Refd.* *Rowe v. Young* (1820), 2 Bl. 391.

**6272.** ———.]—*BOROUGHES' CASE*, No. 6268, *ante*.

### iv. From Whom Demanded.

**6273. From occupier—Underlessee.]**—Where *deft.* does not reside upon the land, demand of the rent from his under-tenants is sufficient demand in order to maintain ejectment on the usual clause of re-entry in a lease.—*Doe d. BROOK v. BRYDGES* (1822), 2 Dow. & Ry. K. B. 29; 1 L. J. O. S. K. B. 9.

### v. Amount of.

**6274. Exact sum due—At last period for payment.]**—If the rent reserved at two feasts, viz. Michaelmas and Lady Day, & it is arrear at Lady Day, & not demanded at that day, if he may demand all at Michaelmas Day, & it was held he cannot, & a demand in that manner is void for all.—*SCOT v. SCOT* (1587), Cro. Eliz. 73; 2 Leon. 128; 78 E. R. 333.

**6275.** ———.]—The demand of rent must be of the precise sum due, & in pleading it ought to be expressed when it was due, but a variance as to the duration of the demand is not material.—*FABIAN v. WINSTON* (1589), Cro. Eliz. 209; 78 E. R. 465.

**6276.** ———.]—*MOODIE v. GARNANCE*, No. 6080, *ante*.

**6277.** ———.]—Additional claim for arrears.]—If a lease for years be made rendering £7 rent *per annum*, & there be £3 behind, & at the next day the lessor demands £10 rent; this is no good demand whereby to take advantage of a condition, because he takes it as an entire sum; but he must demand the £7 which then becomes due.

**Sect. 1.—Forfeiture: Sub-sect. 4, B. (c), & C. (a)**  
*i., ii., iii., iv. & v.]*

**SILKSTONE & DODSWORTH COAL & IRON CO., LTD.,** *Ex p. CHARLESWORTH* (1895), 65 L. J. Ch. 111; 44 W. R. 198; 12 T. L. R. 58; 40 Sol. Jo. 84; *previous proceedings, sub nom. CHARLESWORTH v. OLD SILKSTONE & DODSWORTH COAL & IRON CO. & MURGATROYD, MURGATROYD v. OLD SILKSTONE & DODSWORTH COAL & IRON CO.* (1894), 38 Sol. Jo. 216.

**6244.** — *Rent accrued after issue of writ.* — **SERJEANT v. NASH, FIELD & Co.,** No. 6419, *post*.

*C. Breach of Covenant for Payment of Rent.*

*(a) Demand for Payment.*

*i. Necessity for.*

*Rent, generally, see Part XV., ante.*

**6245. General rule.** — **BUSKIN v. EDMUNDS,** No. 6271, *post*.

**6246.** — *—* **BOROUGHES' CASE,** No. 6268, *post*.

**6247.** — *—* **HANSON v. NORCLIT** (1620), W. Jo. 9; 82 E. R. 6.

**6248.** — *—* Demand must be made where an interest is to be determined. — **STEWART v. ALLEN** (1677), 2 Mod. Rep. 264; 86 E. R. 1063.

**6249.** — *—* When a lease for years is made to be void on non-payment of rent, an actual demand is necessary to avoid it. *Aliter*, if it is to be void on non-payment of a sum in gross. — **MASHAM v. GOODERE** (1678), 1 Freem. K. B. 242; 89 E. R. 173.

**6250.** — *—* As to demand, a clause of re-entry is required as a security for the rent; demand is requisite, both by common law & statute; a clause of re-entry will never be allowed to operate farther than as a security for rent. — **HOTLEY v. SCOT** (1773), Lofft, 316; 98 E. R. 670; *sub nom. TANKERVILLE (LORD) v. WINGFIELD & PRITCHARD*, 3 Bli. 331, n.; 2 Brod. & Bing. 498, n.; 5 Moore, C. P. 340, n.; 7 Price, 343, n.

*Annotations: —* **Refd.** Smith v. Jersey (1821), 3 Bli. 290. **Mentd.** Goodtitle v. Fumecan (1781), 2 Doug. K. B. 565; Greenaway v. Hart (1854), 14 C. B. 340.

**6251.** — *—* To support an ejectment on a forfeiture of a lease by non-performance of a covenant, if the covenant be to do an act, the lessor of pltf. must give some evidence of the omission of the act; & if the covenant be for payment of rent, the lessor of pltf. must prove a demand of such rent. — **DOE d. CHANDLESS v. ROBSON** (1826), 2 C. & P. 245, N. P.

*Annotation: —* **Mentd.** Toleman v. Portbury (1870), 18 W. R. 679.

**6252.** — *—* Where land is demised subject to a condition for re-entry on default in payment of the rent, the right of re-entry does not accrue until the rent has been duly demanded. — **HILL v. KEMPSHALL** (1840), 7 C. B. 975; 13 L. T. O. S. 211; 137 E. R. 386.

*Annotation: —* **Expld. & Distd.** Phillips v. Bridge (1873), L. R. 9 C. P. 48.

**6253. Lease by crown.** — **BOROUGHES' CASE,** No. 6268, *post*.

**6254.** — *"So long as lessee shall pay rent."* — A lease for years, "so long as the lessee shall duly pay the rent," makes a limitation, & not a

condition; & so no demand of rent is requisite to avoid it. — **BALTINGLASS (LADY)** (1671), 1 Freem. K. B. 23; 89 E. R. 21; *sub nom. TUSTIAN v. ROPER*, T. Jo. 27; *sub nom. TRISTRAM v. ROPER*, Vaugh. 28.

*Annotation: —* **Mentd.** Anon. (1669), 1 Mod. Rep. 8.

*ii. Time of.*

Time of payment of rent, *see* Part XV., Sect. 4, sub-sect. 1, *ante*.

**6255. Last day for payment.** — Of a demand or tender of a rent reserved payable at a place out of the land, out of which it issues.

Although the rent was not demanded on the day it was first due, that is, on the day of the feast of the Annunciation of our Lady nor pltf. ready the same day on the land, nor at Hyde, to receive the same rent, yet this is not material, nor shall it hurt his entry, but he may well enter for default of payment the last instant of the last of the 40 days (*per* CUR.). — **KIDWELLY v. BRAND** (1550), 1 Plowd. 69; 1 Dyer, 68 a; 75 E. R. 111.

*Annotations: —* **Refd.** Buskin v. Edmunds (1594), Moore, K. B. 598; Boroughes' Case (1596), 4 Co. Rep. 72 b; Hassell d. Hodgson v. Gouthwaite (1744), Willes, 500; Rowe v. Young (1820), 2 Bli. 331. **Mentd.** Chudleigh's Case, Dillon v. Freine (1595), 1 Co. Rep. 113 b; Wade's Case (1601), 5 Co. Rep. 114 a; Startup v. Macdonald (1843), 6 Man. & G. 593; Taite v. Gosling (1879), 11 Ch. D. 273.

**6256.** — *—* **ANON.** (1586), Godb. 67; 78 E. R. 41.

**6257.** — *—* **DOE d. FORSTER v. WANDLASS,** No. 6291, *post*.

**6258.** — *Before sunset & till sunset.* — If the lessor comes to the land before the last hour, viz. in the morning, or in the afternoon, & demands the rent, & afterwards goes off the land, & is not there at the last instant of the day, same is not a sufficient demand, although that return be presently after the sun is set (*per* CUR.). — **WOOD v. CHIVERS** (1573), 4 Leon. 179; 74 E. R. 806.

**6259.** — *—* A demand of rent to avoid a lease upon a condition ought to be in the most open place.

The demand ought to be made at the setting of the sun the last instant of that day (*per* CUR.). — **KNAP v. IEWELCH** (1607), 1 Brownl., 138; 123 E. R. 715.

**6260.** — *—* **THOMSON v. FIELD,** No. 6122, *ante*.

**6261.** — *—* **DOE d. WHEELDON v. PAUL,** No. 6278, *post*.

**6262.** — *—* By a lease rent was reserved payable on the usual quarter days, provided that if the rent should be in arrear for the space of twenty-eight days next after any of the days appointed for payment after same had been lawfully demanded, it should be lawful for the lessor to re-enter & take possession of the premises without bringing an action of ejectment. The rent being unpaid: — **Held:** a demand made on the premises at half past ten o'clock on the morning of the last day was not sufficient to entitle the lessor to re-enter without action. — **ACOCKS v. PHILLIPS** (1860), 5 H. & N. 183; 157 E. R. 1149.

**6263.** — *Demand before due date.* — An agreement of tenancy contained the following clause:

**PART XXIV. SECT. 1, SUB-SECT. 4. —**  
**C. (a) i.**

**62451. General rule.** — A power of re-entry for non-payment of rent in a lease which does not expressly dispense with the necessity for making a demand for the rent, cannot be validly exercised unless there has been a previous common law demand for the rent. — **SANDHUURST & NORTHERN DISTRICT TRUSTEES, EXECUTORS &**

**AGENCY CO., LTD. v. CANAVAN,** [1908] V. L. R. 373. — **AUS.**

**6245 ii.** — *—* **DOE d. CUBITT v. McLEOD** (1840), 2 Ont. Dig. 3828. — **CAN.**

**6245 iii.** — *—* Where a clause would only make a lease voidable at the option of the lessor, not void, to entitle the lessor to determine the lease for non-payment of rent, a formal demand is necessary. — **FAUGHER v.**

**BURLEY** (1875), 37 U. C. R. 498. — **CAN.**

**6245 iv.** — *—* **BARRY v. GLOVER** (1859), 10 I. C. L. R. 113; 11 Ir. Jur. 280. — **IR.**

**6245 v.** — *—* **SAMUEL v. DUNN,** 1 J. R. N. S. 136. — **N.Z.**

**6245 vi.** — *—* **NICKLE v. AKAPITA TE TOA,** [1921] N. Z. L. R. 1049. — **N.Z.**

this agreement is entered into upon the express condition that, if the tenant shall make default in payment of the rent, or any part thereof, within twenty-one days after same shall become due, being demanded, it shall be lawful for the landlord, without giving any notice to quit, & without any other warrant, authority, or proceedings, to re-enter, etc.:—*Held*: to entitle the landlord to avail himself of the right of re-entry, the rent must be in arrear twenty-one days, & a demand, but without the formalities of a common law demand, of payment be then made. A demand within the twenty-one days is insufficient.—*PHILLIPS v. BRIDGE* (1873), L. R. 9 C. P. 48; 43 L. J. C. P. 13; 29 L. T. 692; 38 J. P. 104; 22 W. R. 237.

**6264.** ———.]—By an agreement in writing dated Mar. 7, 1884, made between plffs. & defts., defts. agreed to lease to plffs. the advertisement spaces on the cars of defts. running at N. for three years from Jan. 7, 1884, at £120 payable quarterly from Jan. 7; & the agreement provided that the advertising boards & fittings should be found by plffs.; & it contained a condition that in the event of default by plffs. in payment of any moneys due under the agreement for thirty days after demand in writing, defts. should be at liberty to at once determine the agreement or lease & on the determination thereof the boards were to become the property of defts., who were to have the option of purchasing the other fittings. Plffs. usually paid the rent upon the first day of the month, & plffs. & defts. believed that that was the day fixed by the agreement. Upon Apr. 7, 1885, plffs. not having paid the rent for the past quarter, defts. sent a written demand for the payment of £30, "being one quarter's rent under the advertising agreement, due on Apr. 1," & on May 30 the rent being still in arrear, they wrote to plffs. determining the agreement:—*Held*: the demand of Apr. 7, being inaccurate, was not a demand on which a forfeiture could be founded, & the agreement was not properly determined.—*JACKSON & Co. v. NORTHAMPTON STREET TRAMWAYS Co.* (1886), 55 L. T. 91.

### iii. Place of.

Place of payment of rent, see Part XV., Sect. 4, sub-sect. 6, *ante*.

**6265. On demised premises—In open place.**—If lands & woods are demised together, the rent ought to be demanded at the land, & not the wood, because the land is the more worthy thing, & also more open than the wood; rent ought not to be demanded in any private place of close, as amongst bushes, in a pit, or the like, nor in the open & most usual passage thereof, as at a stile, gate, & the like (*per cur.*).—*ANON.* (1561), Poph. 58; 79 E. R. 1173.

**6266.** ———.]—*KNAP v. LEWELCH*, No. 6259, *ante*.

**6267.** ———.]—Demand of rent must be made upon the demised premises.—*ANON.* (1583), Cro. Eliz. 15; 78 E. R. 281.

**6268.** ———.]—Queen Elizabeth made a lease of and for years, reserving rent payable at the Exchequer or into the hands of her bailiffs or receivers, with condition to be void by non-payment of rent, & afterwards granted the reversion to another & his heirs:—*Held*: (1) the grantee, to take advantage of the condition, must demand the rent upon the land; & in the case of a common person, if the rent is reserved payable at a place out of the land, to take advantage of the condition, the rent must be demanded at the place

where it is appointed to be paid; (2) the Queen shall take advantage of the condition without any demand; otherwise of her grantee; (3) if the King makes a lease without appointing any place, or into whose hands the rent should be paid, the lessee may pay it either at the receipt of the Exchequer, or into the hands of the King's bailiffs or receivers, authorised to the purpose.—*BOROUGHES' CASE* (1596), 4 Co. Rep. 72 b; 76 E. R. 1043; *sub nom.* *BURROUGH v. TAYLOR*, Cro. Eliz. 462; Moore, K. B. 404; *sub nom.* *ANON.*, Gouldsb. 124.

*Annotation*:—*As to* (2) *Refd.* Hassell d. Hodgson v. Gouthwaite (1744), Willes, 500.

**6269.** ———.]—In case of rent reserved payable at a certain day, the demand ought to be upon the land only, because the land is the debtor (*per cur.*).—*STWETON v. CUSHE* (1603), Yelv. 36; 80 E. R. 27; *sub nom.* *STRETTON v. CUSH*, 1 Brownl. 135; *sub nom.* *SWELNAM v. CUTS*, Moore, K. B. 680; *sub nom.* *SWETMAN v. CUSH*, Cro. Jac. 8.

*Annotations*:—*Consd.* Doe d. Brook v. Brydges (1822), 2 Dow. & Ry. K. B. 29. *Mentd.* Nurse v. Frampton (1693), 1 Salk. 214.

**6270. At place appointed for payment.**—Demand of rent where it is payable is sufficient.—*WILLIS v. JERMIN* (1590), Cro. Eliz. 167; 78 E. R. 424.

*Annotation*:—*Mentd.* Phillips v. Bury (1694), Skin. 447.

**6271.** ———.]—Rent made payable at a place off the land is still a rent; & must be demanded at the place.—*BUSKIN v. EDMUNDS* (1595), Cro. Eliz. 415; Moore, K. B. 598; 78 E. R. 657; *sub nom.* *TUSKING v. EDMONDS*, Moore, K. B. 408; *on appeal*, *sub nom.* *BUSKYN v. EDMUNDS* (1596), Cro. Eliz. 535, Ex. Ch.

*Annotations*:—*Consd.* Haldane v. Johnson (1853), 8 Exch. 689. *Refd.* Rowe v. Young (1820), 2 Bli. 391.

**6272.** ———.]—*BOROUGHES' CASE*, No. 6268, *ante*.

### iv. From Whom Demanded.

**6273. From occupier—Underlessee.**—Where deft. does not reside upon the land, demand of the rent from his under-tenants is sufficient demand in order to maintain ejectment on the usual clause of re-entry in a lease.—*DOE d. BROOK v. BRYDGES* (1822), 2 Dow. & Ry. K. B. 29; 1 L. J. O. S. K. B. 9.

### v. Amount of.

**6274. Exact sum due—At last period for payment.**—If the rent reserved at two feasts, viz. Michaelmas and Lady Day, & it is arrear at Lady Day, & not demanded at that day, if he may demand all at Michaelmas Day, & it was held he cannot, & a demand in that manner is void for all.—*SCOT v. SCOT* (1587), Cro. Eliz. 73; 2 Leon. 128; 78 E. R. 333.

**6275.** ———.]—The demand of rent must be of the precise sum due, & in pleading it ought to be expressed when it was due, but a variance as to the duration of the demand is not material.—*FABIAN v. WINSTON* (1589), Cro. Eliz. 209; 78 E. R. 465.

**6276.** ———.]—*MOODIE v. GARNANCE*, No. 6080, *ante*.

**6277.** ———.]—**Additional claim for arrears.**—If a lease for years be made rendering £7 rent *per annum*, & there be £3 behind, & at the next day the lessor demands £10 rent; this is no good demand whereby to take advantage of a condition, because he takes it as an entire sum; but he must demand the £7 which then becomes due, & if he demands the arrears also, that is good

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enough (ROLL, J.).—ANON. (1648), Aleyn, 94; 82 E. R. 933.

**6278.** —[—]—In ejectment to recover, demised premises for non-payment of rent, under the usual proviso for re-entry on non-payment for twenty-one days, it appeared that the rent was payable quarterly, & that a demand of more than one quarter's rent was made on the twenty-first day at one o'clock:—*Held*: only one quarter's rent should have been demanded, & that at sunset.—DOE d. WHEELDON v. PAUL (1829), 3 C. & P. 613, N. P.

*Annotation*:—*Refd.* Acocks v. Phillips (1860), 5 H. & N. 183.

**6279. What amounts to specific demand**—"My last half year's rent."—HUMLOCK'S CASE (1028), Het. 109; 124 E. R. 381.

*(b) Dispensing with Formal Demand.*

*i. By Agreement.*

**6280. Demand may be dispensed with.**—NEW-DIGATE'S CASE (1551), 1 Dyer, 68 b; 73 E. R. 144. *Annotation*:—*Refd.* Smith v. Jersey (1821), 3 Bl. 290.

**6281.** —[—]—CHALLONER v. WARE (1627), Het. 77; 124 E. R. 356.

**6282.** —[—]—A. let certain premises to B. by an agreement which contained the usual clauses for payment of rent & for repairing the premises, & also a clause, that in case of non-payment of the rent or non-performance of the conditions, it should be lawful for A., without any demand, to enter upon & take possession of the premises, & expel B. therefrom without any legal process; & that in case of such entry & of any action being brought for same, deft. might plead leave & licence of B. to A. for the entry or trespasses complained of. In an action of trespass by B. against C. for breaking & entering, etc., & assaulting pltf., C. pleaded leave & licence. It appeared that rent being in arrear from B. to A., C., under a written order from A., had entered & forcibly expelled B. The foregoing agreement was given in evidence:—*Held*: the plea was sustained by the evidence.—KAVANAGH v. GUDGE (1844), 7 Man. & G. 316; 1 Dow. & L. 928; 7 Scott, N. R. 1025; 13 L. J. C. P. 99; 2 L. T. O. S. 497; 8 Jur. 362; 135 E. R. 132.

*Annotations*:—*Refd.* Lane v. Dixon (1847), 3 C. B. 776. *Mentd.* Hewitt v. Isham (1851), 7 Exch. 77.

**6283. Proviso relating to demand**—"Being lawfully demanded."—Upon a lease reserving rent payable quarterly, with a proviso, that if the rent be in arrear twenty-one days next after day of payment, being lawfully demanded, the lessor may re-enter:—*Held*: five quarters being in arrear, & no sufficient distress on the premises, lessor might re-enter without a demand.—DOE d. SCHOLEFIELD v. ALEXANDER (1814), 2 M. & S. 525; 105 E. R. 477.

*Annotations*:—*Refd.* Doe d. Shrewsbury v. Wilson (1822), 5 B. & Ald. 363; Mavor v. Croome (1823), 1 Blig. 261.

**6284.** —[—]—By the common law the landlord never could re-enter without making a demand. Every clause of re-entry, therefore, contained the words "lawfully demanded," in effect, though not in terms; & therefore in the lease of 1708, those words were quite nugatory. They were probably copied inadvertently into the subsequent leases without considering their effect. I am of opinion, that such a proviso for re-entry, which was originally introduced for the benefit of the landlord, ought not to be construed, in consequence of the introduction of those words, which were nugatory in the former leases, to

deprive the landlord of the benefit intended to be conferred upon him by 4 Geo. 2, c. 28. The case might have been otherwise, if the lease had contained an express covenant that he would not re-enter without demand, or that having entered he would not sell (ABBOTT, C.J.).—DOE d. SHREWSBURY (EARL) v. WILSON (1822), 5 B. & Ald. 363; 106 E. R. 1223.

*Annotations*:—*Mentd.* Doe d. Harries v. Morse (1834), 2 Cr. & M. 247; Doe d. Douglas v. Lock (1835), 2 Ad. & El. 705; Fryer v. Coombs (1840), 11 Ad. & El. 403; Rutland v. Wythe (1843), 10 Cl. & Fin. 419; Doe d. Egremont v. Stephens (1844), 6 Q. B. 208.

**6285.** —[—]—A lease for years contained a covenant to pay rent, & a proviso for re-entry on non-payment of rent, the rent "being first lawfully demanded." The property being vacant, the landlord asked for payment of rent from the person liable to pay it, & not receiving it, re-entered:—*Held*: there had been a sufficient demand, & the lease was effectually determined.—MANSEY v. DIX (1857), 8 De G. M. & G. 703; 3 Jur. N. S. 252; 44 E. R. 561, L. J.J.

**6286.** —[—]—"Although not demanded."—REDE v. FARR, No. 6185, ante.

**6287.** —[—]—"No legal or formal demand."—DOE d. HARRIS v. MASTERS, No. 6314, post.

**6288.** —[—]—"Being demanded."—Informal demand.—PHILLIPS v. BRIDGE, No. 6263, ante.

**6289. Agreement to accept notice to quit.**—A lease for six years contained the following clause: " & it is mutually agreed, that if it shall happen that the rent shall be behind & unpaid for the space of twenty-eight days next after any of the quarterly days of payment, then & in that case J. shall be at liberty to give to II. three months' notice to quit the premises, which notice he, II., hereby agrees to accept, & peaceably to deliver up same pursuant thereto":—*Held*: no demand of rent was necessary upon the day it became due, or twenty-eight days afterwards, but, upon non-payment, a notice to quit could be given.—DOE d. JEFFKINS v. HOUSTON (1846), 7 L. T. O. S. 182.

*ii. By Statute.*

*See, now, C. L. P. Act, 1852 (c. 76), s. 210; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 46.*

**6290. Landlord & Tenant Act, 1730 (c. 28), s. 8—Effect of Act.**—(1) Actual entry is not necessary to take advantage, by ejectment, of a clause in a lease to re-enter for non-payment of rent.

(2) Above Act is very perplexed; but the meaning certainly only is that, where there is no stipulation in the lease for entry without demand you may, notwithstanding, enter without demand, provided six months' rent is in arrear & there is not a sufficient distress (LORD MANSFIELD, C.J.).—GOODRIGHT d. HARE v. CATOR (1780), 2 Doug. K. B. 477; 90 E. R. 304.

*Annotations*:—*As to (1) Refd.* Doe d. Phillips v. Rollings (1847), 4 C. B. 188. *As to (2) Refd.* Doe d. Harris v. Masters (1824), 2 B. & C. 490. *Generally, Mentd.* Bringloe v. Goodson (1838), 1 Arn. 322.

**6291. Sufficient distress on premises.**—Where a landlord has a right to re-enter for non-payment of rent, he cannot recover in ejectment at common law, unless he demand the rent on the day when it becomes due; nor under sect. 2 of above Act, if there be a sufficient distress on the premises.—DOE d. FORSTER v. WANDLASS (1797), 7 Term Rep. 117; 101 E. R. 885.

*Annotations*:—*Refd.* Smith v. Spooner (1810), 3 Taunt. 246; Smith v. Jersey (1821), 3 Bl. 290.

**6292.** —[—]—It is no ground of nonsuit, in an action of ejectment, that the service of the

declaration is on a day subsequent to that of the demise to John Doe, if it appears that there is rent in arrear, & no distress on the premises, at the time the declaration is served. Above sect. substitutes the service of a declaration in ejectment in lieu of a formal demand of rent, to work a forfeiture.—*DOE d. LAWRENCE v. SHAWCROSS* (1825), 3 B. & C. 752; 5 Dow. & Ry. K. B. 711; 107 E. R. 912.

*Annotations*:—*Refd.* *Doe d. Gooch v. Knowles* (1843), 12 L. J. Q. B. 332; *Selby v. Browne* (1845), 14 L. J. Q. B. 307; *Cotesworth v. Spokes* (1861), 10 C. B. N. S. 103; *Elliott v. Boynton*, [1824] 1 Ch. 236.

**6293. What must be proved—Six months' arrears of rent—Insufficient distress to countervail six months' arrears.**—On an application for judgment against the casual ejector, where proceedings under Landlord & Tenant Act, 1730 (c. 28), have been taken, it is not sufficient to show that there is no sufficient distress "to countervail the arrears of rent," if more than half a year's rent is sworn to be due.—*DOE d. POWELL v. ROE* (1841), 9 Dowl. 548; 5 Jur. 801.

*Annotations*:—*Overd.* *Cross v. Jordan* (1853), 22 L. J. Ex. 70. *Refd.* *Doe v. Roe* (1847), 9 L. T. O. S. 199.

**6294.** ————*]*—*CROSS v. JORDAN*, No. 6298, *post*.

**6295.** ————*]*—*DOE d. GRETTON v. ROE* (1847), 4 C. B. 576; 136 E. R. 633.

**6296.** ————*]*—In ejectment brought upon a right of re-entry, under Landlord & Tenant Act, 1730 (c. 28), s. 2, it must appear that the landlord had a power to re-enter, in respect of the non-payment of half a year's rent, at the time of affixing the declaration & notice upon the premises.—*DOE d. DIXON v. ROE* (1849), 7 C. B. 134; 137 E. R. 55.

*Annotations*:—*Refd.* *Cotesworth v. Spokes* (1861), 10 C. B. N. S. 103; *Phillips v. Bridge* (1873), L. R. 9 C. P. 48.

**6297.** ————*]*—Three quarters' rent being in arrear under a lease containing a clause of re-entry on non-payment of rent within twenty-one days after each quarter day, the lessors, on Oct. 2, distrained, & after sale of the distress there remained due more than a quarter but less than a half year's rent. The lessors on Nov. 2, served the lessee with a writ in ejectment under C. L. P. Act, 1852 (c. 76), s. 210:—*Held*: the action was not maintainable, there not being half a year's rent in arrear at the time of the service of the writ.—*COTESWORTH v. SPOKES* (1861), 10 C. B. N. S. 103; 30 L. J. C. P. 220; 4 L. T. 214; 25 J. P. 582; 7 Jur. N. S. 803; 9 W. R. 436; 142 E. R. 389.

*Annotation*:—*Refd.* *Thomas v. Lulham*, [1895] 2 Q. B. 400.

**6298. How proved—By affidavit.**—Upon a motion for judgment on a writ of ejectment under C. L. P. Act, 1852 (c. 76), s. 210, an affidavit which states (*inter alia*) that three-quarters of a year's rent was due from the tenant before the copy of the writ was affixed to the premises; & that, at the time the copy was affixed, "no sufficient distress was to be found upon the premises countervailing the arrears of rent," is sufficient.—*CROSS v. JORDAN* (1853), 8 Exch. 149; 22 L. J. Ex. 70; 20 L. T. O. S. 226; 17 Jur. 93; 155 E. R. 1297.

**6299. Proof of insufficient distress—Landlord prevented from entering.**—In ejectment on a clause of re-entry for non-payment of rent, if the landlord shows that he was prevented by deft. from entering on the premises to distrain, he is entitled to recover, under Landlord & Tenant Act, 1730 (c. 28), s. 2, without showing that there was actually no sufficient distress on the premises.—*DOE d. CHIPPENDALE v. DYSON* (1827), 1 Mood. & M. 77, N. P.

*Annotation*:—*Fold.* *Wedgwood v. Hart* (1856), 2 Jur. N. S. 288.

**6300.** ————*]*—In an ejectment under Landlord & Tenant Act, 1730 (c. 28), where the premises are kept locked, & access refused by the parties in possession, so that it cannot be ascertained whether there is a sufficient distress thereon or not; the affidavit stating those facts is sufficiently positive, if it state a belief only, that there is no sufficient distress on the premises.—*DOE d. COX v. ROE* (1847), 5 Dow. & L. 272.

**6301.** ————*]*—In an action of ejectment for breach of covenant, brought by a landlord against his tenant, since C. L. P. Act, 1852 (c. 76), s. 210, it appeared that pltf. had sought to re-enter on the premises for a forfeiture for breach of a covenant not to assign without consent, but found them shut up & empty:—*Held*: in order to entitle pltf. to recover, it was not necessary for him to show that there was no sufficient distress found on the premises at the time when he attempted to re-enter.—*WEDGWOOD v. HART* (1856), 2 Jur. N. S. 288.

*Annotation*:—*Refd.* *Toleman v. Portbury* (1870), 22 L. T. 33.

**6302.** ————*]*—If the tenant of demised premises leave them locked up, the landlord may recover under the C. L. P. Act, 1852 (c. 76), s. 210, as no sufficient distress can be found.—*HAMMOND v. MATHER* (1862), 3 F. & F. 151.

**6303.** ————*Goods not visible.*—Goods sufficient to countervail arrears of rent are not "to be found" on the demised premises, so as to avoid the operation of Landlord & Tenant Act, 1730 (c. 28), s. 2, unless they are so visibly there that a broker going to distrain would, using reasonable diligence, find them, so as to be able to distrain them.—*DOE d. HAVERSON v. FRANKS* (1847), 2 Car. & Kir. 678.

**6304.** ————*Premises shut up.*—Where the proceedings in ejectment are between landlord & tenant under C. L. P. Act, 1852 (c. 76), s. 210, & deft. allows judgment to go for want of appearance, it is not necessary to state in the affidavit, upon applying for judgment & execution, if the premises are shut up, that search has been made & no sufficient distress found; but it is enough to state the fact that the premises are shut up, & that deponent has been informed that there is no sufficient distress.—*ROMILY v. FYCROFT* (1855), 4 W. R. 26.

**6305.** ————*Part of demised property in landlord's possession.*—In ejectment for a forfeiture, under C. L. P. Act, 1852 (c. 76), s. 210, it appeared that pltf. sought to recover possession of two houses, numbered 13 & 14, which, in Aug. 1849, with two other houses, numbered 15 & 16, were demised by pltf. to L. for twenty-one years at an annual rent of £73 10s. payable quarterly. The lease contained the usual proviso for re-entry on non-payment of rent. At Midsummer, 1858, a year's rent was due, & in July, 1858, the houses, Nos. 15 & 16, were deserted & a police constable entered & for some time kept possession of them, but afterwards, by the direction of pltf.'s agent, gave possession to T. to take care of them for pltf.; but upon a verbal understanding that if pltf. could get possession of Nos. 13 & 14, the four houses should be let to T. In Dec. 1859, a distress for £73, one year's rent, due Michaelmas, 1858, was put in on Nos. 13 & 14, which were then occupied by defts. At that time the property on the premises were only worth a few shillings, & there never was, up to the commencement of the action, a sufficient distress to satisfy the arrears of rent. No distress or search was made on Nos. 15 & 16 after T. took possession, & it was uncertain whether, at the time of the service of the declaration, there

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were or were not goods on those premises sufficient in value, if distrainable, to satisfy the arrears of rent:—*Held*: (1) there was no evidence for the jury of an eviction by pltf. in respect of the houses Nos. 15 & 16; (2) there was evidence of no sufficient distress, since pltf. was not bound to show that there were no goods of sufficient value in Nos. 15 & 16, inasmuch as the possession of T. must be considered as pltf.'s possession & under the circumstances, justifiable.—*WHEELER v. STEVENSON* (1860), 6 H. & N. 155; 30 L. J. Ex. 46; 158 E. R. 64.

**6306. Right to re-enter limited.]**—A lease contained the following clause: “& also shall be lawful for E.” (the lessor), “her exors.” etc., “to call on tenant for quarterly payment of rent, or, if otherwise, as now accepted, at Michaelmas & Lady Day, as a matter of favour, with a quarter remaining in hand, & if not paid in twenty days after, rent as stated, & £10 of increased rent for breaking up land by acre, then the tenant shall be liable to have the rent, etc., due recovered by sale & distress, or to enter on the premises for same till it be fully satisfied”:—*Held*: (1) the clause might be understood as reserving a right of entry, upon non-payment of rent, to hold the premises till the arrears were paid; (2) under this clause, the lessor could not enter without the common law formalities, *Landlord & Tenant Act*, 1730 (c. 28), s. 2, applying only where there is a right of re-entry by which the lease is avoided.—*DOE d. DARKE v. BOWDITCH* (1846), 8 Q. B. 973; 15 L. J. Q. B. 266; 10 Jur. 637; 115 E. R. 1140.

**(c) Relief against Forfeiture.**

**i. Right to Relief.**

*See, now, C. L. P. Act*, 1852 (c. 76), ss. 210, 212; *C. L. P. Act*, 1860 (c. 126), s. 1; *Supreme Court of Judicature (Consolidation) Act*, 1925 (c. 49), s. 46.

**6307. Power of court to relieve.]**—(1) A lessee applying to redeem a lease, which has become forfeited at law by non-payment of rent, is not required by 4 Geo. 2, c. 28, s. 3, before the hearing, to pay into ct. the arrears of rent or the costs at law, if no injunction is granted until the hearing, & the lessor is in possession.

(2) Where the suit to redeem the lease was brought by the personal representatives of the lessee, evidence having been given tending to show that the lessee in his lifetime was insolvent, & had committed breaches of covenant, & that his estate was also insolvent, the ct. directed an issue to try whether other breaches of covenant had been committed or waived, but imposed it as a term upon pltf. that he should previously pay into ct. the costs at law & the arrears of rent due at the time the lessor sued out his writ of possession. *Semble*: the arrears of rent & amount of costs

brought into ct. by pltf., in a suit to redeem a lease forfeited by non-payment of rent, must, if the bill is dismissed, be repaid to pltf.

(3) *Semble*: equitable agreements, charging the property comprised in a lease, but not accompanied with a change of possession or other alteration of the property, do not work a forfeiture of the lease in equity, notwithstanding there is a clause in the lease against assignment.

(4) A ct. of equity, when asked by a lessee to grant him relief, will consider the conduct of the lessee in dealing with the property whether that conduct does or not involve a breach of covenant.

(5) A lease provided that, in case of any breach of covenant, it should be lawful for the lessor to re-enter & expel the lessee, & the lease should, in that case, be forfeited, & be utterly null & void. The lessee committed a breach by non-payment of rent. *Semble*: such a lease is voidable & not void.

A ct. of equity will relieve a lessee from a forfeiture by non-payment of rent where there is a proviso that in that case the lease shall be void, as well as where there is a mere power of re-entry.

—*BOWSER v. COLBY* (1841), 1 Hare, 109; 11 L. J. Ch. 132; 5 Jur. 1178; 66 E. R. 969.

*Annotations*:—As to (1) *Reid. Howard v. Fanshawe*, [1895] 2 Ch. 581. As to (4) *Consd. Dendy v. Evans*, [1910] 1 K. B. 263. As to (5) *Consd. Howard v. Fanshawe*, [1895] 2 Ch. 581.

**6308. Discretion of court.]**—*SCOTT v. BROWN (MATTHEW) & Co., LTD.*, No. 6324, *post*.

**6309. Landlord & Tenant Act, 1730 (c. 28)—Tender of rent—Stay of proceedings.]**—Tender of rent before ejectment delivered shall stay proceedings under above Act.—*GOODRIGHT d. STEVENSON v. NORIGHT* (1771), 2 Wm. Bl. 746; 96 E. R. 436.

**6310. Who may apply—Mortgagee.]**—The mtgee. of a lease has the same title to relief against an ejectment for non-payment of rent, & upon the same terms, as the lessee against whom the recovery is had.—*DOE d. WHITFIELD v. ROE* (1811), 3 Taunt. 402; 128 E. R. 160.

*Annotations*:—*Expld. & Distd. Hare v. Elms*, [1893] 1 Q. B. 604. *Reid. Humphreys v. Morten*, [1905] 1 Ch. 739.

**6311. Trustee in bankruptcy.]**—(1) The jurisdiction to grant to a lessee relief against the forfeiture of his lease for non-payment of rent is not confined to cases where the lessor has recovered possession by legal process, but extends to cases where the lessor has recovered peaceable possession without the assistance of any ct. In such a case an order may be made under *C. L. P. Act*, 1852 (c. 76), s. 212, giving the lessee relief in equity, & declaring that he may hold & enjoy the demised lands according to the lease made thereof without any new lease. The right of a lessee to be relieved from the forfeiture of a lease is a chose in action which vests in his trustee in bkpcy., & the trustee is entitled to sell such right & to assign it to a purchaser.

**PART XXIV. SECT. 1, SUB-SECT. 4.—C. (a) i.**

**6308 i. Discretion of court.]**—*McPHERSON v. GILES* (1919), 45 O. L. R. 441; 16 O. W. N. 183.—CAN.

**6308 ii.** —.]—*SNIDER v. HARPER (Alta.)* (1922), 66 D. L. R. 149; [1922] 2 W. W. R. 417.—CAN.

**6308 iii.** —.]—Relief against forfeiture for non-payment of rent, while in the discretion of the ct., should be granted or withheld upon proper principles. It should not be granted where the lessee has been in default for many years & is still in default & has never expressed any willingness or disclosed any ability to pay the

rent in arrear.—*R. v. VANCOUVER LUMBER CO.*, [1924] 2 D. L. R. 482; 1 W. W. R. 1041; 33 B. C. R. 468.—CAN.

**6308 iv.** —.]—*APPAYPA SHETTY v. MAHAMMAD BEARI* (1915), 1 L. R. 39. Mad. 834.—IND.

**6308 v.** —.]—*HIRANANDAN OJHA v. RAMDHAR SINGH* (1922), 1 L. R. 1 Pat. 363.—IND.

**6308 vi.** —.]—*VASUDEVA UDPA v. KRISHNA UDPA* (1920), 1 L. R. 44 Mad. 629.—IND.

**6308 vii.** —.]—*BEASLEY v. DARCY* (1800), 2 Sch. & Lef. 403, n.—IR.

**6308 viii.** —.]—*SWANTON v. BIGGS*

(1828), Beat. 170.—IR.

**6308 ix.** —.]—Only in a strong case, if at all, will the ct. grant an injunction to restrain proceedings for non-payment of rent.—*CLANCY v. ROBERTS* (1838), 1 I. Eq. R. 21.—IR.

**6308 x.** —.]—*MULLOY v. GOFF* (1850), 1 I. Ch. R. 27; 3 Ir. Jur. 25.—IR.

**6308 xi.** —.]—*Re A LEASE, NICHOLSON TO COSTELLO* (1894), 13 N. Z. L. R. 62.—N.Z.

**6308 xii.** —.]—*ANDERSON v. YULE* (1907), 26 N. Z. L. R. 502.—N.Z.

**6308 xiii.** —.]—*HILLMAN BROTHERS v. CONDRIN & Co.*, [1919] W. L. D. 114.—S. AF.

(2) Pltff. must bear the costs of the action except in so far as they were increased by deft. resisting his claim (STIRLING, J.).—HOWARD v. FANSHAW, [1895] 2 Ch. 581; 64 L. J. Ch. 666; 73 L. T. 77; 43 W. R. 645; 39 Sol. Jo. 623; 13 R. 663.

*Annotations*.—As to (1) *Refd.* Durell v. Gread (1914), 84 L. J. K. B. 130. As to (2) *Follid.* Humphreys v. Morton, [1905] 1 Ch. 739.

**6312. When application may be made—After judgment.**—In ejectment for non-payment of rent, the proceedings may be stayed upon bringing in the rent, & costs, etc., although pltff. has obtained judgment.—PHILLIPS v. DOELITTLE (1725), 8 Mod. Rep. 345; 88 E. R. 247.

*See* R. S. C., Ord. 14, r. 10.

**6313. — Before trial—Landlord & Tenant Act, 1730 (c. 28).**—The ct. will not, after a trial, stay the proceedings on payment of the rent, etc., above Act only warranting such application before trial; & that statute is not confined to cases of ejectment brought after half a year's rent due where no sufficient distress was to be found on the premises.—ROE d. WEST v. DAVIS (1806), 7 East, 363; 103 E. R. 140.

*Annotations*.—*Follid.* Doe d. Harris v. Masters (1824), 2 B. & C. 490. *Menda.* Smith v. Jersey (1821), 3 Bl. 290; Paul v. Meek (1828), 2 Y. & J. 116; Charrington v. Johnson (1845), 4 L. T. O. S. 398; Houghton v. Koenig (1856), 18 C. B. 235.

**6314. — — — — —**—(1) In ejectment upon the forfeiture of a lease for non-payment of rent, where the proviso was, that, if the rent was in arrear for twenty-one days, the lessor might re-enter, "although no formal or legal demand shall be made for payment thereof":—*Held*: ejectment for non-payment of the rent within the time stipulated might be maintained against the lessee, without demanding the rent, or actually re-entering the premises.

(2) Although this case might not be strictly within above Act, yet the ct. refused to relieve the tenant by staying proceedings, upon bringing the rent in arrear, & the costs of the ejectment, into ct. after trial.—DOE d. HARRIS v. MASTERS (1824), 2 B. & C. 490; 4 Dow. & Ry. K. B. 45; 2 L. J. O. S. K. B. 117; 107 E. R. 466.

**6315. — After execution of ejectment—Other grounds for forfeiture.**—After execution executed in an action of ejectment, the ct. will not set the proceedings aside on payment of the rent due & costs of the action, if there are other grounds of forfeiture besides the non-payment of rent, & if such an application be made, the ct. will dismiss

it with costs.—DOE d. LAMBERT v. ROE (1835), 3 Dow. 557.

**6316. — Delay in application.**—Relief refused on ground of delay in making application.—STANHOPE v. HAWORTH (1886), 3 T. L. R. 34, C. A.

*Annotation*.—*Distd.* Newbolt v. Bingham (1895), 73 L. T. 852.

**6317. Re-entry without aid of court—Power of court to relieve.**—WILSON v. BOLTON, No. 6319, *post*.

**6318. — — — — —**—HOWARD v. FANSHAW, No. 6311, *ante*.

#### ii. How Relief Claimed.

**6319. Re-entry by landlord—Application by lessee for relief—Not by summons in chambers.**—Where a forfeiture for non-payment of rent the landlord has taken possession of the premises without bringing any action, so that he does not require the assistance of the ct. the tenant cannot obtain relief on a summons at chambers.—WILSON v. BOLTON (1893), 10 T. L. R. 17, D. C.

#### iii. Costs.

**6320. Liability of lessee to pay lessor's costs—Lessor refused costs in ejectment action.**—Where, in an action of ejectment upon a forfeiture by non-payment of rent pltff. obtains judgment, but without costs, deft. may obtain relief from the forfeiture under C. L. P. Act, 1860 (c. 126), s. 1, without being required to pay pltff. any costs other than those of the summons for relief.—CROFT v. LONDON & COUNTY BANKING CO. (1885), 14 Q. B. D. 347; 54 L. J. Q. B. 277; 52 L. T. 374; 49 J. P. 356; 1 T. L. R. 246, C. A.

*Annotation*.—*Refd.* Humphreys v. Morton, [1905] 1 Ch. 739.

**6321. — Costs increased by resistance to relief.**—HOWARD v. FANSHAW, No. 6311, *ante*.

#### (d) Rights of Underlessees.

*See* Sub-sect. 4, E., *post*.

#### D. Breaches of Covenant Other than for Payment of Rent.

##### (a) Notice of Breach.

##### i. Necessity for.

*See, now*, Law of Property Act, 1925 (c. 20), s. 146 (1).

**6322. Whether necessary to enforcement of forfeiture.**—In an ejectment for a forfeiture of a lease the ct. will compel pltff. to deliver a particular

**6317i. Re-entry without aid of court—Power of court to relieve.**—The provisions of 4 Geo. 2, c. 28, s. 4, dispensing with a new lease where relief against forfeiture for non-payment of rent is decreed are not confined to cases in which possession has been obtained by action, but extended to cases in which possession has been gained peaceably without proceeding in any ct.—SUTTIE v. TE WINITANA TUPOTAHI (1914), 33 N. Z. L. R. 1216.—N.Z.

**6317 II. — — — — —**—JOHNS v. COLONIAL GOVERNMENT (1898), 15 S. C. 245; 8 C. T. R. 290.—S. AF.

**r. Where Crown lessor.**—A.-G. OF VICTORIA v. ETTERSHANK, ETTERSHANK v. A.-G. OF VICTORIA (1875), 44 L. J. P. C. 65.—AUS.

**t. — — — — —**—The ordinary provisions of the law relating to relief against forfeiture of leases, for non-payment of rent apply to the Crown & its tenants.—R. v. DALL, [1908] V. L. R. 682.—AUS.

**a. No relief—Where position of parties changed.**—MOIR v. PALMATIER

(1900), 13 Man. L. R. 34.—CAN.

**b. Tender of overdue rent.**—TUCKER v. ARMOUR (1906), 5 W. L. R. 35; 6 Terr. L. R. 388; *on appeal* (1907), 6 W. L. R. 93.—CAN.

**c. — — — — —**—HUNTING v. MACADAM (1908), 8 W. L. R. 214; 13 B. C. R. 426.—CAN.

**d. — — — — —**—BALAGNO v. LE ROY (1913), 18 B. C. R. 127.—CAN.

**e. — — — — —**—O'CONNOR v. SPAIGHT (1804), 1 Sch. & Lef. 305.—IR.

**f. — — — — —**—O'MAHONY v. DICKSON (1805), 2 Sch. & Lef. 400.—IR.

#### PART XXIV. SECT. 1, SUB-SECT. 4.—C. (c) iii.

**g. Liability of lessee to pay lessor's costs.**—LATTER v. HOWEY (1892), 11 N. Z. L. R. 122.—N.Z.

#### PART XXIV. SECT. 1, SUB-SECT. 4.—D. (a) i.

**6322 i. Whether necessary to enforcement of forfeiture.**—No notice or demand is necessary before action upon a forfeiture where there is a power of

entry in the lease upon breach of a covenant to repair or not to underlet.—CONNELL v. POWER (1863), 13 C. P. 91.—CAN.

**6322 II. — — — — —**—Where a lease stipulates that if the lessees should make any assignment for the benefit of creditors the term should immediately become forfeited, such forfeiture is enforceable without notice served upon the lessees.—ARGLES v. MCMAHON (1895), 26 O. R. 244; (1896), 23 A. R. 44.—CAN.

**6322 III. — — — — —**—*Re* SNURE & DAVIS (1902), 22 C. L. T. 234; 4 O. L. R. 82; 1 O. W. R. 379.—CAN.

**6322 iv. — — — — —**—Landlord & Tenant Act, 1897, does not require that the notice should be given after the right of re-entry has arisen. It must be given after the act or neglect upon which the right to re-enter arises, but it may be given before the forfeiture takes place.—HOLMAN v. KNOX (1912), 21 O. W. R. 325; 3 O. W. N. 745; 25 O. L. R. 588; 3 D. L. R. 207.—CAN.

**6322 v. — — — — —**—In an action for a declaration of forfeiture of a farm lease



**6331.** —[—]—**GREENFIELD v. HANSON**, No. 6325, *ante*.

**6332.** —[—]—(1) A notice under Conveyancing & Law of Property Act, 1881 (c. 41), s. 14 (1), requiring the lessee to remedy a breach of covenant, may be good, though it does not require payment of compensation in money.

(2) An application by a lessee under sub-sect. 2 of the above sect. must be made in an action commenced by writ, & cannot be made by originating summons.

The first point is as to the jurisdiction of NORTH, J., to enter upon the question at all, & that raises this point, whether the application could be made on an originating summons. Now, what the judge was asked for was relief under Conveyancing Act, 1881 (c. 39), s. 14 (2). Under what circumstances can he entertain that question? He can only entertain it "where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture." The first impression, therefore, is that it can only be brought before him whilst the lessor is proceeding to enforce the right of re-entry or forfeiture. If the re-entry has been made, then it is too late; he could not bring himself within the terms of that sect. But when the lessor is proceeding, I assume that the entry is not complete, the lessee may "in the lessor's action, if any, or in any action brought by himself, apply to the ct. for relief" (LORD ESHER, M.R.).—**LOCK v. PEARCE**, [1893] 2 Ch. 271; 62 L. J. Ch. 582; 68 L. T. 569; 41 W. R. 369; 9 T. L. R. 363; 37 Sol. Jo. 372; 2 R. 403, C. A.

*Annotations*:—As to (1) **Expld.** **Pannell v. City of London Brewery Co.**, [1900] 1 Ch. 496; **Gullemard v. Silverthorne** (1902), 99 L. T. 584. **Consd.** **Fox v. Jolly**, [1916] 1 A. C. 1. **Refd.** **Civil Service Co-op. Soc. v. McGregor's Trustee**, [1923] 2 Ch. 347. As to (2) **Refd.** **Roberts v. Battersea Metropolitan Borough** (1914), 110 L. T. 566.

**6333.** —[—]—**Proviso for re-entry on bankruptcy.**—**CIVIL SERVICE CO-OPERATIVE SOCIETY v. MCGRIGOR'S TRUSTEE**, No. 6534, *post*.

**6334. Particulars of breach—Must be precise.**—The notice to be served by a lessor on his lessee, under Conveyancing Act, 1881 (c. 41), s. 14 (1) "specifying the particular breach of covenant complained of," to entitle the lessor to enforce by action a right of re-entry for the breach, must be given in such detail as will enable the lessee to understand what is complained of, so that he may have an opportunity of remedying the breach before action brought. A mere general notice of breach of a specified covenant is not sufficient. A notice by a lessor to his lessee that "you have broken the covenants for repairing the inside & outside of the houses" (describing them) contained in a specified lease:—**Held**: insufficient, & on this ground an action by the lessor to recover possession of the demised houses for breach of covenant was dismissed with costs; (2) also the lessor could not maintain the action for damages for the breach.—**FLETCHER v. NOKES**, [1897] 1 Ch. 271; 66 L. J. Ch. 177; 76 L. T. 107; 61 J. P. 232; 45 W. R. 471; 13 T. L. R. 171; 41 Sol. Jo. 242.

*Annotations*:—As to (1) **Folld.** **Re Serle, Gregory v. Serle**, [1898] 1 Ch. 652. **Consd.** **Fox v. Jolly**, [1916] 1 A. C. 1. **Refd.** **Matthews v. Usher** (1899), 68 L. J. Q. B. 988.

**6335.** —[—]—(1) A notice served by a lessor on his lessee under Conveyancing Act, 1881 (c. 41), s. 14, merely informing the lessee that he "has not kept the same premises well & sufficiently repaired, & the party & other walls thereof," is not sufficient, as it does not direct the attention

of the lessee to the particular breaches complained of, so as to give him an opportunity of remedying them before an action is brought against him. The fact that such a notice sufficiently specifies other breaches of covenant which are complained of will not make the notice sufficient within the sect.

(2) A notice requiring a lessee to repair "within one month or a reasonable time thereafter" when the lease itself allows three months is good within Conveyancing Act, 1881 (c. 41), s. 14 (1).—**Re SERLE, (GREGORY v. SERLE)**, [1898] 1 Ch. 652; 67 L. J. Ch. 344; 78 L. T. 384; 46 W. R. 440; 42 Sol. Jo. 414.

*Annotations*:—As to (1) **Distd.** **Pannell v. City of London Brewery Co.**, [1900] 1 Ch. 496. **Consd.** **Fox v. Jolly**, [1916] 1 A. C. 1. **Refd.** **Matthews v. Usher** (1899), 68 L. J. Q. B. 988.

**6336.** —[—]—(1) Notice to a tenant of a breach of covenant under Conveyancing Act, 1881 (c. 41), s. 14, must give precise information of what is alleged against the tenant & what is required of him; & therefore a notice requiring a tenant to remove a structure, when two had been erected, was held bad.

(2) A lessee having committed a breach of covenant which entitled the lessor to re-enter, the lessor sold the reversion "subject to & with the benefit of the lease" to a purchaser who had knowledge of the breach:—**Held**: this was a recognition in terms of the existence of the lease & therefore a waiver by the purchaser of the right to re-enter.—**DAVENPORT v. SMITH**, [1921] 2 Ch. 270; 91 L. J. Ch. 225; 126 L. T. 184; 37 T. L. R. 909; 65 Sol. Jo. 707.

*Annotation*:—As to (2) **Expld.** **Atkin v. Rose**, [1923] 1 Ch. 522.

**6337.** —[—]—**Indicating matter complained of.**—It is not necessary that notices of breaches of covenants under Conveyancing Act, 1881 (c. 41), s. 14, should state exactly what the lessees are required to do; it is sufficient if they indicate the matter complained of & the matter to be put right.—**PIGGOTT v. MIDDLESEX COUNTY COUNCIL**, [1909] 1 Ch. 134; 77 L. J. Ch. 813; 99 L. T. 662; 72 J. P. 461; 52 Sol. Jo. 698; 6 L. G. R. 1177.

*Annotations*:—**Consd.** **Jolly v. Brown**, [1914] 2 K. B. 109. **Mentd.** **Wild v. Woolwich B. C.** (1909), 78 L. J. Ch. 633.

**6338.** —[—]—**Reserving right to specify other breaches.**—A notice was served under Conveyancing & Law of Property Act, 1881 (c. 41), s. 14, by the lessor of six small houses, stating that the repairing covenants as therein set out had been broken & that the particular breaches complained of were the committing or allowing the dilapidation mentioned in the schedule annexed to the notice. The schedule indicated, under general headings, repairs which were required to be done in all the houses, & in a few instances only specified repairs to be done in particular houses. In some instances it required the lessee to "examine & repair" specified parts of the houses. The schedule concluded with the words "& note that the completion of the items mentioned in this schedule does not excuse the execution of other repairs if found necessary:—**Held**: the notice sufficiently specified the particular breaches complained of, & it was not vitiated by the addition of the general clause at the end.—**Fox v. JOLLY**, [1916] 1 A. C. 1; 84 L. J. K. B. 1927; 113 L. T. 1025; 31 T. L. R. 579; 59 Sol. Jo. 665, H. L.; *affg.* **S. C. sub nom. JOLLY v. BROWN**, [1914] 2 K. B. 109, C. A.

*Annotations*:—**Refd.** **Day v. Waldron** (1919), 120 L. T. 634. **Mentd.** **Gates v. Jacobs**, [1920] 1 Ch. 567.

breach & claiming compensation, is sufficient.—**McMULLEN v. VANNATTO** (1894), 24 O. R. 625.—**CAN.**

**b. Must be accurate.**—A very little

inaccuracy in a notice that is to be made the basis of a forfeiture, such as erroneously stating the date of a lease, is sufficient to invalidate

the notice.—**BIG VALLEY COLLIERIES, LTD. v. MCKINNON** (1915), 32 W. L. R. 158; 9 W. W. R. 4; 23 D. L. R. 62.—**CAN.**

*Sect. 1.—Forfeiture: Sub-sect. 4, D. (a) ii., iii. & iv., & (b) i.]*

**6339. Several breaches alleged—Failure to establish some.]—**A notice under Conveyancing Act, 1881 (c. 41), s. 14, referring to several distinct alleged breaches of covenant is not invalidated *in toto* because it turns out that although some of the alleged breaches have occurred the others have never taken place, or that the lessor is not entitled to rely on them.—**PANNELL v. CITY OF LONDON BREWERY Co.**, [1900] 1 Ch. 496; 69 L. J. Ch. 244; 82 L. T. 53; 48 W. R. 204; 16 T. L. R. 152; 44 Sol. Jo. 195.

*Annotations:—***Expld. & Distd.** *Gullemond v. Silverthorne* (1908), 99 L. T. 584. **Consd.** *Fox v. Jolly*, [1916] 1 A. C. 1.

**6340. Notice referring to wrong covenant—Invalid notice.]—**Pltfs. demised to defts. a piece of land, & defts. covenanted within twelve months to erect certain buildings thereon, & also at all times during the term of the lease to keep the premises "so to be erected as aforesaid in good & substantial repair, & the same in good & substantial repair" to deliver up at the expiration of the term. The lease contained a proviso for re-entry on breach of any of the lessees' covenants. The buildings were never erected, but pltfs. accepted the quarter's rent which accrued next after the expiration of the twelve months limited for the erection of the buildings. Pltfs. afterwards served upon defts. a notice under Conveyancing Act, 1881 (c. 41), s. 14, referring to the building covenant only, & calling upon defts. to erect the buildings. In an action for recovery of possession:—**Held:** the building covenant was broken once for all at the expiration of the twelve months, & was not a continuing covenant; the repairing covenant implied an obligation to erect the buildings, & there was, therefore, a continuing breach of it; but inasmuch as the notice under the Act only referred to the building covenant as to the breach of which there was a waiver, & did not mention the breach of the repairing covenant, the notice was insufficient & the action failed.—**JACOB v. DOWN**, [1900] 2 Ch. 156; 69 L. J. Ch. 493; 83 L. T. 191; 64 J. P. 552; 48 W. R. 441; 44 Sol. Jo. 378.

*Annotations:—***Mentd.** *Wright v. Lawson* (1903), 19 T. L. R. 203; *Stephens v. Junior Army & Navy Stores*, [1914] 2 Ch. 516.

**6341. ———.]—**(1) A notice under Conveyancing & Law of Property Act, 1881 (c. 41), s. 14, which set out the general covenant to repair contained in a lease, & then set out two further special painting covenants which the lease did not contain at all, comprised a schedule of work required to be done generally, some at least of which was not properly referable to the general covenant:—**Held:** the notice was invalid.

(2) Where after service of a notice under s. 14 of the Act for non-repair, rent was received by the lessors on three successive quarter days during negotiations for the acceptance by the tenant of a new lease from the head landlords:—**Held:** the acceptance of the rent was a waiver of the forfeiture.—**GUILLEMAND v. SILVERTHORNE** (1908), 99 L. T. 584, N. P.

*Annotation:—***As to** (2) **Consd.** *New River Co. v. Crumpton*, [1917] 1 K. B. 762.

**6342. Notice relating to portion of premises—Sufficient.]—**By an indenture of lease made in 1863 pltf.'s predecessors in title demised to one W. a parcel of land situated at B., of which they were the freeholders, upon a building lease for a term of ninety-eight years at the yearly rental of £17. The lease contained covenants by the lessee to repair & paint the buildings then being erected

on the said land, & there was a proviso for re-entry on breach of any of the covenants or conditions in the lease. Five houses were built on the said land, & deft. O'M. became the assignee of the lease & bound by its covenants. S., other deft., was in possession of two of the houses under a sub-lease of Sept. 1912. This sub-lease contained repairing covenants substantially similar to those of the head lease. The houses, including the two in possession of the sub-lessee, were allowed to fall into a state of disrepair, & pltfs. prepared a schedule of dilapidations & served a notice pursuant to Conveyancing Act, 1881 (c. 41), s. 14. The notice, as well as the schedule of dilapidations, related to one only of the five houses, & was served under sect. 67 (3) of the Act, by affixment upon the house to which it related:—**Held:** (1) a notice relating to a portion only of the premises was sufficient; (2) where the head lessee fails to obtain relief under Conveyancing Act, 1881 (c. 41), s. 14, relief under Conveyancing Act, 1892 (c. 13), s. 4, may be granted upon terms to an under-lessee of part of the premises, notwithstanding the fact that he himself has been guilty of a breach of his covenant with the head lessee.—**HURD v. WHALEY**, [1918] 1 K. B. 448; 88 L. J. K. B. 260; 118 L. T. 593; 34 T. L. R. 253.

### iii. Length of.

*See, now, Law of Property Act, 1925 (c. 20), s. 146 (1).*

**6343. General rule—Must be reasonable.]—**A plot of land was demised for a term of years to certain persons, one of whom was a limited co. By the lease the lessees for themselves & their assigns, & each of them for himself & itself respectively & his & its respective assigns, covenanted to repair all buildings to be erected on the land, & not to assign or underlet the premises without the consent of the lessors. The lease contained a proviso that if the lessees failed or neglected to perform or observe any of the covenants, or "if the lessees shall become bkpt. or enter into liquidation for the benefit of or compound with their creditors, or being a co. shall enter into liquidation whether compulsory or voluntary," the lessors might re-enter. The lessors conveyed their interest in the premises to pltfs., & the lessees with the consent of pltfs. assigned the residue of the term to defts., one of whom was a limited co. Subsequently, in Jan. 1897, deft. co. passed a resolution for a voluntary winding-up, not because of insolvency, but for the purpose of reconstruction & increasing the capital. A new co. was formed, & deft. co. agreed to sell to the new co. all their interest in the leasehold premises for the residue of the term. No assignment was executed, but the new co. were let into possession. On Nov. 2, 1897, pltfs. served notice on defts. under Conveyancing Act, 1881 (c. 41), s. 14, stating that deft. co. had entered into liquidation, & that defts. had broken the covenant to repair, & that if defts. failed to remedy the breaches specified within a reasonable time pltfs. would re-enter. Two days afterwards pltfs. brought an action to recover possession:—**Held:** (1) the proviso for re-entry in the lease meant that if either the individual lessees became bkpt. or the co. lessee entered into liquidation the lessors might re-enter; the right of re-entry accrued upon the liquidation of the co. for any cause whatever, & not merely in consequence of insolvency; & the condition for re-entry in the event of the co. entering into liquidation ran with the land, & bound the assignees of the lessees; (2) the liquida-

tion of the co. was equivalent to bkpcy. within the meaning of Conveyancing Act, 1881 (c. 41), s. 14 (6), & the effect of Conveyancing Act, 1892 (c. 18), s. 2 (2), was to take the case of forfeiture for bkpcy. or liquidation for one year from the date of the bkpcy. or liquidation out of the cases in which notice, required by sect. 14, sub-sect. 1 of the Act of 1881 before enforcing the forfeiture, was not necessary; therefore, notice was necessary, & the notice was bad.

The statute clearly contemplates that a reasonable interval shall elapse after service of notice & before action. Can two days' notice be said in all circumstances to be a reasonable notice? I think not (LORD RUSSELL, C.J.).—HORSEY ESTATE, LTD. v. STEIGER, [1899] 2 Q. B. 79; 68 L. J. Q. B. 743; 80 L. T. 857; 47 W. R. 644; 15 T. L. R. 367, C. A.

*Annotations:*—As to (1) *Apprvd.* Fryer v. Ewart, [1902] A. C. 137. *Refd.* Pannell v. City of London Brewery Co., [1900] 1 Ch. 496; *Re* Riggs, *Ex p.* Lovell, [1901] 2 K. B. 16; *Civil Service Co-op. Soc. v. McGrigor's Trustee*, [1923] 2 Ch. 347. As to (2) *Consd.* Pannell v. City of London Brewery Co., [1900] 1 Ch. 496; *Civil Service Co-op. Soc. v. McGrigor's Trustee*, [1923] 2 Ch. 347. *Refd.* Jacob v. Down, [1900] 2 Ch. 156; Fox v. Jolly, [1916] 1 A. C. 1; Davenport v. Smith (1921), 91 L. J. Ch. 225. *Generally*, *Mentd.* Gentle v. Faulkner (1899), 68 L. J. Q. B. 848; Woodall v. Clifton, [1905] 2 Ch. 257.

**6344. What notice sufficient—Covenant to repair—One month.]—***Re* SERLE, GREGORY v. SERLE, No. 6335, *ante*.

**6345. — Condition for re-entry on liquidation—Two days.]—**HORSEY ESTATE, LTD. v. STEIGER, No. 6343, *ante*.

**6346. — Condition for re-entry on bankruptcy—Fourteen days.]—**CIVIL SERVICE CO-OPERATIVE SOCIETY v. MCGRIGOR'S TRUSTEE, No. 6534, *post*.

**6347. — Covenant to keep land cleaned—Notice applying to whole land.]—**In 1906, a local authority under their statutory powers, obtained compulsorily a lease of land & sub-let it in allotments to numerous persons. The lease contained covenants by the local authority to keep the land clean and in good heart & condition. In June, 1909, the lessor served the local authority with a notice under Conveyancing & Law of Property Act, 1881 (c. 41), s. 14 (1), directed to the whole of the land, & alleging generally, breaches of the said covenants, & requiring the same to be remedied within a reasonable time, & in the following Nov. he issued a writ alleging that the breaches had not been remedied & claiming to re-enter. The local authority denied the breaches. At the trial of the action the lessor's evidence showed that all the allotments were in bad condition when the notice was given, that some of them were clean at the date of the writ, but that it would take at least a year from the date of the notice to put the whole of the land in good condition. On this the local authority objected that a reasonable time had not been allowed to remedy the breaches:—*Held*: (1) as the notice was in general terms & directed to the whole of the land it was not divisible, & as a sufficient time had not been allowed to remedy all the breaches, the action was premature & must be dismissed; (2) the objection that a reasonable time had not been allowed was not an allegation in the nature of a condition precedent within the meaning of R. S. C., Ord. 19, r. 14, & one which ought as such to have been pleaded by the local authority in their statement of defence.—HOPLEY v. TARVIN PARISH COUNCIL (1910), 74 J. P. 209.

**6348. Objection to length of notice—Need not be specially pleaded.]—**HOPLEY v. TARVIN PARISH COUNCIL, No. 6347, *ante*.

**6349. Extension of time—Jurisdiction of court.]**

—GAZE v. LONDON DRAPERY STORES, LTD., No. 6374, *post*.

#### iv. Service of.

*See, now*, Law of Property Act, 1925 (c. 20), ss. 146 (1), (5), b, 196.

**6350. Presumption of due service.]—**The service on a lessee of the notice required by Conveyancing Act, 1881 (c. 41), s. 14, & his non-compliance therewith being a condition precedent to the lessor's right of action to recover possession of the demised premises, the due performance by the lessor of the statutory condition is of necessity implied & need not be specially pleaded in his statement of claim in such an action.—GATES v. JACOBS (W. A. & R. J.), LTD., [1920] 1 Ch. 567; 89 L. J. Ch. 319; 123 L. T. 238; 64 Sol. Jo. 425.

**6351. On occupier of premises—Notice addressed to lessee & all others whom it doth concern.]—**(1) A notice requiring a tenant to remedy a breach of covenant by repairing premises within three months, expired on Feb. 1, 1884. No repairs were then done, & on Feb. 2, the rent due at Christmas, 1883, was accepted:—*Held*: the acceptance of the rent was no waiver of the breach of covenant.

(2) An assignee of a lease is a "lessee" within Conveyancing Act, 1881 (c. 41), s. 14 (1).

(3) A notice, under Conveyancing Act, 1881 (c. 41), s. 14 (1), addressed to B., the original lessee, & "all others whom it doth or may concern," & served on the persons in occupation of the demised premises, is sufficiently addressed to, & validly served on, the assignee of the lease.—CRONIN v. ROGERS (1884), 1 Cab. & El. 348.

**6352. On equitable assignee.]—**GENTLE v. FAULKNER, No. 6390, *post*.

**6353. Covenant to repair after notice—Service before expiry of notice.]—**A lease contained a covenant by the lessee to repair within three months after notice. The lessor gave the lessee the required notice, & before the expiration of the three months gave the lessee notice specifying the breach of covenant, requiring the same to be remedied & compensation to be made & threatening an action for recovery of possession in case of non-compliance:—*Held*: the second notice was valid under Conveyancing Act, 1881 (c. 41), s. 14 (1).—COVE v. SMITH (1880), 2 T. L. R. 778.

#### (b) Relief against Forfeiture.

##### i. Discretion of Court.

*See, now*, Law of Property Act, 1925 (c. 20), s. 146.

**6354. Due diligence exercised by lessee in complying with notice.]—**A lease contained the usual covenant to repair, & that it should be lawful for the lessor to enter upon the premises, & of all want of reparation to give notice in writing to repair within three months; & it was provided that in case the lessee did not perform the covenant, it should be lawful for the lessor to re-enter. On Sept. 16, the lessor gave notice to the lessee to do certain specified repairs within three months; the lessee proceeded to execute the repairs, but from the state of the weather, some small portions were not completed until some little time after the expiration of the three months. The greater part, however, were completed by Dec. 16. On Dec. 30, the lessor brought an action of ejectment. Upon a bill by the lessee, the ct. being of opinion that the lessee had used due diligence in complying with the covenant, & that the lessor had been guilty of precipitancy in bringing the action, restrained the further prosecution

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of the action, each party to bear their own costs.—**BARGENT v. THOMSON** (1864), 4 Giff. 473; 9 L. T. 365; 28 J. P. 4; 9 Jur. N. S. 1192; 66 E. R. 792. **Annotation:—Reid.** *Hughes v. Met. Ry.* (1876), 1 C. P. D. 120.

**6355. Relief not claimed by pleadings.]—**In an action for the recovery of land for breach of a covenant to repair, relief will be granted under Conveyancing Act, 1881 (c. 41), although the premises are in a very dilapidated condition, & the relief is not claimed by the pleadings.—**MITCHISON v. THOMSON** (1883), 1 Cab. & El. 72.

**Annotation:—Reid.** *Hurd v. Whaley* (1918), 118 L. T. 593.

**6356. Discretion unfettered.]—**The discretion entrusted to the ct. under Conveyancing Act, 1881 (c. 41), s. 14 (2), for relief against forfeiture for breach of covenant in a lease is wide in its terms, & it is not advisable to lay down rigid rules for guiding that discretion so as to fetter it by limitations which have nowhere been enacted.

In the case of a building which for many years had been used as a chapel, & was being converted into a place of public entertainment, certain extensive interior & external alterations being made, which included the removal of staircases & the construction of new ones, the opening of a new door, & the removal of iron railings, relief against forfeiture was granted by the House of Lords on the deposit by appts. of a sum sufficient to secure the restoration of the building to its former condition at the end of the lease.—**HYMAN v. ROSE**, [1912] A. C. 623; 81 L. J. K. B. 1062; 106 L. T. 907; 28 T. L. R. 432; 56 Sol. Jo. 535, H. L.; *reversg.* S. C. *sub nom.* **ROSE v. SPICER**, **ROSE v. HYMAN**, [1911] 2 K. B. 234, C. A.

### ii. In What Cases.

*See, generally,* Law of Property Act, 1925 (c. 20), s. 146.

**6357. Historical survey.]—**In granting relief, non-payment of rent was at first the only ground. Then the jurisdiction was extended to cases of breach of covenant to insure against fire, & subsequently it was extended by Conveyancing Act, 1881 (c. 41), s. 14. But it has never been extended to such a case as this [covenant against assignment]

(**SARGANT, J.**).—**ELLIS v. ALLEN**, [1914] 1 Ch. 904; 83 L. J. Ch. 590; 110 L. T. 479.

**Covenants against assignment.]—See** Law of Property Act, 1925 (c. 20), s. 146 (8) i.; sub-sect. 4, D. (d), *post*.

**Covenants in mining lease.]—See** Law of Property Act, 1925 (c. 20), s. 148 (8) ii.; MINES.

**Forfeiture on bankruptcy.]—See** Law of Property Act, 1925 (c. 20), s. 146 (10); sub-sect. 4, D. (e), *post*.

**Forfeiture on taking in execution lessee's interest.]—See** Law of Property Act, 1925 (c. 20), s. 146 (10).

**Notice to effect decorative repairs.]—See** Law of Property Act, 1925 (c. 20), s. 147.

### iii. Who may Claim Relief.

**6358. Equitable mortgage—Of lessee's interest—Lessee submitting to judgment by default.]—**

Where the owner of ground rents reserved under a lease brought an action against the lessee, who, to his knowledge had no interest in the property, for recovery of the lands for forfeiture, by breach of covenant & signed judgment by default, & the issue of the writ was not known to the equitable mtgee. of the lease until three days before judgment was signed, during two of which he was necessarily absent on business, & there existed in fact a defence to this action:—**Held**: the judgment could be set aside under R. S. C., Ord. 27, r. 15, on the application of the equitable mtgee., who should be at liberty to defend the action in deft.'s name, but deft. ought to have been made a party to the application, & therefore notice must be served on deft., & he must have liberty to apply to vary or discharge the order.—**JACQUES v. HARRISON** (1884), 12 Q. B. D. 165; 53 L. J. Q. B. 137; 50 L. T. 246; 32 W. R. 470, C. A.; *previous proceedings, sub nom.* **NORTH LONDON FREEHOLD LAND & HOUSE CO. v. JACQUES** (1883), 49 L. T. 659.

**Annotations:—Reid.** *Lock v. Pearce* (1893), 62 L. J. Ch. 582; *Sedgwick, Collins v. Rossia Insce. of Petrograd* (1925), 133 L. T. 808.

**6359. Tenant under agreement for lease.]—**Pltf. entered into possession of a farm under an agreement for a lease for twenty-one years from deft. Before any rent was due or had been paid the landlord gave pltf. notice to quit, & turned him out of possession, because he had done that which

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**6356 i. Discretion unfettered.]—BAL-AMBHAT BIN RAJIBHAT v. VINAYAK GANPATRAY PATWARDHAN** (1911), 1 L. R. 35 Bom. 239.—IND.

**k. Duty of court to consider all circumstances.]—M'DONNELL v. BURNETT, BURNETT v. GOING** (1841), 4 I. Eq. R. 216.—IR.

**l. —.]—BURKE v. PRIOR** (1863), 15 I. Ch. R. 106.—IR.

**m. —.]—SHODROSKE v. HADLEY** (1908), 27 N. Z. L. R. 377.—N.Z.

**n. —.]—THOMAS' ESTATE v. KERR** (1903), 20 S. C. 354.—S. AF.

## PART XXIV. SECT. 1, SUB-SECT. 4.— D. (b) ii.

**o. Forfeiture in bankruptcy.]—CAIRNS v. BURGESS** (1905), 2 C. L. R. 298.—AUS.

**p. —.]—**The ct. refused to relieve against forfeiture of the lease through tenant's insolvency.—**STANDARD TRUSTS CO. v. STEELE (DAVID), LTD.**, [1922] 1 W. W. R. 137; *affd.*, 68 D. L. R. 750; [1922] 2 W. W. R. 510.—CAN.

**q. Difficulty in construing covenant.]—**Where a covenant accompanied by a right of re-entry on breach, is so

expressed that its meaning is doubtful, & the tenant in good faith has done what he supposes to be a performance of it, a forfeiture will not be enforced; the difficulty in construing the covenant is a special circumstance entitling deft. to relief.—**McLAREN v. KERR** (1876), 39 U. C. R. 507.—CAN.

**r. —.]—Re JUST & STEWART** (1913), 24 W. L. R. 433; 4 W. W. R. 780; 12 D. L. R. 65; 23 Man. L. R. 517.—CAN.

**t. Non-payment of taxes.]—BUCKLEY v. BEIGLE** (1885), 8 O. R. 85.—CAN.

**a. Only at request of tenant.]—DENISON v. MAITLAND** (1892), 22 O. R. 166.—CAN.

**b. Subletting without leave.]—ROYAL TRUST CO. v. BELL** (1909), 12 W. L. R. 546.—CAN.

**c. —.]—**A lease contained a covenant by the lessees that they would not assign or sublet without leave & a proviso for re-entry in case of breach of said covenant.—**Held**: the lessor was entitled to recovery of possession of the premises & mesne profits, & it was not a proper case for relief against forfeiture.—**HAMILTON v. FERNE & KILBIR**, [1921] 1 W. W. R. 249.—CAN.

**d. —.]—MADAR SAHEB v. SANNA-BAWA GUJRANSHAH** (1895), 1 L. R. 21

Bom. 195.—IND.

**e. —.]—CAMERON v. NASH** (1900), 19 N. Z. L. R. 396.—N.Z.

**f. Permitting noxious growth of weeds.]—WARNER v. LINAHAN (Alta.)**, [1919] 2 W. W. R. 94.—CAN.

**g. Mistake.]—EDWARDS v. FAIRVIEW LODGE**, [1920] 3 W. W. R. 867.—CAN.

**h. No relief where no principle entitling him to relief.]—**The fact that a lessee from the Dominion Govt. has been harassed for years by litigation, with respect to his right of possession, brought by a Provincial Govt. & by a municipality & has been forcibly ejected by the latter does not entitle him to relief from forfeiture of the lease if there be no principle on which he is otherwise entitled to such relief.—**R. v. VANCOUVER LUMBER CO.**, [1925] 4 D. L. R. 188; 3 W. W. R. 122; *affd.*, [1924] 2 D. L. R. 482; 1 W. W. R. 1041; 33 B. C. R. 468.—CAN.

**k. Covenant to repair & insure.]—**Breach of covenants to repair & to insure contained in a lease relieved against on terms.—**TATLEY v. COOPER** (1905), 25 N. Z. L. R. 18.—N.Z.

**l. No relief on breach of condition precedent.]—GREVILLE v. PARKER**, [1910] A. C. 335.—N.Z.

amounted to a breach of a covenant contained in the agreement & intended to be inserted in the lease. The tenant brought an action for trespass:—*Held*: *pltf.* was not entitled to recover; as he was in possession under an agreement for a lease for twenty-one years & had paid no rent he was only a tenant at will, & his landlord was therefore entitled so to determine that tenancy; & the tenancy was not subject to or controlled by Conveyancing Act, 1881 (c. 41), s. 14.—*COATSWORTH v. JOHNSON* (1886), 55 L. J. Q. B. 220; 54 L. T. 520; 2 T. L. R. 351, C. A.

*Annotations*:—*Reid*, *Swain v. Ayres* (1888), 21 Q. B. D. 289. *Mentd.* *Foster v. Reeves* (1892), 57 J. P. 23.

**6360.** —.]—An agreement for a lease is not a lease within Conveyancing Act, 1881 (c. 41), s. 14, & therefore the terms of that sect. do not apply to a mere tenancy under an agreement for a lease, where there is no actual lease in existence, nor any title to specific performance.

*Deft.* in an action for recovery of land was in possession of the premises as tenant under an agreement for a lease, which provided that the lease to be executed thereunder should contain (*inter alia*) a covenant to keep the premises in repair & a condition for re-entry for breach of such covenant. Rent had been paid under the agreement, but no lease had been executed. The premises being out of repair the landlord brought the action to recover them as upon a forfeiture. No notice had been given before action under the above sect.:—*Held*: there being no lease in fact executed or title shown to a decree for specific performance by execution of a lease, the sect. did not apply, & the action was maintainable.

*Qu.*: whether the sect. would have applied, if there had been a right to specific performance.—*SWAIN v. AYRES* (1888), 21 Q. B. D. 289; 57 L. J. Q. B. 428; 36 W. R. 798; 4 T. L. R. 609, C. A.

*Annotations*:—*Consd.* *Strong v. Stringer* (1889), 61 L. T. 470; *Foster v. Reeves*, [1892] 2 Q. B. 255; *Gray v. Snyer*, [1922] 2 Ch. 22. *Reid*, *Lowther v. Heaver* (1889), 41 Ch. D. 248; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608; *Carrington Manufacturing Co. v. Saldin* (1923), 133 L. T. 432. *Mentd.* *Wenman v. Lyon* (1891), 39 W. R. 301.

**6361.** —.]—*STRONG v. STRINGER*, No. 6504, *post*.

*Statutory tenant.*—*See* No. 7243, *post*.

#### iv. Time for Claiming.

**6362.** Not after actual re-entry by lessor.]—A lessee cannot apply under Conveyancing Act, 1881 (c. 41), s. 14, for relief against re-entry or forfeiture after the lessor has actually re-entered.—*ROGERS v. RICE*, [1892] 2 Ch. 170; 61 L. J. Ch. 573; 66 L. T. 640; 40 W. R. 489; 8 T. L. R. 511; 36 Sol. Jo. 445, C. A.

*Annotation*:—*Reid*, *Lock v. Pearce* (1892), 61 L. J. Ch. 606.

**6363.** —.]—*LOCK v. PEARCE*, No. 6332, *ante*.

#### v. How Claimed.

*See, now*, Law of Property Act, 1925 (c. 20), s. 146.

**6364.** By application on lessor's action—Though not claimed in pleadings.]—*MITCHISON v. THOMSON*, No. 6355, *ante*.

**6365.** Application for relief by lessee—Necessity for writ.]—*LOCK v. PEARCE*, No. 6332, *ante*.

**6366.** Application by underlessee—By defence & counterclaim—In lesser's action for possession.]—

By Conveyancing Act, 1892 (c. 13), s. 4, where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant in a lease, the ct. may, on application by any person claiming, as underlessee, any estate or interest in the property "either in the lessor's action or in any action brought by such person for that purpose," make an order vesting for the whole term of the lease or any less term the property comprised in the lease in any person entitled as underlessee upon such conditions as the ct. may think fit:—*Held*: an application by an underlessee for a vesting order under this sect. may be made by defence & counterclaim in the lessor's action for possession.—*SIR ROGER CHOLMELEYS SCHOOL AT HIGHGATE (WARDEN, ETC.) v. SEWELL*, [1893] 2 Q. B. 254; 62 L. J. Q. B. 476; 69 L. T. 118; 57 J. P. 680; 37 Sol. Jo. 602; *sub nom.* *HIGHGATE SCHOOL v. SEWELL*, 41 W. R. 637; 5 R. 501, D. C.

*Rights & liabilities of underlessees.*—*See* Subsect. 4, E., *post*.

#### vi. Terms of Relief.

*See* Subsect. 4, D. (c), *post*.

#### vii. Effect of Relief.

**6367.** Old lease preserved.]—*DENDY v. EVANS*, No. 6235, *ante*.

#### (c) Terms of Relief.

##### i. In General.

*See, now*, Law of Property Act, 1925 (c. 20), s. 146 (2).

**6368.** Application by landlord.]—*WEST v. ROGERS* (1888), 4 T. L. R. 229, D. C.

**6369.** Refusal by lessee to perform conditions—Waiver of right to relief.]—Where an order granting relief against the forfeiture of a lease was expressed to be made upon *defts.* performing certain conditions, & *defts.* having performed part of the conditions declined to perform the remainder & desired to waive the relief:—*Held*: there was no power to compel *defts.* to perform the conditions, & the order for relief must therefore be treated as abandoned.—*TALBOT v. BLINDELL*, [1908] 2 K. B. 114; 77 L. J. K. B. 540; 98 L. T. 859; 24 T. L. R. 477.

**6370.** Refusal to impose terms—No appreciable loss suffered by landlord.]—*ASSOCIATED OMNIBUS CO., LTD. v. IDRIS & CO., LTD.* (1919), 148 L. T. Jo. 157.

##### ii. Remedy for Past Breaches.

*See, now*, Law of Property Act, 1925 (c. 20), s. 146 (2).

**6371.** Covenant to insure—Payment of arrears of insurance & rent.]—Conveyancing Act, 1881 (c. 41), s. 14, which enables the ct. to relieve against forfeiture of a lease on a breach of a covenant by the lessee applies, not only to leases made before Jan. 1, 1881, when the Act came into operation, & breaches of covenant occurring before that date, but also to cases in which an action to recover possession for such a breach has been commenced before that date, even where judgment has been recovered prior to the commencement of the Act, if the lessor has not obtained possession.

A lessee having committed breaches of covenants in his lease in respect of insuring the property, an action to recover possession of the property

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m. *Covenant against waste*—*Restoration of property.*—Where *defts.* had pulled down a wall:—*Held*: what

was done was a breach of the covenant, but relief ought to be granted & the only appropriate relief would be the restoration of the wall within a reasonable time.—*HOLMAN v. KNOX* (1912), 21 O. W. R. 325; 3 O. W. N. 745; 25

O. L. R. 588; 3 D. L. R. 207.—*CAN.*

n. — *Security for reinstatement at end of term.*—*SULLIVAN v. DORE* (1913), 25 O. W. R. 31; 5 O. W. N. 70; 13 D. L. R. 910.—*CAN.*

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demised was brought by the lessor, & at the trial the judge held that deft. was not entitled under the existing statute (Law of Property Amendment Act, 1859 (c. 35)) to relief against forfeiture. Deft. appealed, & before the appeal was finally determined, Conveyancing Act, 1881 (c. 41), came into operation:—*Held*: the ct. had power to relieve deft., & the proper terms to impose were, that deft. should insure to the full amount, pay all insurance moneys & rent in arrear, with interest, & pay rent in advance to the next quarter day, & also all the costs of the action & the appeal.—**QUILTER v. MAPLESON** (1882), 9 Q. B. D. 672; 52 L. J. Q. B. 44; 47 L. T. 561; 47 J. P. 342; 31 W. R. 75, C. A.

**Annotations**:—**Consd.** *Rogers v. Rice*, [1892] 2 Ch. 170; *Matthews v. Smallwood*, [1910] 1 Ch. 777. **Mentd.** *Leeds Bank v. Walker* (1883), 11 Q. B. D. 84; *Re Local Government Act, 1888, & Municipal Elections (Corrupt & Illegal Practices) Act, 1884, Ex p. Thomas* (1889), 60 L. T. 728; *Borthwick v. Elderslie S.S. Co.* (No. 2), [1905] 2 K. B. 516; *Ponnamma v. Arumogam*, [1905] A. C. 383; *West v. Gwynne*, [1911] 2 Ch. 1; *A.-G. v. Birmingham, Tame & Rea District Drainage Board*, [1912] A. C. 788; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Stovin v. Fairbrass* (1919), 88 L. J. K. B. 1004; *Robinson v. R.*, [1921] 3 K. B. 183.

**6372. Covenant to build—Payment of arrears of rent—& fulfilment of covenant.**—**NORTH LONDON FREEHOLD LAND & HOUSE CO. v. JACQUES**, No. 6329, *ante*.

**6373. Covenant to repair—Completion of repair & payment of arrears of rent.**—Relief granted to a lessee against forfeiture for breach of a covenant to keep in repair the demised premises, upon the terms of his executing the repairs under the superintendence of lessor's surveyor, & paying all rent in arrear, costs of action & reasonable costs of surveys.—**BOND v. FREKE**, [1884] W. N. 47; *Bitt Rep.* in Ch. 188.

**6374. ——— Power of court to enlarge time.**—If I am right in thinking that the legislature intended to bring forfeiture for specified causes within the doctrines of equity with regard to forfeiture, I have jurisdiction to grant the extension of time & I am not really deciding an appeal. . . . I must enlarge the time by adding a month from to-day, & appts. must pay the costs (**FARWELL, J.**).—**GAZE v. LONDON DRAPERY STORES, LTD.** (1900), 44 Sol. Jo. 722.

**6375. ——— Alteration of structure—Security for reinstatement at end of term.**—**HYMAN v. ROSE**, No. 6356, *ante*.

**6376. Court cannot sanction continuing breach.**—A public body had had the lease of certain premises assigned to it, & had by inadvertence committed a breach of a covenant in the lease. Judgment for possession had been given against that body. Upon an application under Conveyancing & Law of Property Act, 1881 (c. 41), s. 14 (2), the ct. granted relief upon certain terms, but declined to allow a continuing breach of the covenant as one of the terms of relief.—**BATSON v. LONDON SCHOOL BOARD** (1904), 69 J. P. 9.

**iii. Compensation.**

*See, now, Law of Property Act, 1925 (c. 20), s. 146 (1).*

**6377. General rule.**—(1) The "compensation" for breach of covenant which a lessee is liable to pay under Conveyancing Act, 1881 (c. 41), s. 14, does not include the costs incurred by the lessor in consulting & employing a solr. & surveyor in respect of the preparation of the notice required by that sect.

(2) *Semble*: compensation is to be measured by

the same rule as damages in an action for breach of covenant.—**SKINNERS' CO. v. KNIGHT**, [1891] 2 Q. B. 542; 60 L. J. Q. B. 629; 65 L. T. 240; 56 J. P. 36; 40 W. R. 57; 7 T. L. R. 712, C. A.

**Annotations**:—*As to* (1) *Distd. Bridge v. Quick* (1892), 61 L. J. Q. B. 375. *Expld.* *Nind v. Nineteenth Century Bldg. Soc.*, [1894] 1 Q. B. 472. **Consd.** *Pannell v. City of London Brewery Co.*, [1900] 1 Ch. 496. *Generally, Reft.* *Lock v. Pearce*, [1893] 2 Ch. 271.

**6378. What included—Costs of survey.**—**BOND v. FREKE**, No. 6373, *ante*.

**6379. ———.**—**SKINNERS' CO. v. KNIGHT**, No. 6377, *ante*.

**6380. ———.**—Where in an action for re-entry upon breach of covenant to repair, deft. applies to the ct. for relief under Conveyancing Act, 1881 (c. 41), s. 14 (2), the ct. may, in its discretion, make an order to stay the action upon payment by deft. of pltf.'s costs as between solr. & client, as well as the costs of surveys & schedules of dilapidations.—**BRIDGE v. QUICK** (1892), 61 L. J. Q. B. 375; 67 L. T. 54; 56 J. P. 696, D. C.

**iv. Costs.**

*See, now, Law of Property Act, 1925 (c. 20), s. 146 (3).*

**6381. Liability of party obtaining relief—Vexatious defence.**—The party who is restrained from enforcing the right of forfeiture is *prima facie* entitled to his costs in equity, but they will be refused if he makes a vexatious defence.—**PAGE v. BENNETT** (1860), 2 Giff. 117; 29 L. J. Ch. 398; 2 L. T. 36; 24 J. P. 405; 6 Jur. N. S. 419; 8 W. R. 339; 66 E. R. 50.

**Annotation**:—**Mentd.** *West v. Gwynne*, [1911] 2 Ch. 1.

**6382. ———.**—**QUILTER v. MAPLESON**, No. 6371, *ante*.

**6383. ———.**—**BOND v. FREKE**, No. 6373, *ante*.

**6384. ———.**—**GAZE v. LONDON DRAPERY STORES, LTD.**, No. 6374, *ante*.

**6385. ——— As between solicitor & client.**—**BRIDGE v. QUICK**, No. 6380, *ante*.

**6386. ——— Items unnecessarily incurred.**—The owner of the reversions upon four leases, each comprising a number of houses, brought four actions for the recovery of the houses respectively comprised in each lease, on the ground of forfeiture for breach of covenants to repair contained in the leases. He made defs. in the actions a very large number of persons who respectively occupied the houses as weekly tenants to one H., to whom the leases had been assigned. H. obtained leave to appear & defend the actions; & subsequently having put the houses into a state of repair, he made application in each action for relief against the forfeiture. An order for such relief was made by consent in each action on condition of his paying pltf.'s costs of the action as between solr. & client. On taxation of pltf.'s costs, the master allowed in each action (*inter alia*) items in respect of copies of the writ for service, & service thereof on each of the weekly tenants. On application for a review of taxation, the ct. being of opinion that, under the circumstances, the real object of the actions, namely, to compel the execution of the repairs, might have been attained by one action against H. as sole deft.:—*Held*: the above mentioned items having been unnecessarily incurred, they must be disallowed under R. S. C., Ord. 65, r. 27, sub-r. 20, but H. having consented to an order for relief in each action being made on condition of his paying pltf.'s costs of the action, the ct. could not order that pltf. should only have the costs of one action.—**GEEN v. HERRING**, [1905] 1 K. B. 152; 74 L. J. K. B. 62; 92 L. T. 37; 53 W. R. 326; 21 T. L. R. 93, C. A.

**6387. — Lessor sustaining no damage.]—**  
**ASSOCIATED OMNIBUS CO., LTD. v. IDBIS & CO., LTD.** (1919), 148 L. T. Jo. 157.

(d) *Forfeiture on Assignment or Underletting.*

See, now, Law of Property Act, 1925 (c. 20), s. 146 (8) (i).

**6388. Breach due to mistake—Negligence of solicitors.]—**In a lease for years the lessees covenanted not to underlet the premises, or any part thereof, without the consent in writing of the lessor, which consent the lessor agreed should not be arbitrarily withheld in the case of a respectable or responsible person, & power to re-enter was given to the lessor in case the lessees did not well & truly observe & perform their covenants. The lessees underlet part of the premises without obtaining or asking for the lessor's consent. The underlease was prepared by their solr., who omitted to look at the head lease, & forgot that it contained the covenant not to underlet without consent. Both the lessees & their underlessees were respectable & responsible persons, & no injury was done, or likely to be done, to the lessor by reason of the underlease, nor could he have had any valid objection to it if his consent had been asked. In an action by the lessor to recover possession of the premises for breach of the covenant:—*Held*: the omission to ask the lessor's consent was not a mistake in respect of which the ct. would grant the lessees equitable relief against forfeiture for breach of the covenant, & therefore pltf. was entitled to succeed in the action.—**BARROW v. ISAACS & SON**, [1891] 1 Q. B. 417; 60 L. J. Q. B. 179; 64 L. T. 686; 55 J. P. 517; 30 W. R. 338; 7 T. L. R. 175, C. A.

**Annotations:—***Fold*. **EASTERN TELEGRAPH CO. v. DENT**, [1899] 1 Q. B. 835. *Consd.* **HARMAN v. AINSIE**, [1904] 1 K. J. 698; *Upjohn v. Macfarlane*, [1922] 2 Ch. 256. *Mentd.* **MATTHEWS v. SMALLWOOD**, [1910] 1 Ch. 777; *Ellis v. Allen*, [1914] 1 Ch. 904; *Mills v. Cannon Brewery Co.*, [1920] 2 Ch. 38; *Fuller's Theatre & Vaudeville Co. v. Rofe*, [1923] A. C. 435; *Abrahams v. MacFishes*, [1925] 2 K. B. 18; *Houlder v. Gibbs*, [1925] Ch. 575. *Mentd.* **HOOD v. AVALON v. MACKINNON**, [1909] 1 Ch. 476; *Re Copal Varnish Co.*, [1917] 2 Ch. 349.

**6389. —**—In a lease for years the lessees covenanted not to underlet, assign, or part with the possession of the premises, or any part thereof, without the consent in writing of the lessors, such consent not to be unreasonably withheld. The lease contained a power to re-enter upon breach of any of the covenants. The lessees, without asking for the consent of the lessors, underlet a part of the premises to a tenant who already occupied under the lessors, & to whom no objection could have been reasonably taken. In an action by the lessors to recover possession of the premises for breach of covenant:—*Held*: the fact that the breach of covenant had been committed through forgetfulness, or because the lessees thought it unimportant, did not form a ground for giving them equitable relief against forfeiture for breach of the covenant, & pltf. were entitled to succeed in the action.—**EASTERN TELEGRAPH CO. v. DENT**, [1899] 1 Q. B. 835; 68 L. J. Q. B. 564; 80 L. T. 459; 15 T. L. R. 296; 43 Sol. Jo. 366, C. A.

**Annotations:—***Refd.* **GREVILLE v. PARKER**, [1910] A. C. 335; *De Soysa v. De Pless Pol.*, [1912] A. C. 194; *Fuller's Theatre & Vaudeville Co. v. Rofe*, [1923] A. C. 435; *Abrahams v. MacFishes*, [1925] 2 K. B. 18.

**6390. Assignment for benefit of creditors.]—**

By a lease the lessee covenanted not to assign or underlet the demised premises without the consent of the lessor, & there was a proviso for re-entry on breach of any of the covenants, or if the lessee should (*inter alia*) execute an assignment for the benefit of his creditors. The lessee executed an assignment of all his real & personal property, except that of a leasehold tenure, to a trustee for the benefit of his creditors, & he declared that he would stand possessed of all his leasehold property upon trust for the trustee & to assign & dispose of the same in such manner as the trustee should direct for the purposes of the deed. The trustee entered into possession of the demised premises, but no legal assignment of them was executed. The lessor served upon the trustee a notice alleging as ground of forfeiture the execution by the lessee of the assignment. In an action against the lessee to recover possession of the premises:—*Held*: (1) as there had been no legal assignment of the premises, there had been no breach of the covenant against assignment; (2) the condition against assignment for the benefit of creditors was not a condition against disposing of the land leased within *Conveyancing & Law of Property Act*, 1881 (c. 41), s. 14 (6) (i), & therefore service of notice on the lessee under sect. 14 (1), was necessary before the lessor could enforce his right of re-entry; & service of the notice on the trustee under the deed was not a sufficient compliance with *Conveyancing & Law of Property Act*, 1881 (c. 41), ss. 14 (1), 67 (2).

A condition against the disposing of the land leased within *Conveyancing & Law of Property Act*, 1881 (c. 41), s. 14 (6) (i), means a condition which on its face is against the disposing of the land leased.—**GENTLE v. FAULKNER**, [1900] 2 Q. B. 267; 69 L. J. Q. B. 777; 82 L. T. 708; 16 T. L. R. 397; 44 Sol. Jo. 483, C. A.

**Annotations:—***As to (1)* *Refd.* **MATTHEWS v. USHER** (1900), 69 L. J. Q. B. 856; *Re Masters & G. W. Ry.* (1901), 70 L. J. K. B. 516.

**6391. Adjudication as bankrupt on own petition.]—**

A lease contained a covenant not to assign without licence, & a proviso for re-entry on bkpcy. of the lessee or breach of any covenant. The lessee having been adjudicated bkpt. on his own petition, the lessor purported to determine the lease under the proviso of re-entry, & obtained peaceable possession from the lessee without giving any notice under *Conveyancing Act*, 1881 (c. 41), s. 14:—*Held*: (1) the lessor's re-entry was void as against the lessee's trustee in bkpcy., for the statutory notice was necessary before the lessor could obtain possession either peaceably or by action; (2) the lessee's being adjudicated bkpt. on his own petition did not operate as a breach of his covenant not to assign.—*Re RIGGS, Ex p. LOVELL*, [1901] 2 K. B. 16; 84 L. T. 428; *sub nom. Re RIGGS, Ex p. TRUSTEE*, 70 L. J. K. B. 541; 49 W. R. 624; 45 Sol. Jo. 408; 8 Mans. 233.

**Annotations:—***As to (2)* *Distd.* **COHEN v. POPULAR RESTAURANTS**, [1917] 1 K. B. 480. *Refd.* *Re Cotgrave, Mynor v. Cotgrave*, [1903] 2 Ch. 705.

**6392. Sub-demise to mortgagees.]—SERJEANT v. NASH, FIELD & CO., No. 6419, post.**

**6393. Sharing possession of demised premises.]—***Conveyancing & Law Property Act*, 1881 (c. 41), s. 14 (6), does not include a lessee's covenant against sharing the possession of the demised premises, & a landlord cannot, therefore, enforce his right

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D. (d).

**6390 I. Assignment for benefit of creditors.]—****TREW v. ROUTLEY** (1900), 20 C. L. T. 36; 31 O. R. 358.—CAN.

*o. Proviso must be definite.]—*In a lease there was no express proviso for re-entry, but the lease was stated to be made "subject to the following stipulations." Then followed a number of clauses,

that the lessee should not assign the lease without the consent in writing of the lessor:—*Held*: the words quoted had not the effect of making the succeeding clauses conditions, so as to cause a forfeiture & right of entry

**Sect. 1.—Forfeiture: Sub-sect. 4, D. (d), (e), (f) & (g), & E. (a) i.]**

of re-entry in respect of the breach of such a covenant without serving on the lessee the notice prescribed by sub-sect. 1 of that sect.—**JACKSON v. SIMONS**, [1923] 1 Ch. 373; 92 L. J. Ch. 161; 128 L. T. 572; 39 T. L. R. 147; 67 Sol. Jo. 262.

**Annotations:—***Consd.* **Russell v. Beecham**, [1924] 1 K. B. 525. *Refd.* **Abrahams v. MacFisherles**, [1925] 2 K. B. 18.

**6394. Sub-lease of part of premises.]—***Pltfs.*, in Nov. 1899, demised a house for a term of thirty years. The lease contained a covenant that "the lessee shall not . . . during the last ten years of the term hereby granted, assign or part with his lease or the premises hereby demised or any part thereof without the licence & consent of the" lessors. First deft., who was the assignee of the lease, mortgaged his interest in the premises to second deft. by sub-demise, retaining in himself a few days. The mtge. deed excluded the right of the mtgor. to grant leases in pursuance of the provisions of Conveyancing & Law of Property Act, 1881. Subsequently, in Nov. 1921, first deft. agreed with G., to let to G. some rooms in the house for three years from Sept. 29, 1921, at a specified rent, the tenant to have the option of continuing the tenancy for successive periods of three years so long as the landlord or his assignees should remain lessees of the premises. In Aug. 1922, *pltfs.* brought an action against *defts.* for recovery of possession owing to breach of covenant, the breach alleged being the agreement to sub-let the premises to G.:—*Held*: (**BANKES & ATKIN, L.J.J.**) (1) in view of the ambiguity in the covenant in the lease, in that it did not make it clear beyond any question, that the intention of the parties was that the mere parting with possession of the premises should work a forfeiture, *pltfs.* had failed to show that there had been any breach of the covenant, & therefore the action failed; (**SCRUTTON, L.J.**) (2) the action failed on a different ground, namely, because no notice of the alleged breach of covenant had been served on *defts.* under Conveyancing & Law of Property Act, 1881 (c. 41), s. 14.—**RUSSELL v. BEECHAM**, [1924] 1 K. B. 525; 93 L. J. K. B. 441; 130 L. T. 570; 40 T. L. R. 36; 68 Sol. Jo. 301, C. A.

**Annotations:—***As to* (1) *Consd.* **Abrahams v. MacFisherles**, [1925] 2 K. B. 18. *As to* (2) *N.F.* **Abrahams v. MacFisherles**, [1925] 2 K. B. 18. *Consd.* **Carrington Manufacturing Co. v. Saldin** (1925), 133 L. T. 432.

**6395. —.]—**Where a lease contains a covenant on condition against assigning, transferring, under-letting or parting with the possession of the premises or any part thereof, & where there is a proviso for re-entry or forfeiture for breach of covenant, & the lessee in breach of such covenant does part with possession of part of the premises, the landlord is not required to serve any notice of breach under Conveyancing & Law of Property Act, 1881 (c. 41), s. 14 (1), before enforcing the forfeiture, as such a breach falls within the exceptions set out in sect. 14 (6), no less than if the breach had consisted in parting with possession of the whole of the premises.—**ABRAHAM v. MACFISHERIES, LTD.**, [1925] 2 K. B. 18; 94 L. J. K. B. 502; 133 L. T. 89.

**Annotation:—***Refd.* **Carrington Manufacturing Co. v. Saldin** (1925), 133 L. T. 432.

**(e) Forfeiture on Bankruptcy.**

*See, now, Law of Property Act, 1925 (c. 20), s. 146 (9), (10).*

for their breach; & therefore ejectment would not lie for assigning the lease without the consent of the lessor.—**McINTOSH v. SAMO** (1875), 24 C. P.

**625.—CAN.**

*P. Administratrix of lessee not bound*  
*By proviso for re-entry.*—**LEE v. LORSCH** (1875), 37 U. C. 262.—**CAN.**

**6396. Breaches excluded from relief—Re-entry on bankruptcy.]—**A lease, executed in 1880, of a mill & warehouse, for twenty-one years, contained a covenant by the lessors with the lessees (*inter alia*), that certain articles mentioned in a schedule should be the property of the lessees, & should be removable by them, they making good all damage done by such removal. It was provided (a) that in case (*inter alia*) the lessees should during the term be bkpts., or file a petition in liquidation, the term should cease; (b) that the lessees might by notice determine the term at the end of seven or fourteen years; (c) that on the determination or cesser of the term all the machinery, & also all the buildings erected by the lessees, other than certain specified buildings, should be their property, & should be removed by them previously to the determination or cesser of the term, unless it should be then mutually agreed that the lessors should purchase them, the lessees, in case of removal, to make good all damages which might be caused by such removal. After Bkpcy. Act, 1883 (c. 53), came into operation, the lessees presented a bkpcy. petition, & a receiving order was made:—*Held*: (1) the presentation of the petition caused a forfeiture of the term; (2) notwithstanding the forfeiture, the official receiver was entitled to the articles mentioned in the schedule to the covenant & clause (c) of the proviso as being property of the lessees; (3) Conveyancing Act, 1881 (c. 41), s. 14, had no application.—*Re WALKER, Ex p. GOULD* (1884), 13 Q. B. D. 454; 51 L. T. 368; 1 Morr. 168, D. C.

**Annotation:—***As to* (1) *Refd.* *Re Burden, Ex p. Wood* (1888), 21 Q. B. D. 24.

**6397. — Liquidation of limited company — Not on ground of insolvency.]—****HORSEY ESTATE, LTD. v. STEIGER**, No. 6343, *ante*.

**6398. — — — —.]—**A proviso in a lease for re-entry, if the lessees being a co. should enter into liquidation either compulsory or voluntary, applies to the case of a solvent co. going into voluntary liquidation for the purpose of reconstruction or amalgamation only, & is "a condition for forfeiture on the bkpcy. of the lessee" within Conveyancing & Law of Property Act, 1881 (c. 41), s. 14 (6).—**FRYER v. EWART**, [1902] A. C. 187; 71 L. J. Ch. 433; 9 Mans. 281; *sub nom.* **WATNEY, COMBE, REID & CO. v. EWART**, 86 L. T. 242; 18 T. L. R. 426, H. L.; *affg.* S. C. *sub nom.* **EWART v. FRYER**, [1901] 1 Ch. 499, C. A.

**Annotations:—***Refd.* **Hurd v. Whalley** (1918), 118 L. T. 593; *Civil Service Co-Op. Soc. v. McGrigor's Trustee*, [1923] 2 Ch. 347.

**6399. — — — Contract for sale within one year—Must be absolute.]—**The B. co., *defts.*, were mtgees. in possession of the freehold of certain premises leased to the C. co. This co. went into liquidation, & thereby incurred a forfeiture for breach of a covenant in their leases against bkpcy. The receiver appointed by the C. co., to enable him to take advantage of the provision for relief against such a forfeiture under Conveyancing Act, 1881 (c. 41), s. 14 (1), (6), Conveyancing Act, 1892 (c. 13), s. 2 (2), entered into a contract for sale within one year from the date of the co. going into liquidation, but such contract was conditional only & entered into solely for the purpose of obtaining the benefit of the provisions in the Acts. On a motion in the action by the B. co. for possession of the premises for the forfeiture:—

**PART XXIV. SECT. 1, SUB-SECT. 4.—D. (e).**

*q. Petition for arrangement.]—*The lessee having presented to the Ct.

*Held*: there was no sale within the meaning of s. 2 (2) of the 1892 Act.

To come within the provisions of that sect. & sub-sect. a sale must be completed by conveyance, or the contract entered into must be an absolute contract for sale.—*Re CASTLE (HENRY) & SONS, LTD., MITCHELL v. CASTLE (HENRY) & SONS, LTD.* (1906), 94 L. T. 396; 50 Sol. Jo. 240.

(f) *Forfeiture on Taking into Execution Lessee's Interest.*

See Law of Property Act, 1925 (c. 20), s. 146 (9), (10).

(g) *Rights and Liabilities of Underlessees.*

See Sub-sect. 4, E., *post*.

E. *Rights and Liabilities of Underlessees.*

(a) *Breach of Covenant for Payment of Rent.*

i. *In General.*

See, now, Law of Property Act, 1925 (c. 20), s. 146.

**6400. Relief claimed by one of several underlessees—Liability of claimant for whole rent—Apportionment as between other underlessees.**—One makes a lease, & the lessee covenants to pay the rent & to repair. The lessee makes one hundred underlessees. The rent is behind, & the premises out of repair; the original lease is avoided for non-payment of rent. Some of the underlessees bring a bill to be relieved against the forfeiture. Equity will not apportion the rent; but plffs. must pay the whole rent in arrear; & repair all the houses, & may compel the other underlessees to contribute.—*WEBBER v. SMITH* (1689), 2 Vern. 103; 23 E. R. 676.

*Annotations*:—*Reid*, Hill v. Barclay (1810), 16 Ves. 402; *Bracebridge v. Buckley* (1816), 2 Price, 200; *Hare v. Elms*, [1893] 1 Q. B. 604.

**6401. Right to relief—Landlord & Tenants Act, 1730 (c. 28), s. 4.**—In ejectment upon a forfeiture for non-payment of rent, a sub-lessee is entitled to a stay of proceedings on payment of the rent & costs, under the above sect.—*DOE d. WYATT v. BYRON* (1845), 1 C. B. 623; 3 Dow. & L. 31; 14 L. J. C. P. 207; 5 L. T. O. S. 128; 135 E. R. 685.

*Annotations*:—*Reid*, *Hare v. Elms*, [1893] 1 Q. B. 604; *Moore v. Smee & Cornish*, [1907] 2 K. B. 8; *Dendy v. Evans*, [1910] 1 K. B. 263.

**6402. — Conveyancing Act, 1892 (c. 13), s. 4.**

—The above sect. is not a mere amendment of Conveyancing & Law of Property Act, 1881 (c. 41), s. 14, extending the provisions of that sect. to underlessees, but an independent provision for affording relief to underlessees against forfeiture for breach of any covenant in the head lease, & therefore relief can be given under the sect. to an underlessee against a forfeiture of the head lease for non-payment of rent.—*GRAY v. BONSALE*, [1904] 1 K. B. 601; 73 L. J. K. B. 515; 90 L. T. 404; 52 W. R. 387; 20 T. L. R. 335; 48 Sol. Jo. 310, C. A.

*Annotations*:—*Reid*, *West v. Gwynne* (1911), 80 L. J. Ch. 578; *Hurd v. Whaley*, [1918] 1 K. B. 448.

**6403. Who entitled—Mortgage by sub-lessee.**—By C. L. P. Act, 1860 (c. 126), s. 1, it is enacted that "in the case of any ejectment for a forfeiture brought for non-payment of rent, the ct. or judge shall have power, upon rule or summons, to give relief in a summary manner up to & within the like time after execution executed & subject to

the same terms & conditions in all respects, as to payment of rent, costs, & otherwise, as in the Ct. of Ch., & if the lessee, his exors., administrators, or assigns, shall upon such proceedings be relieved, he & they shall hold the demised lands according to the lease thereof made, without any new lease:—*Held*: after judgment & execution, no relief could be given to an assignee of the lease, an underlessee or a mtgee., or any other person interested in the lease, unless the original lessee was made a party to the application, or good ground shown for omitting to do so.—*HARE v. ELMS*, [1893] 1 Q. B. 604; 62 L. J. Q. B. 187; 68 L. T. 223; 57 J. P. 309; 41 W. R. 297; 37 Sol. Jo. 214; 5 R. 189, D. C.

*Annotations*:—*Distd.* *Humphreys v. Morten*, [1905] 1 Ch. 739. *Reid*, *Howard v. Fanshawe*, [1895] 2 Ch. 581; *Dendy v. Evans*, [1910] 1 K. B. 263.

**6404. — — — — —**—*J*—By C. L. P. Act, 1852 (c. 76), s. 210, the proceedings in ejectment for non-payment of rent under that sect. are subject to the following proviso: "Provided that nothing herein contained shall extend to bar the right of any mtgee. of such lease, or any part thereof who shall not be in possession, so as such mtgee. shall & do, within six months after such judgment obtained & execution executed, pay all rent in arrear, & all costs & damages sustained by such lessor . . . & perform all the covenants & agreements which on the part & behalf of the lessee are & ought to be performed":—*Held*: a mtgee. of a lease by sub-demise was, according to the settled practice in equity, entitled to relief upon the terms of the above proviso, unless a right in some third party had accrued between the date of the judgment & the application for relief.—*NEWBOLT v. BINGHAM* (1895), 72 L. T. 852; 14 R. 526, C. A.

*Annotation*:—*Consd.* *Humphreys v. Morten*, [1905] 1 Ch. 739.

**6405. — Tenant in possession.**—On an application under C. L. P. Act, 1852 (c. 76), s. 212, for relief against forfeiture of a head lease for non-payment of rent by an underlessee, it is not necessary for the applicant to prove his title as underlessee or assignee of the original lessee; the fact that the applicant is "tenant" in possession is sufficient.—*MOORE v. SMEE & CORNISH*, [1907] 2 K. B. 8; 76 L. J. K. B. 658; 96 L. T. 594, C. A.

**6406. Who must be party—Original lessee—Unless good cause shown.**—*HARE v. ELMS*, No. 6403. *ante*.

**6407. — — — — —**—*J*—A lessor having ejected an underlessee for non-payment of ground rent, mtgees. by sub-demise of the underlease applied for relief under the ordinary equitable jurisdiction & C. L. P. Acts, claiming a direct lease for their mtge. term, on the usual conditions. The lessor opposed the application on the ground that the lessee & the assignee of the head lease were not parties, & on other grounds which failed. It appeared that the lease had been assigned by the lessee's trustee in bkpy. twenty-seven years ago, & that the assignee had not been heard of for twenty-six years, & could not be traced:—*Held*: (1) the above circumstances afforded sufficient reason for not making the lessee & assignee parties as *prima facie* required, & the mtgees. were entitled to the relief claimed; (2) the mtgees. must pay the costs of the action, except so far as they had been increased by the lessor resisting their claim to relief, which increased costs must be paid by the lessor.—*HUMPHREYS v. MORTEN*, [1905] 1 Ch.

of Bkpy. a petition for arrangement:—*Held*: there was a forfeiture of the lease.—*KILKENNY GAS CO. v. SOMERVILLE* (1878), 2 L. R. Ir. 192.—*IR.*

PART XXIV. SECT. 1, SUB-SECT. 4.—  
E. (a) 1.

**64051. Who entitled—Tenant in possession.**—*SHINE v. GOUGH* (1811), 1

Ball & B. 436.—*IR.*

*r. Who must be party—Original lessee.*—*ADAMS v. ST. LEGER* (1809), 1 Ball & B. 181.—*IR.*

**Sect. 1.—Forfeiture: Sub-sect. 4, E. (a) i. & ii., (b) i. & ii.]**

739; 74 L. J. Ch. 370; 92 L. T. 834; 53 W. R. 552.

**6408. Costs—Paid by applicant—Except so far as increased by resistance to relief.]—HUMPHREYS v. MORTEN, No. 6407, ante.**  
Compare No. 6311, ante.

ii. *Terms of Relief.*

**6409. Whether rent increased.]—CHOLMELEY SCHOOL, HIGHGATE (WARDENS, ETC.) v. SEWELL, No. 6420, post.**

**6410. Power of court to vary rent.]—**In granting relief under s. 4 of Conveyancing & Law of Property Act, 1892 (c. 13), to an underlessee against the forfeiture of the head lease the Court has, under that section, the most ample discretion in fixing the terms, covenants & conditions as to rent & otherwise, of the new lease vesting in the underlessee the property, or any part thereof comprised in the headlease—a discretion which is to be exercised having regard to all the circumstances of the case, including the circumstance that the forfeiture has operated to vest in the original lessor the whole of the rights in the demised premises, unfettered by any limitation except that contained in the latter part of the sect., namely, that the underlessee shall not be entitled to require a lease for a longer term than he had under his original sub-lease.

A lease of a tavern was granted to a limited brewery co. for a term of thirty years at a yearly rent of £300 with a condition for re-entry if the lessees "should enter into liquidation either compulsory or voluntary." On the same day the co. granted an underlease of the tavern to a publican for a term of twenty-nine & a quarter years at a yearly rent of £800 reducible to £300 so long as he got his beer from the co. Subsequently the co. which was perfectly solvent went into voluntary liquidation for the sole purpose of amalgamation with two other solvent brewery cos., so as to form one new brewery co., & assigned the original lease to that new co. Thereupon the original lessor, claiming that the voluntary liquidation of the original lease co. had occasioned a forfeiture of the lease, brought an action against the underlessee & the new co. to recover possession of the tavern. The underlessee then counterclaimed under s. 4 of Conveyancing & Law of Property Act, 1892 (c. 13), for relief against the forfeiture (if any) & insisted that the rent to be payable under any new lease which might be granted to him under the sect. should be no larger than that fixed by his original underlease:—*Held*: the voluntary liquidation of the lessee co. had occasioned a forfeiture of the original lease, & the ct. in fixing the terms of the new lease to be granted to the underlessee under s. 4, had power to vary the rent which had been reserved by the original underlease having regard to the circumstances that the tavern by reason of the forfeiture of the original lease & the consequent destruction of the underlease had ceased to be a tied house.—**EWART v. FRYER**, [1901] 1 Ch. 499; 70 L. J. Ch. 138; 83 L. T. 551; 49 W. R. 145; 17 T. L. R. 145; 45 Sol. Jo. 115, C. A.; *affd. sub nom.* **FRYER v. EWART**, [1902] A. C. 187, H. L.

*Annotations*:—**Refd.** **Hurd v. Whaley** (1918), 118 L. T. 593; **Civil Service Co-Op. Soc. v. McGrigor's Trustee**, [1923] 2 Ch. 347.

**PART XXIV. SECT. 1, SUB-SECT. 4.—**

E. (a) ii.

i. *Relief apportioned.]—CROOKS v. DICKSON* (1864), 15 C. P. 23.—**CAN.**

**PART XXIV. SECT. 1, SUB-SECT. 4.—**

E. (b) i.

a. *Breach by under lessor—No*

**6411. —.]—**By a lease dated June 22, 1896, plff. co. demised unto S. T. & C. T. the ground floor & basements of R. for a term of twenty-one years at a rent of £300 for the first three years & thereafter at a rent of £350. By an underlease, dated Dec. 31, 1896, S. T. & C. T. demised unto O. a part of the ground floor of R. for the term of twenty-one years, except the three last days thereof, at a rent of £125. Forfeiture of the lease of June 22, 1896, having occurred by reason of the non-payment of rent, on Sept. 9, 1902, plff. co. instituted an action to recover possession of the premises demised by them to S. T. & C. T. & for £226 being arrears of rent up to June 24, 1902, & for further proportionate rent from June 24, 1902, until payment. The action was brought against all persons then interested in the premises, & on Jan. 7 & Jan. 15, 1903, judgment was recovered against all defts. except C. C. by his defence & counterclaim delivered Jan. 13, 1903, denied that under the lease of the June 22, 1896, any cause of forfeiture had arisen, & claimed an order under s. 4 of Conveyancing & Law of Property Act, 1892 (c. 13), vesting in him the premises comprised in the underlease of Dec. 31, 1896, for the whole of the term thereby created. It was admitted by C. at the trial that cause of forfeiture had, in fact, arisen under the lease of June 22, 1896. The ct. granted the order as claimed by C. but upon the terms that he should pay all arrears of rent due from S. T. & C. T. to plff. co. down to Jan. 15, 1903, & the costs of the present proceedings, & that as from Jan. 15, 1903, he should pay a fair rent to be ascertained.—**LONDON BRIDGE BUILDINGS Co. v. THOMSON** (1903), 89 L. T. 50.

*Annotation*:—**Refd.** **Hurd v. Whaley** (1918), 118 L. T. 593.

**6412. Costs—Enquiry to determine fair rent.]—**Where a lease became forfeited by virtue of a proviso contained therein, & the ct., acting under Conveyancing & Law of Property Act, 1892 (c. 13), s. 4, made an order vesting the property in the underlessee, the underlessee was ordered to pay the costs of the inquiry that was necessary to determine the new rent.—**EWART v. FRYER** (1902), 86 L. T. 676; 18 T. L. R. 590; 46 Sol. Jo. 485.

(b) *Breaches of Covenant Other than for Payment of Rent.*

i. *In General.*

*See, now, Law of Property Act, 1925 (c. 20), s. 146 (4).*

Underleases generally, *see* Part IV., ante.

**6413. General rule.]—**It is a rule of law that if there is a lessee & he has created an underlease, or any other legal interest, if the lease is forfeited, then the underlessee, or the person who claims under the lessee, loses his estate as well as the lessee himself; but if the lessee surrenders he cannot, by his own voluntary act in surrendering, prejudice the estate of the underlessee, or the person who claims under him (**MELLISH, L.J.**).—**GREAT WESTERN RY. Co. v. SMITH** (1876), 2 Ch. D. 235; 45 L. J. Ch. 235; 34 L. T. 267; 40 J. P. 469; 24 W. R. 443, C. A.; *affd. sub nom.* **SMITH v. GREAT WESTERN RY. Co.** (1877), 3 App. Cas. 165, H. L.

*Annotations*:—**Consd.** **Parker v. Jones**, [1910] 2 K. B. 32. **Mentd.** **Dixon v. Cale. & G. & S. W. Rys.** (1880), 5 App. Cas. 820; **Consett Waterworks Co. v. Riton** (1888), 22 Q. B. D. 318; **Holliday v. Wakefield Corp.**, [1891] A. C. 81; **R. v. L. & N. W. Ry.**, [1894] 2 Q. B. 612; **G. N. Ry. v. I. R. Comrs.**, [1899] 2 Q. B. 652; **Bwilla & Merthyr**

*effect on under lessee—Unless head lessor acts on it.]—*It is no defence that plff. is himself the lessee of the premises under a lease which he has for-

Dare Steam Collieries (1891), Ltd. v. Pontypridd Waterworks Co., [1903] A. C. 426; Manchester Corp'n. v. New Moss Colliery, [1906] 1 Ch. 278; Eden v. N. E. Ry., [1907] A. C. 400; L. & N. W. Ry. v. Howley Park Coal & Cannel Co., [1911] 2 Ch. 97.

**6414. Who are underlessees—Trustees of unregistered society—Lease held by member of society.]**—A member of an unregistered society, but on behalf of the society, executed & purported to take an underlease made to the society as underlessee. On the head lease being forfeited for breach of covenant, the trustees of the society, suing on behalf of the members, brought an action for an order vesting the residue of the term of the underlease in them under Conveyancing Act, 1892 (c. 13), s. 4:—*Held*: plffs. were not underlessees within the meaning of the sect. & were not entitled to sue as trustees or at all.—*JARROTT v. ACKERLEY* (1915), 85 L. J. Ch. 135; 113 L. T. 371; 59 Sol. Jo. 509.

**6415. Two properties in head lease—Underlease of one—Re-entry in respect of breach on other.]**—If a lessee for a term of years underlet for a less term, & the underlessee sell by auction the lesser term describing it as a lease, & one of the conditions of sale, is, that the lessor's title shall not be inquired into; the vendor's title being good:—*qu.*: whether the purchaser can refuse to complete because there is a term interposed between the vendor's interest & the freehold. But, in such a case, where the property was included in the original lease, together with other hereditaments, subject to general covenants, & a power of re-entry for breach of any of them, & the purchaser had discovered these facts *aliunde*:—*Held*: he was entitled to refuse to perform his contract, notwithstanding that the original lease contained provisions for the apportionment of the rent, & of the power of re-entry.—*DARLINGTON v. HAMILTON* (1854), Kay, 550; 2 Eq. Rep. 908; 23 L. J. Ch. 1000; 24 L. T. O. S. 33; 69 E. R. 233.

*Annotations*:—*Apld.* Cresswell v. Davidson (1887), 56 L. T. 811; *Re* Lloyds Bank & Lillingston's Contract, [1912] 1 Ch. 601. *Reid.* Waddell v. Wolfe (1874), L. R. 9 Q. B. 515; Camberwell & South London Bldg. Soc. v. Holloway (1879), 13 Ch. D. 754; *Re* National Provincial Bank of England & Marsh, [1895] 1 Ch. 190; *Hurd v. Whaley* (1918), 118 L. T. 593. *Mentd.* Best v. Hamand (1879), 12 Ch. D. 1.

**6416. ——— Conveyancing & Law of Property Act, 1881 (c. 41), s. 14.]**—The doctrine established by the case of *Darlington v. Hamilton*, No. 6415, *ante*—namely, that where two houses are comprised in one lease, & subject to covenants common to both, an underlessee of one house is liable to have his underlease determined by re-entry by the original lessor for breach of any covenant relating to the other house—still prevails, & is not affected by the above sect., which merely protects a lessee or underlessee against re-entry or forfeiture by giving him an opportunity of making good any breach of covenant.—*CRESSWELL v. DAVIDSON* (1887), 56 L. T. 811.

*Annotations*:—*Apld.* Burt v. Gray, [1891] 2 Q. B. 98. *Consd.* Cholmeley School, Highgate v. Sewell, [1894] 2 Q. B. 906. *Apprvd.* Nind v. Nineteenth Century Bldg. Soc., [1894] 2 Q. B. 226. *Apld.* *Re* Lloyds Bank & Lillingston's Contract, [1912] 1 Ch. 601. *Reid.* *Hurd v. Whaley* (1918), 118 L. T. 593.

**6417. ——— ——— ———.]**—The provisions of Conveyancing & Law of Property Act, 1881 (c. 41), s. 14, enabling the ct. to grant relief to lessees against forfeiture for breach of covenant, do not enable an underlessee of a part of the demised premises to obtain relief for breach of a covenant to repair contained in the head lease.—*BURT v.*

*GRAY*, [1891] 2 Q. B. 98; 60 L. J. Q. B. 604; 65 L. T. 229; 39 W. R. 429, D. C.

*Annotations*:—*Consd.* Cholmeley School, Highgate v. Sewell, [1894] 2 Q. B. 906. *Apprvd.* Nind v. Nineteenth Century Bldg. Soc., [1894] 2 Q. B. 226.

**6418. Breach by head lessee—Similar breach by underlessee.]**—*HURD v. WHALEY*, No. 6342, *ante*.

## ii. Terms of Relief.

*See, now*, Law of Property Act, 1925 (c. 20), s. 146.

**6419. Discretion of court—Power to fix new terms—Creation of new interest.]**—The lessee of premises created a yearly tenancy under which the plff. became tenant & occupier of the premises. On the same day the lessee mortgaged the premises by way of sub-demise without obtaining the permission of the lessor. The lease contained a covenant not to assign, underlet, or part with the possession of the premises without the consent in writing of the lessor, & a clause providing for re-entry upon breach of any of the covenants. The lessee, who had been adjudicated bkpt., failing to pay the interest, the mtgees. appointed a receiver, to whom plff. paid a quarter's rent due at the following Midsummer. Before the next quarterly rent became due the lessor issued a writ to recover possession of the premises; but the writ, which was served on plff. (as occupier) & others, did not contain a statement of the ground of forfeiture. Plff., after appearance in that action, but before delivery of statement of claim specifying the cause of forfeiture, paid the rent falling due at Michaelmas to the receiver. He refused to pay the rent falling due at Christmas, & the receiver, under the powers given by Conveyancing Act, 1881 (c. 41), distrained. In an action by plff. against the receiver for a wrongful distress:—*Held*: (1) the sub-demise to the mtgees., without the consent of the lessor, constituted a breach of the covenant as to assignment; (2) the issue & service of the writ to recover possession of the premises, operated as a final election by the lessor to determine the term, & to have that effect it was not necessary that the actual ground of forfeiture should be stated; with the determination of the term the right of the mtgees. to recover rent from plff. came to an end; & the distress was in consequence illegal.

Our attention has been called to s. 4 of Conveyancing Act, 1892, as indicting that the mere commencement of an action does not put an end to the provisions of an underlease. That sect., however, simply provides that a person claiming as underlessee may come forward & ask the ct. to make an order vesting the property in him. The estate or interest vested under such an order would seem to be a new estate or interest, for the ct. may impose conditions as to the execution of any deed or document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise, showing that there is not an affirmation of the former estate or interest of the applicant, but a new estate or interest subject to new conditions (*STIRLING, L.J.*).—*SERJEANT v. NASH, FIELD & Co.*, [1903] 2 K. B. 304; 72 L. J. K. B. 630; 89 L. T. 112; 19 T. L. R. 510.

*Annotation*:—*As to* (2) *Apld.* Works Comrs. v. Hull, [1922] 1 K. B. 205.

**6420. Covenants of head lease—Inserted in new lease.]**—Conveyancing & Law of Property Act, 1881 (c. 41), s. 14, gives the ct. power, upon terms to grant relief to a lessee against forfeiture, but

feited by breach of covenant in sub-  
letting to deflt., there being no aver-

ment that plff.'s lessor had taken any  
advantage of the forfeiture.—*HENDER-*

*SON v. TORRANCE* (1846), 2 U. C. R.  
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this power does not extend to (amongst other things) a forfeiture on the bkpcy. of the lessee; & Conveyancing & Law of Property Act, 1892 (c. 13), s. 4, gives the ct. a similar power to relieve underlessees against forfeiture:—*Held*: the ct. had jurisdiction, under s. 4 of the Act of 1892, to grant relief to an underlessee for an act of forfeiture committed by the lessee, although the forfeiture be such that the lessee himself would have been precluded from all relief under s. 14 of the Act of 1881.

Accordingly, where a lessee leased to an underlessee & afterwards became bkpt., thereby incurring a forfeiture under the original lease, it was held that, although the lessee by his bkpcy. would have been shut out from all relief, the ct. had power to give relief to the underlessee, & did so on the terms that he should personally enter into the same covenants with the lessor, & pay the same rent as the lessee, but that he should not be required to pay the increased rent which it was alleged the premises were worth.—*CHOLMELEY SCHOOL, HIGHGATE (WARDENS, ETC.) v. SEWELL*, [1894] 2 Q. B. 906; 71 L. T. 88; 58 J. P. 591; 10 R. 368; *sub nom.* CHOLMELEY SCHOOL (WARDENS) *v.* SEWELL, 63 L. J. Q. B. 820; *sub nom.* CHOLMELEY SCHOOL, HIGHGATE (WARDENS, ETC.) *v.* NICHOLSON, 10 T. L. R. 509.

*Annotations*:—*Apprvd.* Imray v. Oakshotte, [1897] 2 Q. B. 218. *Consd.* Ewart v. Fryer, [1901] 1 Ch. 499. *Refd.* West v. Gwynne (1911), 80 L. J. Ch. 578.

**6421. Costs—Preparation of schedule of defects.]**—An underlessee is not, as between himself & the original lessor, a lessee within Conveyancing & Law of Property Act, 1892 (c. 13), s. 2 (1), & therefore such lessor cannot recover from him the costs & expenses mentioned in that sub-sect.—*NIND v. NINETEENTH CENTURY BUILDING SOCIETY*, [1894] 2 Q. B. 226; 63 L. J. Q. B. 636; 70 L. T. 831; 58 J. P. 732; 42 W. R. 481; 10 T. L. R. 449; 38 Sol. Jo. 436; 9 R. 468, C. A.

*Annotations*:—*Refd.* Cholmeley School, Highgate *v.* Sewell [1894] 2 Q. B. 906; Dendy v. Evans, [1910] 1 K. B. 263.

**6422. — Paid by underlessor as term of relief.]**

—One T. as lessor under a lease dated 1855, brought an action for possession, rent, & for damages for breach of a lessee's covenant to repair against pltf. in respect of a number of houses. By a sub-lease granted in 1887 pltf. sub-let two of the houses to deft. The covenant to repair ran in the same terms as that in the head lease. In both lease & sub-lease a three months' notice to repair was provided for, which, if not complied with, worked a forfeiture. There was no covenant in the sub-lease of indemnity against the covenants in the head lease nor was there any covenant to perform the covenants in the head lease. Notice to repair was given by the superior landlord to pltf., & pltf. served a similar notice to repair on deft. There was an admitted default. The notices were not complied with, & T., the head landlord, brought his action. The repairs were executed, & pltf. subsequently obtained an order to which deft. was not a party, for relief against forfeiture on payment of fifteen guineas for rent, & on payment of costs as between solr. & client, without prejudice to any claim by pltf. against deft. —*Held*: these costs so paid by pltf. were not recoverable as against deft.—*CLARE v. DOBSON*, [1911] 1 K. B. 35; 80 L. J. K. B. 158; 103 L. T. 506; 27 T. L. R. 22.

*iii. Forfeiture on Assignment and Underletting.*

*See, now, Law of Property Act, 1925 (c. 20), s. 146.*

**6423. Discretion of court—Lessee precluded from relief—Bankruptcy.]**—*CHOLMELEY SCHOOL, HIGHGATE (WARDENS, ETC.) v. SEWELL*, No. 6420, *ante*.

**6424. — Negligence of underlessee.]**—The ct. has jurisdiction under Conveyancing Act, 1892 (c. 13), to relieve an underlessee against a forfeiture of the original lease, though such forfeiture was occasioned by breach of a covenant not to assign or underlet without licence, & therefore could not be relieved against in favour of the lessee under Conveyancing Act, 1881 (c. 41), with which the later Act is to be read together. This jurisdiction, however, will be exercised with caution & sparingly, & the underlessee asking for its exercise must show that he is blameless, & has taken all precautions which a reasonably cautious & careful person would use. Where, therefore, L. purchased an underlease under a contract which did not give him a right to call for the title of the original lessee, who was bound by covenant not to assign or underlet without licence, & he purchased with the intention of laying out a considerable sum upon the property:—*Held*: L. had been guilty of negligence in entering into such a contract, that he was precluded from properly investigating the title, & relief against a forfeiture by the original lessee for breach of the covenant ought not to be granted to him.—*IMRAY v. OAKSHETTE*, [1897] 2 Q. B. 218; 66 L. J. Q. B. 544; 76 L. T. 632; 45 W. R. 681; 13 T. L. R. 411; 41 Sol. Jo. 528, C. A.

*Annotations*:—*Consd.* Ewart v. Fryer, [1901] 1 Ch. 499; Gray v. Bonsal, [1904] 1 K. B. 601. *Fold.* Matthews v. Smallwood, [1910] 1 Ch. 777. *Consd. & Distd.* Hurd v. Whaley, [1918] 1 K. B. 448. *Apld.* Dick v. Jacques (1920), 36 T. L. R. 773. *Refd.* West v. Gwynne (1911), 80 L. J. Ch. 578.

**6425. — —.]**—(1) A right to re-enter under a lease is not waived by the lessor, unless, knowing the facts on which the right arises, he does something unequivocal which recognises the continuance of the lease.

(2) The question whether there has been a waiver in such a case is one of law, & the *onus* is on the lessee to adduce some evidence of the lessor's knowledge, & proof of an act showing recognition of the tenancy does not throw the *onus* of proving want of knowledge on the lessor.

(3) Property held under a lease which contained a covenant against underletting without the consent of the lessor, & a clause of forfeiture in case of any breach of covenant, was mortgaged by sub-demise to the trustees of a co.'s debenture stock deed. The deed comprised a number of other properties. The trustees made no inquiry as to whether the lessor's consent was necessary to the sub-demise:—*Held*: the trustees had been guilty of negligence, & the ct. was precluded from giving them, under Conveyancing & Law of Property Act, 1892 (c. 13), s. 4, relief against the forfeiture.—*MATTHEWS v. SMALLWOOD, SMALLWOOD v. MATTHEWS*, [1910] 1 Ch. 777; 79 L. J. Ch. 322; 102 L. T. 228.

*Annotations*:—*As to* (1) *Apld.* Davenport v. Smith, [1921] 2 Ch. 270. *Apprvd.* Fuller's Theatre & Vaudeville Co. v. Rofe, [1923] A. C. 435. *Refd.* Samuel v. Dumas, [1924] A. C. 431. *As to* (2) *Refd.* Atkin v. Rose, [1923] 1 Ch. 522. *As to* (3) *Consd.* Hurd v. Whaley, [1918] 1 K. B. 448. *Refd.* Atkin v. Rose, [1923] 1 Ch. 522.

**6426. — Breach knowingly committed.]**—*Held*: as deft. C. was guilty of a deliberate breach of the covenant by underletting to G. he was not entitled to the protection afforded to an underlessee by Conveyancing & Law of Property Act, 1892 (c. 13), s. 4.—*ATKIN v. ROSE*, [1923] 1 Ch. 522; 92 L. J. Ch. 209; 128 L. T. 653; 67 Sol. Jo. 350.

## SUB-SECT. 5.—WAIVER OF FORFEITURE.

## A. What Amounts to Waiver.

## (a) In General.

See Law of Property Act, 1925 (c. 20), s. 148.

**6427. Act recognising tenancy—After knowledge of forfeiture.**—If a lessor receive rent arrear by any act affirming the lessee's possession, it bars his right of re-entry for non-payment on the day it was due.

But a distress for the rent, or a receipt of the rent due at another day, is a bar, for those acts do affirm the lessee to have lawful possession (*per Cur.*).—*GREEN'S CASE* (1582), *Cro. Eliz.* 3; 78 E. R. 269.

*Annotations*:—*Consd.* *Doe d. Nash v. Birch* (1836), 1 M. & W. 402; *Croft v. Lumley* (1858), 6 H. L. Cas. 672. *Apld.* *Ward v. Day* (1864), 5 B. & S. 359. *Refd.* *Dendy v. Nicholl* (1858), 6 W. R. 502. *Mentd.* *Smith v. Arden* (1801), *Cro. Eliz.* 826; *Blyth v. Dennett* (1853), 13 C. B. 178.

**6428.** ———.]—(1) When a landlord, after a forfeiture has come to his knowledge, does anything whereby he recognises the relation of landlord & tenant as still existing, he is precluded from saying he did not do the act with the intention of waiving the forfeiture (*COCKBURN, C.J.*).

(2) In *Jones v. Carter*, No. 6242, *ante*, LORD WENSLEYDALE quotes cases showing it to be well settled law, that though the lease is declared to be void for breach of covenant, the true construction of the proviso is that it is void at the option of the lessor (*BLACKBURN, J.*).—*TOLEMAN v. PORTBURY* (1871), L. R. 6 Q. B. 245; 40 L. J. Q. B. 125; 24 L. T. 24; 19 W. R. 623; *affd.* (1872), L. R. 7 Q. B. 344, *Ex. Ch.*

*Annotations*:—*As to* (1) *Consd.* *Evans v. Wyatt* (1880), 43 L. T. 176. *Refd.* *Evans v. Davis* (1878), 10 Ch. D. 747; *Evans v. Enever*, [1920] 2 K. B. 315. *As to* (2) *Refd.* *Re Morrish, Ex p. Hart Dyke* (1882), 22 Ch. D. 410; *Serjeant v. Nash, Field*, [1903] 2 K. B. 304.

**6429.** ———.]—A building agreement between a landowner & a builder contained a stipulation that the landowner, upon the default of the builder in fulfilling his part of the agreement, might re-enter upon the land & expel the builder, & that on such re-entry all the materials then in & about the premises should be forfeited to & become the property of the landowner "as & for liquidated damages."

*Semble*: if the ground of forfeiture was the omission of the builder to complete the buildings on the day appointed by the agreement, & the landowner had after that day made advances of money to the builder for the purposes of the agreement, or had in any other way treated the agreement as still subsisting, he would have waived the forfeiture.—*Re GARRUD, Ex p. NEWITT* (1881), 16 Ch. D. 522; 51 L. J. Ch. 381; 44 L. T. 5; 29 W. R. 344, C. A.

*Annotations*:—*Mentd.* *Reeves v. Barlow* (1883), 11 Q. B. D. 610; *Climpson v. Coles* (1889), 23 Q. B. D. 465; *Church v. Sage* (1892), 67 L. T. 800; *Marshall v. Mackintosh* (1898), 78 L. T. 750.

**6430.** ———.]—*MATTHEWS v. SMALLWOOD, SMALLWOOD v. MATTHEWS*, No. 6425, *ante*.

**6431.** ———.]—*DAVENPORT v. SMITH*, No. 6336, *ante*.

**6432. Necessity for positive acts—Sufficiency of acquiescence or standing by.**—If a lessee exercise a trade on the demised premises, by which his lease is forfeited, the landlord does not, by merely lying by, & witnessing the act for six years, waive the forfeiture. Some positive act of waiver, as receipt of rent, is necessary. But if he permits the tenant to expend money in improvements:—*Semble*: that is evidence to be left to a jury of his consent to the alteration of the premises.

Forfeitures of lease stand on the same ground with forfeitures of copyholds; & there are a great many cases in the old books, where it is held, that a mere knowledge & acquiescence in an act constituting a forfeiture, does not amount to a waiver; there must be some act affirming the tenancy (*HEATH, J.*).—*DOE d. SHEPPARD v. ALLEN* (1810), 3 Taunt. 78; 128 E. R. 32.

*Annotations*:—*Consd.* *Johnstone v. Hall* (1856), 2 K. & J. 414; *Perry v. Davis* (1858), 3 C. B. N. S. 769. *Distd.* *Griffin v. Tomkins* (1880), 42 L. T. 359. *Refd.* *Ward v. Day* (1864), 5 B. & S. 359; *Samuel v. Dumas*, [1924] A. C. 431. *Mentd.* *Doe d. Parry v. Hughes* (1847), 11 Jur. 698.

**6433.** ———.]—Mere standing by & seeing the lessee making alterations which are in breach of his covenant, does not operate as a waiver on the part of the lessor.—*PERRY v. DAVIS* (1858), 3 C. B. N. S. 739; 140 E. R. 945.

**6434.** ———.]—A lease was granted of coals & ironstone for three hundred years at a fixed rent & paying certain royalties not fixed, & the lease contained a stipulation that the working should not be delayed more than five years from the date of the lease; also, that as to three out of four of the mines, the lessees might either work or relinquish, but should not underlet or assign without the consent of the lessor except to responsible persons. The mines were worked for twenty-four years, when the lessee died & a suit was instituted to administer his estate & a receiver appointed. The ironstone mine was then no longer worked, & ten years after the working of the coal mines was also stopped. Rent continued to be received, & a correspondence ensued not assuming a peremptory tone until fifteen years after the mines were shut up, the lessors having had knowledge of the abandonment all along. An action of ejectment was then brought, but restrained by reason of there being a receiver; & on summons for liberty to proceed with the action:—*Held*: the lessors had no right to prohibit the letting to responsible persons, & by acquiescence with knowledge of the breaches of covenant they had lost their right to proceed at law to recover possession immediately, but must give the lessees a reasonable time for restitution of the works; & the application for liberty to proceed at law was ordered to stand over for three months.—*WHITEHEAD v. BENNETT* (1861), 4 L. T. 818; 9 W. R. 626.

**6435.** ———.]—A lease contained a covenant on the part of the lessee that he would not, without the consent of the lessor, use, exercise, or carry on in the demised premises any trade or business whatsoever, nor convert the dwelling-

## PART XXIV. SECT. 1, SUB-SECT. 5.—A. (a).

**6427 i. Act recognising tenancy—After knowledge of forfeiture.**—The execution by the lessor of a lease, commencing from a date prior to its execution, is a waiver by the lessor of all breaches, of which the lessor has knowledge at the time of the execution, although such execution be in pursuance of a previous written agreement for such lease.—*CARSON v. WOOD* (1884), 10 V. L. R. L. 223.—*AUS.*

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**6427 ii.** ———.]—Where acts alleged as justifying forfeiture are not continuing acts, a claim for both rent & forfeiture in the same action, waives the forfeiture.—*STRAUS LAND CORPN., LTD. v. INTERNATIONAL HOTEL WINDSOR, LTD.* (1919), 45 O. L. R. 145; 15 O. W. N. 411; 49 D. L. R. 519.—*CAN.*

**6427 iii.** ———.]—*DUFAUR v. KENEALY* (1908), 28 N. Z. L. R. 269.—*N.Z.*

**6427 iv.** ———.]—*DUNEDIN CITY CORPN. v. SEARL*, [1916] N. Z. L. R.

146.—*N.Z.*

**6432 i. Necessity for positive acts—Sufficiency of acquiescence or standing by.**—*KERR v. HASTINGS* (1875), 25 C. P. 429.—*CAN.*

**6432 ii.** ———.]—Mere knowledge or acquiescence in an act constituting a forfeiture does not amount to a waiver; there must be some expenditure of money in improvements or some positive act of waiver, such as receipt of rent.—*MCLAREN v. KERR* (1876), 39 U. C. R. 507.—*CAN.*

K K.

**Sect. 1.—Forfeiture: Sub-sect. 5, A. (a).]**

houses into a shop, nor suffer the same to be used for any other purpose than dwelling-houses. One of the dwelling-houses was converted into a public-house & a grocery shop, & the lessor, with full knowledge of it, for more than twenty years received the rent. Pltf., having purchased the reversion of the lessor, brought an action of ejectment for the breach of the covenant:—*Held*: the user of the premises in their altered state for more than twenty years, with the knowledge of the lessor, was evidence from which a jury might presume a licence.—*GIBSON v. DOEG* (1857), 2 H. & N. 615; 27 L. J. Ex. 37; 30 L. T. O. S. 156; 21 J. P. 808; 6 W. R. 107; 157 E. R. 253; *affd.* (1862), 7 L. T. 71; 10 W. R. 581, Ex. Ch.

*Annotations*:—*Apld.* *Hepworth v. Pickles*, [1900] 1 Ch. 108. *Fold. Re Summerson, Downie v. Summerson*, [1900] 1 Ch. 112, n.; *Gibbon v. Payne* (1905), 22 T. L. R. 54. *Mentd.* *Clippens Oil Co. v. Edinburgh & District Water Trustees*, [1904] A. C. 64; *Heath v. Deane*, [1905] 2 Ch. 86.

**6436. Conduct of lessor.**—*ST. CATHERINE'S (MASTER) CASE* (1457), cited in 8 Co. Rep. at p. 91 b; 77 E. R. 613; *sub nom.* *ST. KATHERINE'S (MASTER) CASE*, *Fitzherbert's Abridgment*, fo. 119, pl. 162; *sub nom.* *ANON.*, 1 Roll. Abr. 454.

*Annotations*:—*Apld.* *West v. Blakeway* (1841), 2 Man. & G. 729. *Refd.* *Fraunces's Case* (1609), 8 Co. Rep. 89 b.

**6437.**—*]*—If a lessor, after a forfeiture, advises a person to purchase the term of his lessee, he cannot maintain an ejectment for such forfeiture against that purchaser; but otherwise, if the party have an interest, e.g. an annuity secured on the premises, & the advic. is "to take to them" merely.—*DOE d. SORR v. EYKINS* (1824), 1 C. & P. 154; *Ry. & M.* 29, N. P.

**6438.**—*]*—If on the trial of an ejectment against the assignee of a tenant on a forfeiture of a lease by breach of covenant, it appear that the landlord so acted as to induce the tenant's assignee to believe that the latter was doing all that he ought—the landlord cannot recover, although the covenants be actually broken, & there be neither release nor a dispensation on the part of the landlord.—*DOE d. KNIGHT v. ROWE* (1826), 2 C. & P. 246; *Ry. & M.* 343, N. P.

*Annotations*:—*Expld.* *West v. Blakeway* (1841), 9 Dowl. 846. *Distd.* *Doe d. Muston v. Gladwin* (1845), 6 Q. B. 953. *Refd.* *Walrond v. Hawkins* (1875), L. R. 10 C. P. 342.

**6439.**—*Definite election to waive.*—*]*—If the grantor of a licence once elects not to take advantage of a forfeiture & declares his election to the party against whom the forfeiture would be enforced, he waives the forfeiture thereby.

B. the owner of the manor of M. granted to A. a licence to carry away copper as stone on the shore of the manor for twenty-one years, from June 24, 1843, at the yearly rent of £25 payable half-yearly, & subject to a proviso entitling B. his heirs & assigns in case the rent should be in arrear for twenty-one days next after any of the days appointed for payment by notice in writing delivered to A. his exors. administrators or assigns, to terminate the grant. After Christmas 1857, the rent was in arrear for more than twenty-

one days. In Mar. 1858, pltf., to whom the manor had been conveyed, distrained upon H. the then licensee under defts., A.'s assignees, for the rent in arrear, for which illegal distress an action was brought, & judgment suffered by default. In the course of negotiations for a settlement, an oral agreement was made between pltf. & H. the then licensee under defts. that a new licence should be granted to his son to commence from the termination of the old one. After making this agreement, pltf. withdrew from it, & a fortnight afterwards served deft., A.'s assignee, in whom the licence was then vested, with a notice determining the grant, on the ground that the rent had been twenty-one days in arrear after Christmas 1857, as aforesaid:—*Held*: in entering into the oral agreement as above, pltf. had sufficiently made his election to treat the old licence as subsisting, & had thereby waived the forfeiture of it.

*Qu.*: whether the distress being within six months after the cause of forfeiture, the period within which by Landlord & Tenant Act, 1709 (c. 14), ss. 6, 7, a lessor may distrain after the determination of a lease, would by itself amount to an election to treat the licence as existing.—*WARD v. DAY* (1864), 5 B. & S. 359; 4 New Rep. 171; 33 L. J. Q. B. 254; 10 L. T. 578; 10 Jur. N. S. 173; 12 W. R. 829; 122 E. R. 865; Ex. Ch.

*Annotation*:—*Consd.* *Walrond v. Hawkins* (1875), 44 L. J. C. P. 116.

**6440.**—*Covenant to insure.*—*]*—A lessee covenanted to insure, & the premises were uninsured for one week:—*Held*: in an ejectment for a forfeiture for a breach of this covenant, the lessor could not recover if he, by his conduct, had led the lessee to believe that the premises were insured by himself.—*DOE d. PITTMAN v. SUTTON* (1841), 9 C. & P. 706, N. P.

*Annotations*:—*Distd.* *Doe d. Muston v. Gladwin* (1845), 6 Q. B. 953. *Refd.* *Walrond v. Hawkins* (1875), L. R. 10 C. P. 342. *Mentd.* *Winthrop v. Murray* (1850), 19 L. J. Ch. 547.

**6441.**—*]*—*DOE d. MUSTON v. GLADWIN*, No. 6500, *post*.

**6442.**—*]*—Where a tenant under a lease containing a covenant to insure had, in consequence of his agent's embezzlement, failed to pay a premium, & so the premises were left for a time uninsured, but the landlord had, on discovering this, afterwards paid the premium, & allowed the tenant to repay him:—*Held*: this was such a waiver of a forfeiture under the covenant as to bring the tenant within the exception in Law of Property Amendment Act, 1859 (c. 35), s. 6, & preclude him from obtaining relief under C. L. P. Act, 1860 (c. 126), s. 2.

Sect. 6 of Law of Property Amendment Act, 1859 (c. 35), is satisfied by an actual waiver, & it is not necessary to have any formal document expressly waiving the forfeiture.—*MILLS v. GRIFFITHS* (1876), 45 L. J. Q. B. 771.

**6443.**—*Covenant to repair.*—*]*—A lessee will be relieved against forfeiture for breach of a covenant to repair contained in his lease, where the

**6436 i. Conduct of lessor.**—*]*—Even if the lessor's conduct amounts to an expression of intention not for the future to insist on observance of the covenant, the lessee cannot, in the absence of consideration, rely upon that conduct as an effective waiver of the benefit of the covenant.—*MULCAHY v. HOYNE* (1925), 38 C. L. R. 41; 31 Argus L. R. 230.—*AUS.*

**6436 ii.**—*]*—*BLACK v. ALLAN* (1866), 17 C. P. 340.—*CAN.*

**6439 i.**—*Definite election to waive.*—*]*—Where a landlord, with knowledge of a breach of covenant in the lease entitling him to forfeit the lease, allows the tenant to exercise an option thereunder to renew upon similar terms, he does not thereby waive altogether his right to insist upon performance of the covenant, & if after notice the tenant elects to continue the breach the landlord may determine the tenancy as from the date of the notice.—*TOOGOOD v. MILLS* (1896), 23

V. L. R. 106.—*AUS.*

**6439 ii.**—*]*—*SOPER v. LITTLE-JOHN* (1901), 31 S. C. R. 572.—*CAN.*

**6439 iii.**—*]*—*CAR OWNERS ASSOC. v. MCKERCHER (B.C.)* (1922), 67 D. L. R. 626.—*CAN.*

**6439 iv.**—*]*—*VENKATRAMANA BHATTA v. GUNDARAYA* (1908), 1 L. R. 31 Mad. 403.—*IND.*

**6439 v.**—*]*—*TOWNLEY v. BOND* (1843), 4 Dr. & War. 240; 2 Con. & Law. 393.—*IR.*

conduct of the landlord is such as to lead the lessee to believe that the strict legal right will not be insisted on.

The lease of a house contained a covenant to repair upon six months' notice, & a proviso for re-entry for breach of covenant. The under-lease of the house to defts. contained similar provisions. On Oct. 22, 1874, pltf., who was the reversioner, gave notice to defts. to repair within six months. Defts., on Nov. 28, wrote in reply suggesting that pltf. should acquire their interest, & stating that they proposed deferring the commencement of the repairs until they should hear from him as to the probability of an arrangement. After some correspondence, pltf., on Dec. 31, wrote that the price demanded by defts. appeared to him to be out of all reason, & inviting a modified proposal. No further proposal was made, & in Apr. 1875, the repairs were commenced by defts. & completed in June, 1875. Pltf. then brought ejectment for breach of the covenant to repair after six months' notice:—*Held*: the effect of the correspondence was to lead defts. to the belief that the notice to repair was suspended during the negotiations, which were continued until Dec. 31, 1874, so that pltf. was not entitled to insist on forfeiture, because of the non-completion of the repairs within six months from the giving of the notice; & the lease having provided that six months' notice should be given, a period of six months from Dec. 31, 1874, must be taken to be a reasonable time for the completion of the repairs.—*HUGHES v. METROPOLITAN RY. Co.* (1877), 2 App. Cas. 439; 46 L. J. Q. B. 583; 36 L. T. 932; 25 W. R. 680, H. L.

**Annotations:—***Apld.* Birmingham & District Land Co. v. L. & N. W. Ry. (1888), 40 Ch. D. 268. *Mentd.* Bruner v. Moore, [1904] 1 Ch. 305; Morrell v. Studd & Millington, [1913] 2 Ch. 648; Modern Transport Co. v. Duerie S.S. Co., [1917] 1 K. B. 370; Hartley v. Hymans, [1920] 3 K. B. 475.

**6444.**—**Building agreement**—**Money lent to builder.**—*Re* GARRUD, *Ex p.* NEWITT, No. 6429, *ante*.

6445. — — — — —.]—PLATT v. PARKER  
(1886), 2 T. L. R. 786, C. A.

**6446.** ——— [Continuation of work permitted.] — Land was demised to defts., who covenanted in the lease to build & complete certain houses thereon, within a year; & that, if they did not, the lease should be void. The houses not being completed within the specified period:—*Held*: the forfeiture was not waived by the steward of the lessor having permitted deft. to employ workmen in completing the houses for a short period after such forfeiture.—*DOE d. KENSINGTON v. BRINDLEY* (1826), 12 Moore, C. P. 37; 5 L. J. O. S. C. P. 3.

*Annotation* :—**Dbtd.** *Re Garrud, Ex p. Newlitt* (1881), 16 Ch. D. 522.

— **Tenant encouraged to spend money.]—**  
See Sub-sect. 5, A. (f), *post*.

6447. Notice to repair—General & particular covenants to repair—Notice in respect of particular covenant.]—Where a lease contained covenants to keep the premises in repair, & to repair within three months after notice, & a clause of re-entry for breach of any covenant, & the premises being out of repair, the landlord gave a notice to repair within three months:—*Held*: this was a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair, & the landlord could not bring ejectment until after the expiration of the three months.—*DOE d. MORECRAFT v. MEUX* (1825), 4 B. & C. 606; 7 Dow. & Ry. K. B. 98; 4 L. J. O. S. K. B. 4; 107 E. R. 1185.

*Annotations* :—*Consd. Baylis v. Le Gros* (1858), 4 C. B. N. S.

537. *Distd.* Few v. Perkins (1867), L. R. 2 Exch. 92.  
*Refd.* Doe d. De Rutzen v. Lewis (1836), 5 Ad. & El.  
 277; Gregory v. Wilson (1852), 9 Hare, 683; Dendy v.  
 Nicholl (1858), 4 C. B. N. S. 376; Evans v. Wyatt (1880),  
 43 L. T. 176.

6448. ———— Repair by landlord in default of lessee.]—DOE d. DE RUTZEN v. LEWIS, No. 6106, *ante*.

**6449.** — — — — —.]—An indenture of lease contained a general covenant by the lessees to repair the demised premises, & also a covenant to repair within three months after notice given of any defects & wants of repair, with a condition of re-entry for the breach of any of the covenants of the lease. The premises demised being out of repair, the lessor gave a notice to the lessees to repair the premises "in accordance with the covenants" of the lease, & therein stated that he had left a specification for that purpose with the undertenant on the premises:—*Held*: this notice was no waiver of the forfeiture under the general covenant to repair, & an action of ejectment was well brought before the expiration of three months from the date of the notice.—*FEW v. PERKINS* (1867), L. R. 2 Exch. 92; 36 L. J. Ex. 54; 16 L. T. 62; 15 W. R. 713.

*Annotation* :—**Reid**. Cove v. Smith (1886), 2 T. L. R. 778.

**6450. Agreement for extension of time to repair.**—A right of re-entry acquired by an omission to repair three months after notice, is suspended but not waived by an agreement to allow the tenant future time to repair.—*DOE d. RANKIN v. BRINDLEY* (1832), 4 B. & Ad. 84; 1 Nev. & M. K. B. 1; 2 L. J. K. B. 7; 110 E. R. 387.

*Annotation* :—**Dist.** Doe d. Rutzen v. Lewis (1836), 5 Ad. & El. 277.

6451. Assignment of interest by landlord.]—  
HUNT v. BISHOP, No. 6209, *ante*.

6452. Admission of existence of tenancy.—In prior action for breach of covenant—No further breach since such action.]-Pltf., who had leased premises to B. for a term of years, which was unexpired at B.'s death, afterwards, in the belief that no one would administer to B.'s estate agreed with B.'s son for him to occupy the premises as a yearly tenant, at the rent reserved by the lease to B. The son accordingly occupied & paid rent. Pltf. repaired the premises shortly before Michaelmas, 1861, & having afterwards discovered that deft., a daughter of B., was the administratrix to his estate, & as such, claimed to hold the premises for the remainder of the term under B.'s lease, pltf. sued her on the covenant in the lease to repair, & also brought ejectment for forfeiture for non-repair. In the action on the covenant deft. paid a sum of money into ct., which pltf. accepted in satisfaction. There was no want of repair to the premises after pltf. had so repaired them, & the rent due up to Michaelmas, 1861, was paid by B.'s son, & received from him by pltf. before either action:—*Held*: (1) in the action of ejectment, either the rent paid by B.'s son was to be taken in satisfaction of the rent under the lease, & so there had been a waiver of the forfeiture, or else there had been an eviction of deft. by pltf. which would prevent his taking advantage of a forfeiture for non-repair during such eviction; (2) the statement in the pltf.'s declaration in the action on the covenant, that the breach for non-repair occurred during the existence of the term, was a further ground against pltf. recovering in ejectment.—*PELLATT v. BOOSEY* (1862). 31 L. J. C. P. 281; 8 Jur. N. S. 1107.

6453. Necessity for formal document.]—MILLS  
v. GRIFFITHS. No. 6442, *ante*.

6454. Claim inconsistent with recovery of possession—Injunction & damages for breach of

**Sect. 1.—Forfeiture: Sub-sect. 5, A. (a) & (b) i.]**

**covenant.**—(1) E. commenced an action against D. & B. in respect of the breach [not to affix or permit any outward mark or show of business]. No lease had at this time been executed in pursuance of the agreement. The writ was indorsed with a claim for an injunction to restrain defts. from committing a breach of the agreement; damages for the breach & to recover possession of the premises comprised in the agreement. By his statement of claim pltf. said that the lease had not been granted to D. "but pltf. has always been & is ready & willing to grant same":—**Held**: the claim to an injunction, being founded on the continuance of the agreement, was inconsistent with the claim to recover possession, & pltf. must be taken to have waived the latter claim by stating that he was ready & willing to grant the lease. (2) *Semble*: a forfeiture for non-performance of covenants does not apply to breaches of negative covenants.—**EVANS v. DAVIS** (1878), 10 Ch. D. 747; 48 L. J. Ch. 223; 39 L. T. 391; 27 W. R. 285.

**Annotations**:—As to (1) **Apld.** *Moore v. Ullcoats Mining Co.*, [1908] 1 Ch. 675. **Refd.** *Wheeler v. Hithings* (1919), 121 L. T. 636. As to (2) **Consd.** *Harman v. Ainslie*, [1904] 1 K. B. 698. **Generally**, **Mentd.** *Sayers v. Collyer* (1883), 52 L. J. Ch. 770.

**(b) Acceptance of Rent.****i. Due after Cause of Forfeiture.**

**6455. Operates as waiver.**—**ANON.** (undated), *Plowd. Queries* 28, No. 155; 75 E. R. 897.

**6456.** —]—**ANON.** (1441), *Y. B.* 22 Hen. 6, fo. 57, pl. 7.

**Annotations**:—**Refd.** *Crouche v. Fastolfe* (1680), T. Raym. 418; *Rowe v. Young* (1820), 2 Brod. & Bing. 165. **Mentd.** *Seymour's Case* (1585), *Gouldsb.* 8; *Tey's Case* (1592), 5 Co. Rep. 38 a; *Finch's Case* (1607), 6 Co. Rep. 63 a; *Six Carpenters' Case* (1610), 8 Co. Rep. 146 a; *Pillfold's Case* (1612), 10 Co. Rep. 115 b.

**6457.** —]—**ANON.** (1586), *Godb.* 47; 78 E. R. 29.

**Annotation**:—**Refd.** *Eastcourt v. Weekes* (1698), 1 Lut. 799.

**6458.** —]—**FOX v. SWANN** (1655), *Sty.* 482; 82 E. R. 881.

**Annotation**:—**Refd.** *Bell v. Harwood* (1789), 3 Term Rep. 308.

**6459.** —]—**DOE d. SHEPPARD v. ALLEN**, No. 6432, *ante*.

**6460.** —]—**ARNSBY v. WOODWARD**, No. 6218, *ante*.

**6461.** —]—A forfeiture of a lease accruing on the lessee's insolvency, is waived by acceptance of rent from him after his discharge under Insolvent Debtors' Act; & the non-payment of a debt specified in his schedule to be due to the lessor, is not a continuing insolvency to constitute

a new forfeiture after such acceptance of rent.—**DOE d. GATEHOUSE v. REES** (1838), 4 Bing. N. C. 384; 1 Arn. 159; 6 Scott, 161; 7 L. J. C. P. 184; 132 E. R. 835.

**Annotations**:—**Refd.** *Walrond v. Hawkins* (1875), L. R. 10 C. P. 342. **Mentd.** *Card v. Carr* (1856), 1 C. B. N. S. 197; *R. v. Saddlers' Co.* (1863), 10 H. L. Cas. 404.

**6462.** —]—On granting a building lease for 92½ years the lessee covenanted that he would, within the first five years of the term, build thirty-four additional houses, of the dimensions therein mentioned, & keep the same in repair, & the same so repaired, at the end or other sooner determination of the term, deliver up to the lessor or his assigns. Some only of the thirty-four houses were built; but the lessor, notwithstanding, received the rent, payable under the lease, for forty-six years afterwards:—**Held**: on a sale of the property by public auction, by the assignees in bkpy. of the lessee; although there had been a waiver by the lessor of the covenant to build, still the covenant to deliver up the houses, at the end or sooner determination of the term, continued in force, & was a valid objection to the title.—**NOUAILLE v. FLIGHT** (1844), 7 Beav. 521; 13 L. J. Ch. 414; 8 Jur. 838; 49 E. R. 1168.

**Annotation**:—**Distd.** *Hume v. Bentley* (1852), 5 De G. & Sm. 520.

**6463.** —]—It was . . . urged on the part of pltf., that assuming there would have been a breach of this covenant [to insure] if the lease had been executed, the right to take advantage of the breach was gone by waiver & acquiescence; & it cannot I think be doubted that no breach of this covenant anterior to . . . the last payment of rent . . . could now be taken advantage of at law (**TURNER, V.-C.**).—**GREGORY v. WILSON** (1852), 9 Hare, 683; 22 L. J. Ch. 159; 19 L. T. O. S. 102; 16 Jur. 304; 68 E. R. 687.

**Annotations**:—**Apld.** *Hills v. Rowlands* (1853), 1 W. R. 422. **Refd.** *Parker v. Taswell* (1858), 2 De G. & J. 559; *Ranckin v. Lay* (1860), 2 De G. F. & J. 65; *Bamford v. Creasy* (1862), 3 Giff. 675; *Hughes v. Met. Ry.* (1876), 1 C. P. D. 120; *Coatsworth v. Johnson* (1885), *Cab. & El.* 542. **Mentd.** *Ex p. Brain* (1874), 22 W. R. 867.

**6464.** —]—**WHITEHEAD v. BENNETT**, No. 6434, *ante*.

**6465.** —]—Where a lease contains a proviso for re-entry for non-performance of covenants, & a covenant is broken for want of the previous consent of the lessors to alterations, the receipt of rent is a waiver of the forfeiture.—**MILES v. TOBIN** (1867), 17 L. T. 432; 16 W. R. 465, L. C.

**Annotations**:—**Mentd.** *Allen v. Seckham* (1879), 11 Ch. D. 790; *Bailey v. Locke* (1891), 64 L. T. 789.

**6466.** —]—**JACOB v. DOWN**, No. 6340, *ante*.

**6467.** —]—If lessor has knowledge of breach.—**MARCH v. CURTIS** (1597), *Noy* 7; 2 And. 90

**PART XXIV. SECT. 1, SUB-SECT. 5.—A. (b) i.**

**6455 i. Operates as waiver.**—**MCDONALD v. PECK** (1859), 17 U. C. R. 270.—**CAN.**

**6455 ii.** —]—**ROE v. SOUTHARD** (1861), 10 C. P. 488.—**CAN.**

**6455 iii.** —]—**MCLAREN v. KERR** (1876), 39 U. C. R. 507.—**CAN.**

**6455 iv.** —]—**LEIGHTON v. MEDLEY** (1882), 1 O. R. 207.—**CAN.**

**6455 v.** —]—**RE HARDISTY & BISHOPRIC (N. W. T.)** (1905), 2 W. L. R. 21.—**CAN.**

**6455 vi.** —]—**MINUK v. WHITE (Man.)** (1905), 1 W. L. R. 401.—**CAN.**

**6455 vii.** —]—**PIGEON v. PRESTON** (1912), 22 W. L. R. 894; 5 Sask. L. R. 330; 6 D. L. R. 399; 3 W. W. R. 694.—**CAN.**

**6455 viii.** —]—**ST. ALBERT ROMAN**

**CATHOLIC EPISCOPAL CORPN. v. SHEPARD & CO., LTD.** (1913), 23 W. L. R. 282; 9 D. L. R. 619; 3 W. W. R. 814.—**CAN.**

**6455 ix.** —]—**BOOTH v. CALLOW** (1913), 24 W. L. R. 813; 4 W. W. R. 73; 11 D. L. R. 124.—**CAN.**

**6455 x.** —]—**GROSSMAN v. MODERN THEATRES, LTD.** (1919), 45 O. L. R. 564; 16 O. W. N. 242.—**CAN.**

**6455 xi.** —]—**ISMAN v. WIDEN (Sask.)** (1920), 3 W. W. R. 766.—**CAN.**

**6455 xii.** —]—**ORPHEUM THEATRICAL CO., LTD. v. ROSTEIN**, [1923] 4 D. L. R. 499; 32 B. C. R. 251; [1923] 2 W. W. R. 582.—**CAN.**

**6455 xiii.** —]—**KALI KRISHNA TAGORE v. FUZLE ALI CHOWDHRY** (1883), 1 L. R. 9 Calc. 843; 12 C. L. R. 592.—**IND.**

**6455 xiv.** —]—**COURTENAY v. PARKER** (1864), 16 I. Ch. R. 320.—**IR.**

**6455 xv.** —]—**CLIFFORD v. REILLY** (1869), 1 R. 4 C. L. 218.—**IR.**

**6455 xvi.** —]—**KREBEL v. JACKA** (1867), 1 C. A. 39.—**N.Z.**

**6455 xvii.** —]—**DREW v. ZIEHL** (1918), 39 N. L. R. 258.—**S. AF.**

**6455 xviii.** —]—**SHER v. MAYNIER**, [1918] W. L. D. 29.—**S. AF.**

**6455 xix.** —]—**HANER & BERNSTEIN v. ARMITAGE**, [1919] W. L. D. 58.—**S. AF.**

**6467 i.** —]—If lessor has knowledge of breach.—**DOMINION COAL CO. v. TAYLOR** (1909), 7 E. J. R. 199.—**CAN.**

**b. Not after entry.**—**THOMPSON v. BASKERVILLE** (1877), 40 U. C. R. 614.—**CAN.**

**c. Intention with which rent received—Must be considered.**—**LAXTON v. ROSENBERG** (1886), 11 O. R. 199.—**CAN.**

**d. Appropriation proceedings by Crown.**—**Re MINISTER OF PUBLIC**

123 E. R. 561; *sub nom.* MARSH v. CURTEYS, Cro. Eliz. 528; 2 And. 42; 1 Brownl. 78; Moore, K. B. 425.

*Annotation* :—*Refd.* Tovey v. Pitcher (1690), Carth. 177.

6468. ———.]—PENNANT'S CASE, No. 6539, *post*.

6469. ———.]—FOX v. WHITCHCOCKE (1616), 2 Bulst. 290; 80 E. R. 1129; *sub nom.* WHITCHCOT v. FOX, Cro. Jac. 398; 1 Roll. Rep. 389.

*Annotations* :—*Refd.* Tongue v. Pitcher (1691), 3 Lev. 295; Bally v. Wells (1769), Wilm. 341; Dowell v. Dew (1842), 1 Y. & C. Ch. Cas. 345; *Re* Stephenson, Poole v. Stephenson, [1915] 1 Ch. 802. *Mentd.* Rockingham v. Oxendon (1711), 2 Salk. 578.

6470. ———.]—On a condition, that a lessee shall not assign without licence, if the lessor, after notice of an assignment without licence, accept of rent from the assignee, he dispenses with the condition.—MULCARRY v. EYRES (1838), Cro. Car. 511; 79 E. R. 1041.

*Annotations* :—*Refd.* Greene v. Cole (1670), 2 Saund. 252. *Mentd.* Phillips v. Bury (1694), Skin. 447; Wyvell v. Stapleton (1725), 8 Mod. Rep. 315; Kent v. Kent (1733), Lee temp. Hard. 50.

6471. ———.]—If lessee covenant not to underlet without consent of the lessor, under hand & seal, with a power of re-entry, in case of a breach; acceptance by the lessor, of rent due after the condition broken, with full notice, is a waiver of the forfeiture.—GOODRIGHT d. WALTER v. DAVIDS (1778), 2 Cowp. 803; 98 E. R. 1371.

*Annotations* :—*Apld.* Walrond v. Hawkins (1875), L. R. 10 C. P. 342. *Refd.* Dowell v. Dew (1842), 1 Y. & C. Ch. Cas. 345; Lawrie v. Lees (1880), 42 L. T. 485.

6472. ———.]—The lessor's receiving rent after the forfeiture is no waiver, unless the forfeiture were known to him at the time.—ROE d. GREGSON v. HARRISON (1788), 2 Term Rep. 425; 100 E. R. 229.

*Annotations* :—*Consd.* Doe d. Goodbehore v. Bevan (1815), 3 M. & S. 353. *Fold.* Arnaby v. Woodward (1827), 9 Dow. & Ry. K. B. 536. *Refd.* Willmott v. Barber (1880), 15 Ch. D. 96. *Mentd.* Little v. Holland (1790), 3 Term Rep. 590.

6473. ———.]—EVANS v. WYATT, No. 6535, *post*.

6474. ———.]—PORTER v. GIBBONS & BISSETT (1904), 48 Sol. Jo. 814, C. A.

6475. ———.]—MATTHEWS v. SMALLWOOD, SMALLWOOD v. MATTHEWS, No. 6425, *ante*.

—————]—*After action for ejectment.*—See Sub-sect. 5, C., *post*.

6476. ———]—*Acceptance of rent by agent.*—If an agent, who has a general authority to receive rent, receives rent due from a tenant after the lessor knows that the lease has been forfeited by breach of covenant, such receipt of rent is evidence of a waiver of the forfeiture.—DOE d. THOMPSON v. DAVIS (1847), 10 L. T. O. S. 108.

6477. ———]—*As against assignee of lessor.*—By the conditions of sale relating to leaseholds it was stipulated that the production of the last receipt should be conclusive evidence that all the covenants had been performed:—*Held*: the production of such a receipt prevented the purchaser from taking the objection that the lease had been forfeited by reason of the dilapidated state of the premises.—BULL v. HUTCHENS (1863), as reported in 32 Beav. 615; 55 E. R. 242.

*Annotations* :—*Consd.* Lawrie v. Lees (1881), 7 App. Cas. 19. *Refd.* *Re* Hignett & Bird's Contract, [1902] 2 Ch. 214. *Mentd.* Bell v. Holtby (1873), L. R. 15 Eq. 178.

6478. *Acceptance for quarter when breach committed.*—ANON. (1586), Godb. 47; 78 E. R. 29.

*Annotation* :—*Refd.* Eastcourt v. Weekes (1698), 1 Lut. 799.

6479. *Acceptance by person not entitled.*—PENNANT'S CASE, No. 6539, *post*.

6480. *Acceptance from other than lessee—Stranger.*—DOE d. GRIFFITH v. PRITCHARD, No. 6226, *ante*.

6481. ———]—*Son of lessee.*—PELLATT v. BOOSEY, No. 6452, *ante*.

6482. *Acceptance coupled with collateral agreement—Settling all claims & demands—Lessor's ignorance of breach.*—In ejectment against tenant for a forfeiture, a judge at chambers ordered the delivery of particulars of breaches by which it appeared that the breaches relied on were non-payment of rent, omission to insure, non-repair:—*Held*: the breach of a covenant to insure was cured by acceptance of rent & by an agreement between the parties settling all claims & demands though signed by landlord in ignorance of the omission to insure.—DOE d. BATEMAN v. DARBY (1844), 2 L. T. O. S. 355.

6483. *Crown lease.*—In a Crown lease, the lessee covenanted not to convert the premises into a shop or place of sale of any kind, without consent of the Comrs. of Woods & Forests. The trade of an engraver had been carried on in it, without consent or objection, but rent had afterwards been received:—*Held*: the forfeiture had been waived & the title was good.—BRIDGES v. LONGMAN (1857), 24 Beav. 27; 53 E. R. 267.

*Annotations* :—*Refd.* A.-G. of Victoria v. Eftershank (1875), L. R. 6 P. C. 354. *Mentd.* *Re* Chawner's Trusts (1869), 38 L. J. Ch. 726.

6484. ———.]—R. v. PAULSON, No. 6487, *post*.

6485. *Rent paid into lessor's bank—Acquiescence of lessor.*—A lease of a house contained a condition of re-entry for breach of a covenant not to assign, underlet, or part with possession without the consent in writing of the landlord. It was provided that the landlord should not withhold such consent if the proposed assignee or under-lessee were a responsible person. The tenant had been in the habit of paying his rent into the landlord's banking account, but the landlord having discovered that the house had been sublet had given instructions to his bankers not to further receive it. After the landlord had commenced an action to recover possession of the house, the tenant had paid the rent which had just accrued due to the landlord's bankers. The landlord did not know of this for some months, but had not then taken any steps to repay it to the tenant, nor had he given the tenant any notice that he would not receive it:—*Held*: the landlord was not entitled to recover possession of the premises, as there had been a waiver by him of the forfeiture by the receipt of the rent, & the case did not come within the exceptions in Conveyancing & Law of Property Act, 1881 (c. 41), s. 14 (6).—PIERSON v. HARVEY (1885), 1 T. L. R. 430.

6486. *Acceptance from assignee of lessee—Before contract of assignment completed—Ability of assignor to make title.*—An assignor of a lease who by non-compliance with a dilapidation notice served upon him by his landlord has rendered the lease liable to forfeiture cannot make a good title under an open contract, although the assignee has tendered & the landlord has accepted rent subsequently to the date of the contract, but before completion has been effected.—*Re* MARTIN, *Ex p.* DIXON (TRUSTEE) v. TUCKER (1912), 106 L. T. 381.

WORKS & BILLINGHURST (1913), 25 O. W. R. 28; 5 O. W. N. 49; 13 D. L. R. 769.—CAN.

e. *Not waiver—After institution of*

*suit for possession.*—The acceptance of rent by the landlord after the institution of a suit to recover possession of the land is not a waiver of a for-

feiture by the tenant under a condition in the lease.—TIMMARSA PURANIK v. BADIYA (1865), 2 Bom. 70, 2nd ed. 66.—IND.

*Sect. 1.—Forfeiture: Sub-sect. 5, A. (b) i., ii., iii. & iv., & (c).]*

**6487. Proviso that any waiver should be in writing.]**—The principle of law that a lessor who accepts rent knowing that there has been a breach of covenant in the lease thereby irrevocably elects to treat the lease as subsisting, & is precluded from claiming a forfeiture, is applicable although the lease provides that no waiver by the lessor shall take effect unless it is in writing. In 1904 the Crown granted a mining lease of land in Canada, the lessee covenanting to commence mining operations in one year, & to work a mine within two years & thereafter continuously, unless excused by the Minister; the lease also provided that no waiver of any breach should take effect unless it was expressed in writing, & that if the lessee failed to perform any covenant therein contained which had not been waived the Minister might cancel the lease, & that thereupon it should become null & void, & the Crown might re-enter upon the land. The lessee did not commence mining operations, but down to July, 1909, the time was periodically extended & the rent, which was payable annually & in advance, accepted; in July, 1909, the lessee paid a year's rent, & it was accepted conditionally pending a decision upon an application by the lessee for a further extension of time. In Sept. 1909, the Minister wrote to the lessee's solrs. stating that the lease had been cancelled & that the year's rent would be returned:—*Held*: the Crown had elected to treat the lease as subsisting & could not cancel it.—*R. v. PAULSON*, [1921] 1 A. C. 271; 90 L. J. P. C. 1; 124 L. T. 449, P. C.

*Annotation:—Refd. Civil Service Co-op. Soc. v. McGrigor's Trustee*, [1923] 2 Ch. 347.

#### ii. Due before Cause of Forfeiture.

**6488. Acceptance no waiver—Rent in arrear.]**—*GREEN'S CASE*, No. 6427, *ante*.

**6489. — Rent for quarter in which forfeiture occurred.]**—*ANON.* (1586), *Godb.* 47; 78 E. R. 29. *Annotation:—Refd. Eastcourt v. Weekes* (1698), 1 Lut. 799.

**6490. — Acceptance after forfeiture.]**—*PRICE v. WORWOOD*, No. 6130, *ante*.

**6491. Before expiration of notice to repair—Extension of time allowed.]**—*DOE d. RANKIN v. BRINDLEY*, No. 6450, *ante*.

**6492. —.]**—*CRONIN v. ROGERS*, No. 6351, *ante*.

#### iii. Where Cause of Forfeiture Continuing.

**6493. How far operating as waiver—Covenant to repair.]**—Where a right of entry is given in three months after notice of the premises being out of repair, acceptance of rent, after the three months expired, does not prevent *pltf.* from maintaining an ejectment particularly if the premises are not repaired at the time of bringing the action.—*FRYETT d. HARRIS v. JEFFREYS* (1795), 1 Esp. 392, N. P.

**6494. —.]**—The receipt of rent is no waiver of a continuing breach of covenant. Therefore, where a lessee was bound, under penalty of forfeiture, to repair within a reasonable time, &

after breach the lessor accepted rent:—*Held*: the reasonable time for reparation did not commence afresh after such acceptance of rent.—*DOE d. BAKER v. JONES* (1850), 5 Exch. 498; 19 L. J. Ex. 405; 15 L. T. O. S. 207; 155 E. R. 218.

*Annotation:—Refd. Black Point Syndicate v. Eastern Concessions* (1898), 79 L. T. 658.

**6495. — Acceptance during negotiations for new lease.]**—*GUILLEMARD v. SILVERTHORNE*, No. 6341, *ante*.

**6496. —.]**—*NEW RIVER CO. v. CRUMPTON*, No. 6328, *ante*.

**6497. — Restriction on user of premises.]**—In ejectment for a forfeiture incurred by using rooms in a house in a manner prohibited by the lease:—*Held*: such user was a continuing breach, & the landlord was not, by receiving rent, precluded from taking advantage of the forfeiture, provided the user continued after such receipt of rent.—*DOE d. AMBLER v. WOODBRIDGE* (1829), 9 B. & C. 376; 4 Man. & Ry. K. B. 302; 7 L. J. O. S. K. B. 263; 109 E. R. 140.

*Annotations:—Distd. Walrond v. Hawkins* (1875), L. R. 10 C. P. 342. *Refd. Powell v. Hemsley*, [1909] 2 Ch. 252.

**6498. —.]**—Defts. held certain premises of *pltf.* for a term of years under a lease whereby the lessees covenanted not to permit or suffer, at any time during the said term, to be used, exercised, or carried on upon the premises, or any part thereof, any art, trade, profession, or business whatsoever, without the licence or consent in writing of the lessor, first obtained for that purpose. The lease contained a power of re-entry upon breach of covenant. The lessees had, by consent, made some alterations in the premises, & part of the new building was occupied by two of defts. as plumbers, & they carried on their business there in a shop suited for the purpose. There was no written licence or consent of the lessor for this business, but two quarters' rent was paid as usual by the lessees after the business commenced, with the lessor's knowledge of this use of the premises. There was no evidence of the nature of the plumbers' tenancy, but within a year of its commencement *pltf.* took proceedings to recover the land on the ground of a forfeiture by a continuing breach of the covenant:—*Held*: it could not be presumed that a plumber's business would be commenced upon a less tenancy than a year of the shop in which it was to be carried on; & *pltf.*'s waiver of the breach by receipt of rent was sufficient under the circumstances to render these proceedings ineffectual.

Where a lessor with full knowledge that a breach of this particular description has been committed waives the forfeiture by a distinct acceptance of rent accruing due after the forfeiture, that amounts not merely to a waiver of the past breach, but to a licence to continue the breach in future (*COCKBURN, C.J.*).—*GRIFFIN v. TOMKINS* (1880), 42 L. T. 359; 44 J. P. 457.

*Annotation:—Distd. Atkin v. Rose*, [1923] 1 Ch. 522.

**6499. —.]**—A leasehold public-house was sold subject to a condition that the production of the last receipt for rent paid should be taken as conclusive evidence of the due performance of

#### PART XXIV. SECT. 1, SUB-SECT. 5.—A. (b) ii

**6498 i. Acceptance no waiver—Rent in arrear.]**—On the facts:—*Held*: the receipt, after the forfeiture, of the rent which had become due before the forfeiture, did not operate as any waiver thereof.—*DONSON v. SOOTHERAN* (1888), 15 O. R. 15.—*CAN.*

**6498 ii. —.]**—On the facts:—*Held*: the tender of rent was in re-

spect of rent overdue prior to the forfeiture, & its acceptance would not have operated as a waiver of the right of re-entry.—*Re BAGSHAW & O'CONNOR* (1918), 42 O. L. R. 466; 42 D. L. R. 596; 14 O. W. N. 54.—*CAN.*

#### PART XXIV SECT 1, SUB-SECT. 5.—A. (b) iii.

**i. Whether operating as waiver.]**—*MUNDAY v. PROWSE* (1876), 4 V. L. R.

(Eq.) 101.—*AUS.*

**g. —.]**—Receipt of rent by a landlord is not a waiver of a continuing forfeiture.—*BARWICK v. DUCHESSE OF EDINBURGH CO.* (1882), 8 V. L. R. (Eq.) 70.—*AUS.*

**h. —.]**—Breaches of a covenant in a farm lease to keep the fences in repair, & to keep eighteen acres in meadow during the term, are continuing breaches, & the right to re-

the lessee's covenants or the waiver of any breaches up to the time of completion, whether the lessor should be cognisant of such breaches or not. The lease contained a covenant to use the premises for the business of a public-house only, & not to permit any other trade to be carried on on any part of the premises without the lessor's written consent. The particulars on which the contract of purchase was indorsed showed that parts of the premises were underlet to persons who carried on other trades there. From the answers to objections to title it appeared that the lessors had received rent with knowledge of the underlettings, & the last receipt for rent was produced. Specific performance of the contract having been decreed & a reference as to title directed by an order which was not appealed from:—*Held*: whether the breach of covenant was or was not a continuing breach such as to render the purchaser liable to be ejected after the completion of the purchase & whether this would or would not have furnished a valid reason for not decreeing specific performance, the vendor had made a good title in accordance with the contract, which the purchaser was bound to accept the decree for specific performance having been made & not appealed from.—*LAWRIE v. LEES* (1881), 7 App. Cas. 19; 51 L. J. Ch. 209; 46 L. T. 210; 30 W. R. 185, 11. L.

*Annotations*:—*Mentd.* *Re Swire, Mellor v. Swire* (1885), 53 L. T. 205; *Re Highett & Bird's Contract*, [1902] 2 Ch. 214; *Re Gist* (1904), 90 L. T. 35.

**6500. — Covenant to insure.**—(1) Lessee of buildings covenanted in the lease to "insure & continue insured" such buildings in the joint names of himself & the lessor, his exors., etc., or assigns; & there was a proviso for re-entry on breach of the covenant. The lessee insured in his own name singly, but showed the policy to the lessor, who approved of it, & accepted rent during the next three years ending at Christmas 1842. The premiums of insurance were duly paid up to that time, the premium at Christmas 1842 covering the year 1843, & the policy continuing unaltered. In Jan. 1843 the lessor assigned; & the assignee, in the same year, brought ejectment for a forfeiture incurred by not insuring in the joint names. No notice had been given to the lessee to alter the policy:—*Held*: the covenant to insure in the joint names was a continuing covenant, & was not waived by the conduct of the lessor, except as to past breaches; & the ejectment lay.

(2) On occasions like the present *LORD TENTERDEN* was in the habit of saying that we are bound to give all instruments their natural construction, & attach to them their legal consequences, whatever our inclinations may be (*PATTESON, J.*).—*DOE d. MUSTON v. GLADWIN* (1845), 6 Q. B. 953; 14 L. J. Q. B. 189; 4 L. T. O. S. 432; 9 Jur. 508; 115 E. R. 359.

*Annotations*:—*As to* (1) *Distd.* *Walrond v. Hawkins* (1875), L. R. 10 C. P. 342. *As to* (2) *Apld.* *Croft v. Lumley* (1853), 5 E. & B. 648. *Generally, Refd.* *Havens v. Middleton* (1853), 10 Harc. 641.

**6501. — Covenant against assigning or underletting.**—*WALROND v. HAWKINS*, No. 6515, *post*.

#### iv. Acceptance without Prejudice to Forfeiture.

**6502. Whether waiver prevented.**—*CROFT v. LUMLEY*, No. 6085, *ante*.

**6503. —**—*DAVENPORT v. R.*, No. 6195, *ante*.

**6504. —**—(1) A tenant was in possession of plots of land under an agreement for leases to be granted when he should have fulfilled certain conditions as to building. The intention of the parties was, in the view of the ct., that the agreement should be regarded as a lease. The conditions were, to the landlord's knowledge, not fulfilled within the appointed time, but after that date the landlord demanded rent as under the leases & the tenant paid it:—*Held*: the landlord could not, on receiving the rent, stipulate that it was received without prejudice to any breaches of covenant made up to that time in the agreement for leases.

(2) Conveyancing Act, 1881 (c. 41), s. 14, applies to an agreement for a lease of which the tenant is entitled, independently of the Act, to demand specific performance.—*STRONG v. STRINGER* (1889), 61 L. T. 470; 5 T. L. R. 638.

*Annotation*:—*As to* (2) *Refd.* *Wenman v. Lyon & Honeywill* (1891), 60 L. J. Q. B. 223.

#### (c) Demand for Rent.

**6505. Whether operative as waiver—Due after breach.**—Ejectment for a forfeiture, A., by an agreement in writing, lot to B. a house at the rent of £60 a year, to be paid quarterly; & B. agreed, within three calendar months, to erect a shop front, & otherwise repair, paint, paper, & white-wash the house. It was further agreed, that, if B. did not erect the shop front within three months, it should be lawful for A. or his agents to re-take possession of the premises, & the agreement should be null & void. B. continued in the possession of the premises, & enlarged the window, but, as plff. contended, did not erect a shop front. It appeared also, that, after a quarter's rent had become due, & after the expiration of three months from the date of the agreement, A.'s son, the father being too ill to attend to business, made a demand of a quarter's rent, which B. offered to pay, if he would indemnify him for a sum which he had paid as a penalty to A.'s lessor for carrying on a trade in the premises, which was refused. At the trial, B., defl., contended that he had made a shop front which answered the purposes of his trade; & he offered to show that A. held the premises under a lease from C., which contained a clause imposing a penalty upon the lessee, if he allowed a trade to be carried on upon the premises; from which it was to be inferred that the words shop front, in the agreement, were used in a peculiar sense; but this evidence was rejected:—*Held*: (1) it not having been proved that A. himself had any notice of the nature of the alterations, the son had not sufficient authority to waive the forfeiture; (2) the proviso in the agreement, that it should become "null & void," made it a lease voidable only at the election of the lessor.

*Qu.*: whether the demand of rent which became due subsequent to a forfeiture, amounts to a waiver of the forfeiture.—*DOE d. NASH v. BIRCH* (1836), 1 M. & W. 402; 2 Gale, 26; Tyr. & Gr. 769; 5 L. J. Ex. 185; 150 E. R. 490.

*Annotations*:—*As to* (2) *Apld.* *Dondy v. Nicholl* (1858), 4 C. B. N. S. 376. *Fold.* *Black Point Syndicate v. Eastern Concessions* (1898), 15 T. L. R. 117. *Generally, Refd.* *Ward v. Day* (1864), 5 B. & S. 359.

**6506. — With notice of breach.**—*ROE d. CROMPTON v. MINSHALL* (1760), Bull. N. P. 7th ed. 96, N. P.

enter for them is not waived by acceptance of rent.—*AINLEY v. BALSDEN* (1857), 14 U. C. R. 535.—*CAN.*

**k. —**—*KASTURBHAI MANIBHAI v. HIRALAL DAHYABHAI, KASTURBHAI*

*MANIBHAI v. DAVAR* (1920), I. L. R. 45 Bom. 535.—*IND.*

PART XXIV. SECT. 1, SUB-SECT. 5.—**A. (c).**

1. Whether operative as forfeiture—

*Continuance of possession permitted—Acceptance of rent for subsequent term.*—*SHER v. MAYNIER*, [1918] W. L. D. 29.—*S. AF.*

*Sect. 1.—Forfeiture: Sub-sect. 5, A. (c), (d), (e) & (f), B. & C.]*

**6507.** ————.]—A right of re-entry for breach of a covenant in a lease is waived by the lessor's bringing an action for rent accruing subsequently to the breach, with knowledge of its existence.—*DENDY v. NICHOLL* (1858), 4 C. B. N. S. 376; 27 L. J. C. P. 220; 31 L. T. O. S. 134; 22 J. P. 625; 6 W. R. 502; 140 E. R. 1130.

*Annotations:—Distd. Toleman v. Portbury* (1871), L. R. 6 Q. B. 245; *Evans v. Enever*, [1920] 2 K. B. 315. *Consd. Civil Service Co.-op. Soc. v. McGrigor's Trustee*, [1923] 2 Ch. 347. *Refd. Cotesworth v. Spokes* (1861), 10 C. B. N. S. 103; *Ward v. Day* (1864), 5 B. & S. 359; *Evans v. Wyatt* (1880), 43 L. T. 176; *Penton v. Barnett*, [1898] 1 Q. B. 276. *Mend. Wulfsberg v. Weardale S.S. Co.* (1916), 85 L. J. K. B. 1717.

**6508.** ———— *Where cause of forfeiture continuing—Covenant to repair.*—*BEVAN v. BARNETT* (1897), 13 T. L. R. 310.

*Annotation:—Refd. Penton v. Barnett*, [1898] 1 Q. B. 276.

**6509.** ————.]—*PENTON v. BARNETT*, No. 6327, *ante*.

**6510.** Demand by landlord's agent—Without authority.]—*DOE d. NASH v. BIRCH*, No. 6505, *ante*.

(d) *Distress for Rent.*

*Sec. generally, DISTRESS, Vol. XVIII., pp. 260 et seq.*

**6511.** General rule—Operates as waiver.]—*GREEN'S CASE*, No. 6427, *ante*.

**6512.** ————.]—*PENNANT'S CASE*, No. 6539, *post*.

**6513.** ————.]—Lessee covenanted that he, his exors., or assigns, would insure the demised premises, & keep them insured during the term, & deposit the policy with the lessor. The lease contained a proviso for re-entry on breach of any of the covenants. The lessee assigned & the premises were never insured either by him or his assignee.

The lessor distrained on Sept. 30 for rent then due, & afterwards brought an ejectment on a demise of Oct. 24:—*Held*: though the distress was an acknowledgment of a tenancy to Sept. 30, & a waiver of any forfeiture to that time, yet the lessor was entitled to recover in ejectment, for the forfeiture incurred by the breach of covenant between Sept. 30 & Oct. 24.—*DOE d. FLOWER v. PECK* (1830), 1 B. & Ad. 428; 9 L. J. O. S. K. B. 60; 109 E. R. 847.

*Annotations:—Consd. Doe d. Hemmings v. Durnford* (1832), 2 Cr. & J. 667. *Refd. Doe d. Muston v. Gladwin* (1845), 6 Q. B. 953; *Ward v. Day* (1863), 33 L. J. Q. B. 3; *Walrond v. Hawkins* (1875), L. R. 10 C. P. 342.

**6514.** ————.]—In an ejectment by a landlord against his tenant the landlord relied on a disclaimer. It was proved that the tenant disclaimed in Mar. 1833; in Nov. 1833, the landlord put in a distress for rent:—*Held*: a waiver of the disclaimer.—*DOE d. DAVID v. WILLIAMS* (1835), 7 C. & P. 322, N. P.

*Annotation:—Refd. Grimwood v. Moss* (1872), L. R. 7 C. P. 360.

**6515.** ————.]—A lease of a farm contained a covenant on the part of the lessee not to "assign or demise to or permit any other person to occupy the premises, or any part thereof, without the consent in writing of the lessor," & a proviso for re-entry by the lessor for any breach. By agreement in writing the lessee underlet a portion of the farm to T. for one year from Jan. 31, 1873, &

the lessor, on Sept. 30, 1873, with knowledge of the under-letting, distrained for & received rent due on Sept. 29:—*Held*: the lessor had waived the breach of the covenant not to "assign or demise" without consent; & the permitting T. to remain in the occupation of the land during the remainder of the year was not a new or continuing breach of the covenant not to "permit any other person to occupy," without consent.—*WALROND v. HAWKINS* (1875), L. R. 10 C. P. 342; 44 L. J. C. P. 116; 39 J. P. 248; *sub nom. WALDRON v. HAWKINS*, 32 L. T. 119; 23 W. R. 390; *subsequent proceedings, sub nom. HAWKINS v. WALROND* (1876), 1 C. P. D. 280.

*Annotations:—Refd. Griffin v. Tomkins* (1880), 42 L. T. 359; *Lawrie v. Lees* (1881), 7 App. Cas. 19; *Atkin v. Rose*, [1923] 1 Ch. 522.

**6516.** ————.]—The distress was a waiver of the forfeiture for non-payment of rent accrued due before the distress, & the action of ejectment therefore failed (*DAY, J.*).—*KIRKLAND v. BRIANCOURT* (1890), 6 T. L. R. 441, N. P.

*Annotation:—Distd. Shepherd v. Berger* (1891), 7 T. L. R. 332.

**6517.** Where insufficient distress on premises.]—In an ejectment under 4 Geo. 2 (c. 28), on a right of re-entry for non-payment of rent, the taking an insufficient distress after the forfeiture for rent accruing before is not a waiver of the right to re-enter.—*BREWER d. ONSLOW (LORD) v. EATON* (1783), 3 Doug. K. B. 230; 99 E. R. 627.

*Annotations:—Consd. Thomas v. Lulham*, [1895] 2 Q. B. 400. *Refd. Cotesworth v. Spokes* (1861), 10 C. B. N. S. 103; *Ward v. Day* (1863), 4 B. & S. 337.

**6518.** ———— *Common Law Procedure Act, 1852 (c. 76), s. 210.*—*COTESWORTH v. SPOKES*, No. 6297, *ante*.

**6519.** ————.]—A distress does not operate as a waiver of a landlord's right of re-entry for non-payment of rent under the above sect. Where, therefore, a landlord who had a right of re-entry distrained upon the goods of his tenant, but after the goods had been sold half a year's rent still remained due:—*Held*: (1) the landlord was entitled, notwithstanding the distress, to maintain an action of ejectment against the tenant. (2) Such action of ejectment cannot be maintained, unless the landlord has actually distrained for the half year's rent before action.—*THOMAS v. LULHAM*, [1895] 2 Q. B. 400; 61 L. J. Q. B. 720; 73 L. T. 146; 59 J. P. 709; 43 W. R. 689; 11 T. L. R. 558; 39 Sol. Jo. 687; 14 It. 692, C. A.

*Annotations:—As to (1) Consd. Rickett v. Green*, [1910] 1 K. B. 253. *As to (2) Dbtd. Rickett v. Green*, [1910] 1 K. B. 253.

**6520.** Continuing in possession of distress—Levied before forfeiture.]—A lease contains a proviso for re-entry, in case the rent shall be twenty-one days in arrear, & there shall be no sufficient distress on the premises; the landlord, who distrains before the expiration of the twenty-one days, but continues in possession of the distress upon the premises until after the expiration of twenty-one days, does not thereby waive his right of re-entry.—*DOE d. TAYLOR v. JOHNSON* (1816), 1 Stark. 411, N. P.

**6521.** Where cause of forfeiture continuing—Covenant to repair.]—In ejectment for a forfeiture, under a covenant to keep in tenantable repair, it is not necessary to show that the premises were not in repair on the day of the demise; but, if

**PART XXIV. SECT. 1, SUB-SECT. 5.—A. (d).**

**6511 i.** General rule—Operates as waiver.]—On the facts:—*Held*: there had been no forfeiture for non-payment of rent, but, if there had been a for-

feiture the distress for rent operated as a waiver of the forfeiture.—*CHEYNE v. MOSES*, [1919] Q. S. R. 74.—**AUS.**

**6511 ii.** ————.]—A landlord cannot, during the currency of the lease & before the expiration of the term,

re-enter for non-payment of rent for which he has distrained on goods & chattels still held by him under the distress.—*WHITTAKER v. GOGGIN* (1908), 38 N. B. R. 378; 4 E. L. R. 530.—**CAN.**

proved to be out of repair a short time previously, it is incumbent on deft. to give evidence that they have been put into repair before the right to re-enter accrued.

If a neglect to repair continues from day to day, that is a continuing cause of forfeiture. . . . In this case, after the time of the distress, there was no new waiver of forfeiture (BAYLEY, B.).—DOE d. ILEMMINGS v. DURNFORD (1832), 2 Cr. & J. 667; 1 L. J. Ex. 251; 149 E. R. 280.

**6522. Distress within six months after forfeiture—Landlord & Tenant Act, 1709 (c. 18), ss. 6, 7.]—WARD v. DAY, No. 6439, ante.**

**Right to distrain after forfeiture.]—See DISTRESS, Vol. XVIII., pp. 312–313, Nos. 477, 482–484.**

(c) *Agreement for New Lease.*

**6523. From expiration of old lease.]—Where, during the existence of a lease containing a proviso for re-entry in case of assignment or underletting without licence in writing, the lessor, who had purchased the remainder of the interest in it, engaged to grant a new lease to deft., to take effect on the expiration of the old lease:—Held: the lessor could not maintain ejectment against deft. on the fact of his possession, though no licence in writing had been granted, as there was a waiver of the forfeiture if any had taken place, or else there was no forfeiture at all, for deft. came in with the lessor's consent.**

The lessor of pltf. cannot treat deft. as a trespasser, for he came into possession in consequence of the conversation in which the lessor of pltf. assumed to let him have a lease. As that was the lessor of pltf.'s own act, deft. cannot be said to have come in under the lessees, but under the lessor of pltf. (PATTESON, J.).—DOE d. WEATHERHEAD v. CURWOOD (1835), 1 Har. & W. 140.

**6524. —.]—WARD v. DAY, No. 6439, ante.**

(f) *Tenant Encouraged to Spend Money.*

**6525. Operates as waiver.]—DOE d. SHEPARD v. ALLEN, No. 6432, ante.**

**6526. —.]—Ejectment for a forfeiture by erecting more than four houses on the land demised. The lessors of pltf. knew what was going on, & did not object; & the jury found that they so far sanctioned the erection as to allow deft. to go on & finish it: Held:—there had been a waiver of the forfeiture.—DOE d. PLAYER v. DASHWOOD (1851), 17 L. T. O. S. 125.**

**6527. —.]—Where a lessee had forfeited his lease at law, but showed reasonable ground for belief that he had a good defence in equity, the landlord was restrained from proceeding in execution at law until the hearing of the cause. *Semble*: where a landlord is aware that a lease is or must be forfeited, & allows the tenant to go on spending money on the property, the landlord will be restrained from availing himself of the forfeiture at law.—NORTH STAFFORD STEEL, IRON & COAL CO. (BURSLEM), LTD. v. CAMOYS (LORD) (1865), 6 New Rep. 345; 12 L. T. 780; 29 J. P. 628; 11 Jur. N. S. 555, L.JJ.**

**PART XXIV. SECT. 1, SUB-SECT. 5.—A. (f).**

**6525 i. Operates as waiver.]—** Mere knowledge or acquiescence in an act constituting a forfeiture does not amount to a waiver; there must be some expenditure of money in improvements or some positive act of waiver, such as receipt of rent.—MCLAREN v. KERR (1876), 39 U. C. R. 507.—CAN.

**6525 ii. —.]—**To permit a tenant,

to remain in possession, & expend his money in building, with the knowledge of the landlord, after an eviction for non-payment of rent, is a waiver of the forfeiture under the ejectment statutes.—HUME v. KENT (1811), 1 Ball & B. 554, 558, 561.—IR.

**PART XXIV. SECT. 1, SUB-SECT. 5.—B.**

*m. Confined to particular breach.]—*

*B. Extent of Waiver.*

*See, now, Law of Property Act, 1925 (c. 20), s. 148.*

**6528. Confined to particular breach—Covenant against underletting.]—**(1) A lessor who has a right of re-entry reserved on breach of a covenant not to underlet, does not by waiving his re-entry on one underletting, lose his right to re-enter on a subsequent underletting. (2) Nor by waiving his right to re-enter on a breach of covenant to repair, does he waive his re-entry on a subsequent want of repairs.—DOE d. BOSCAWEN v. BLISS (1813), 4 Taunt. 735; 128 E. R. 510.

*Annotations:—As to (1) Refd. Doe d. Bryan v. Bancks (1821), 4 B. & Ald. 401; Doe d. Griffith v. Pritchard (1833), 5 B. & Ad. 765; Dowell v. Dew (1842), 1 Y. & C. Ch. Cas. 345. As to (2) Refd. Doe d. Bryan v. Bancks (1821), 4 B. & Ald. 401.*

**6529. — Covenant to repair.]—DOE d. BOSCAWEN v. BLISS, No. 6528, ante.**

**6530. Waiver of principal covenant—Implies waiver of dependent covenant—Covenant to build & keep building in repair.]—**When in a lease there is an express covenant to erect buildings by a certain date, a further continuing covenant to erect these buildings cannot be implied from a covenant to repair them contained in the same document. Where, therefore, the right of forfeiture for not erecting buildings pursuant to the building covenant has been waived, any right of forfeiture for not repairing these buildings has necessarily been waived also.—STEPHENS v. JUNIOR ARMY & NAVY STORES, LTD., [1914] 2 Ch. 516; 84 L. J. Ch. 56; 111 L. T. 1055; 30 T. L. R. 697; 58 Sol. Jo. 808, C. A.

*C. Effect of Prior Election to Forfeit.*

**6531. Action for possession—Subsequent acceptance of rent.]—**If ejectment is brought on a forfeiture of a lease, & after the bringing of such ejectment the landlord accept rent, it is no waiver of the forfeiture.—DOE d. MORECRAFT v. MEUX (1824), 1 C. & P. 346, N. P.; *subsequent proceedings* (1825), 4 B. & C. 606.

*Annotations:—Apld. Jones v. Carter (1846), 15 M. & W. 718. Consd. Croft v. Lumley (1858), 6 H. L. Cas. 672. Distd. Evans v. Wyatt (1880), 43 L. T. 176. Refd. Civil Service Co-op. Soc. v. McGrigor's Trustee, [1923] 2 Ch. 347.*

**6532. —.]—JONES v. CARTER, No. 6242, ante.**

**6533. —.]—**Pltfs. let to deft. a portion of a house for twelve years from Midsummer, 1914. The lease contained a proviso for re-entry in case the lessee should become bkpt., or if the rent should be in arrear for twenty-one days. In July, 1918, deft. was adjudicated a bkpt. On Jan. 21, 1919, the two quarters' rent due at Michaelmas & Christmas, 1918, were in arrear. On Jan. 21, 1919, pltfs. sued deft. on a specially indorsed writ claiming possession of the premises, on the ground that the lease was liable to forfeiture for non-payment of the rent. Deft., taking advantage of C. L. P. Act, 1852 (c. 76), s. 212, paid the rent & costs to pltfs., & therefore those proceedings came to an end. In the following May pltfs. sued deft. for possession, claiming that

Itlef lies in equity against a forfeiture of a lease during a period when the landlord dealt with the tenant so as to lead him to suppose that the forfeiture would not be insisted on; but where a subsequent forfeiture was incurred after such dealings had ceased:—Held: the prior transactions raised no equity.—FLATTERY v. ANDERDON (1848), 12 I. Eq. R. 218.—IR.

**Sect. 1.—Forfeiture: Sub-sect. 5, C. & D. Sect 2: Sub-sect. 1, A.]**

the lease was forfeited by reason of deft.'s bkpcy.:—**Held:** notwithstanding that the rent which was paid to plffs. in the first action had accrued due subsequently to the date of the adjudication, its acceptance by plffs. did not operate as a waiver of the forfeiture.—**EVANS v. ENEVER**, [1920] 2 K. B. 315; 89 L. J. K. B. 845; 123 L. T. 328; 36 T. L. R. 441; 64 Sol. Jo. 464.

**Annotation:**—**Refd.** Civil Service Co-op. Soc. v. McGrigor's Trustee, [1923] 2 Ch. 347.

**6534.** ———.]—In 1914 certain premises were devised by A. to B. for thirty-five years, with a proviso for re-entry on bkpcy. of the lessee. This happened on Oct. 24, 1922, & the trustee, who was appointed on Nov. 6, entered into possession. On Nov. 13 plffs. served notice on the trustee of their intention within fourteen days to enforce their right of re-entry or forfeiture, but the notice did not require the lessees to make compensation for the breach of covenant, & on Nov. 28 the writ was issued. At Christmas they demanded & were paid rent for the premises:—**Held:** (1) plffs. were entitled to enforce their right of re-entry or forfeiture on the bkpcy. of the lessees; (2) the fourteen days was sufficient notice, & the notice was valid, although it did not require the lessees to make compensation; & (3) the payment of rent accrued, partly after the bkpcy. & partly after the issue of the writ, did not operate as a waiver of the forfeiture.—**CIVIL SERVICE CO-OPERATIVE SOCIETY v. McGRIGOR'S TRUSTEE**, [1923] 2 Ch. 347; 92 L. J. Ch. 616; 129 L. T. 788.

**6535.** ——— **With intention of creating new tenancy.**]—In an action of ejectment to recover possession of premises for breaches of covenants contained in certain leases, deft. pleaded that after the bringing of the action plff., with the intention of waiving the breaches of covenant, accepted rent, which had accrued due after the bringing of the action, & that thereby the breaches of covenant were waived:—**Held:** a good statement of defence, for the facts pleaded amounted to an agreement for a new tenancy on the terms of the old lease.—**EVANS v. WYATT** (1880), 43 L. T. 176; 44 J. P. 767.

**6536.** ——— **Subsequent claim for rent.**]—Plff. demised a house to C., who covenanted not to permit or suffer any sale by auction to take place on the premises. C. subsequently granted a bill of sale under seal assigning his goods in the house as security for a loan, & empowering the grantees to sell them by auction on the premises in default of repayment. He next mortgaged the house by an underlease to deft., & finally, executed a deed of assignment conveying all his estate to trustees for his creditors; he nevertheless remained in possession. The grantees of the bill of sale sold the goods by auction on the premises. Plff. brought an action of ejectment, & in compliance with a judge's order, delivered particulars of the following breaches of covenant, upon which she relied as causing a forfeiture of the lease, namely, first, non-payment of rent accrued since the day of the sale; secondly, the permitting & suffering a sale by auction to take place on the premises. Pursuant to an order under C. L. P. Act, 1852 (c. 76), s. 212, & C. L. P. Act, 1860 (c. 126), s. 1, the arrears of rent were tendered to plff., & being refused were paid into ct., whereupon the proceedings on the first breach were stayed, but the action went to trial on the second. The jury found that C. permitted the sale:—**Held:** he had

power to do so, notwithstanding the conveyance of his estate, & having done so, had committed an act of forfeiture which was not waived by plff. stating in the particulars of breaches, the non-payment of subsequent rent.—**TOLEMAN v. PORTBURY** (1872), L. R. 7 Q. B. 344; 41 L. J. Q. B. 98; 26 L. T. 292; 20 W. R. 441, Ex. Ch.

**Annotations:**—**Consd.** **Evans v. Davis** (1878), 10 Ch. D. 747; **Evans v. Wyatt** (1880), 43 L. T. 176; **Evans v. Enever**, [1920] 2 K. B. 315. **Refd.** **Re Moorish, Ex p. Hart Dyke** (1882), 22 Ch. D. 410; **Serjeant v. Nash, Field**, [1903] 2 K. B. 304; **Berton v. Alliance Economic Investment Co.**, [1921] 1 K. B. 742; **Atkin v. Rose**, [1923] 1 Ch. 522. **Mentd.** **Wilson v. Twamley**, [1904] 2 K. B. 99.

**6537.** ——— **Subsequent distress for rent.**]—A lease of a farm contained a condition of re-entry for breaches of covenants. Breaches of covenants took place before June 24, 1871. The lessors brought ejectment against the tenant on July 21, 1871; but the writ did not claim possession as from any antecedent date. After the commencement of the action, but before trial, the lessors distrained for rent due up to June 24, 1871:—**Held:** by such distress they had not precluded themselves from relying at the trial on any breach of covenant before June 24, 1871, on the ground that by bringing ejectment they had unequivocally declared their election to determine the lease on any ground of forfeiture which had not been waived before the commencement of the action, & the subsequent distress, if not justifiable under the 8 Anne, c. 14, which enables the landlord under certain circumstances to distrain after the determination of the tenancy, was a trespass.—**GRIMWOOD v. MOSS** (1872), L. R. 7 C. P. 360; 41 L. J. C. P. 239; 27 L. T. 268; 30 J. P. 663; 20 W. R. 972.

**Annotations:**—**Consd.** **Evans v. Wyatt** (1880), 43 L. T. 176; **Gentle v. Faulkner** (1899), 68 L. J. Q. B. 848; **Serjeant v. Nash, Field**, [1903] 2 K. B. 304. **Refd.** **Kirkland v. Briancourt** (1890), 6 T. L. R. 441; **R. v. Paulson**, [1921] 1 A. C. 271. **Mentd.** **West v. Rogers** (1888), 4 T. L. R. 229; **Works Comrs. v. Hull**, [1922] 1 K. B. 205; **Civil Service Co-op. Soc. v. McGrigor's Trustee**, [1923] 2 Ch. 347.

— **Amounting to re-entry.**]—**See Sect. 1, sub-sect. 4, B. (b) ii., ante.**

**D. Breach of Proviso Conditioning Term.**

**6538. Lessee cannot plead waiver—Acceptance of rent.**]—**ANON** (1586), Godb. 47; 78 E. R. 29.

**Annotation:**—**Refd.** **Eastcourt v. Weekes** (1698), 1 Lut. 799.

**6539.** ———.]—A lease for years was made rendering rent, upon condition of re-entry, if the lessee, etc. granted or assigned the same or any part thereof without assent of the lessor, etc.; the lessee granted part of the term without his assent, & [the lessor] afterwards accepted the whole rent from the lessee, but did not then know that the condition was broken;—**Held:** (1) the condition being collateral, the acceptance of rent should not make the re-entry void, for notice in this case is material; (2) if the lessor distrains for the rent due, it is a waiver of the forfeiture; (3) where the condition is, that on breach thereof, the lease for years shall be void, acceptance of rent due at a subsequent day will not affirm it; (4) acceptance of rent by a person to whom none is due, does not bind him; (5) in case of a lease for life conditioned to be void on breach thereof, as the estate of freehold cannot be determined without entry, acceptance of rent due at a subsequent day is a waiver of the forfeiture, though otherwise as to a lease for years with such a condition.

In the case of a condition annexed to rent, the acceptance of rent due at a subsequent day is a waiver of the forfeiture: *secus* as to acceptance

n. *Lessee's solicitor—Written authority.*]—*Re CLANCY & SCHERMMEHORN* (1914), 31 O. L. R. 345; 6 O. W. N. 478.—OAN.

**Sect. 2.—Surrender: Sub-sect. 1, A. & B.; sub-sect. 2, A. (a).]**

N. R. 415; 13 L. J. C. P. 11; 2 L. T. O. S. 121; 7 Jur. 1017; 134 E. R. 1063.

**Annotations:—***As to (1) Distd.* Cannan v. Hartley (1850), 9 C. B. 634. *Refd.* Morrison v. Chadwick (1849), 18 L. J. C. P. 189; Furnivall v. Grove (1860), 8 C. B. N. S. 496; Phene v. Popplewell (1862), 12 C. B. N. S. 334. *Generally, Mentd.* Kelly v. Webster (1852), 12 C. B. 283.

**6546. Executor de son tort.]—**Lessee of premises, under a covenant of re-entry if the rent should be in arrear twenty-eight days, died in bad circumstances, & his brother became exor. *de son tort*. B., his brother, agreed with the landlord to give him possession, & suffer the lease to be cancelled, on his abandoning the rent, which was twenty-eight days in arrear. B. afterwards took out letters of administration:—*Held:* the agreement of B., as exor. *de son tort*, did not conclude him as rightful administrator, nor give a right of possession to the landlord who had entered under the agreement, but who had not made any formal claim in respect of the forfeiture, nor taken a regular surrender of the lease.—*Doe d. HORNBY v. GLENN* (1834), 1 Ad. & El. 49; 3 Nev. & M. K. B. 837; 3 L. J. K. B. 161; 110 E. R. 1126.

**Annotations:—***Mentd.* Metters v. Brown (1863), 1 H. & C. 686; Leggett v. G. N. Ry. (1876), 35 L. T. 334.

**6547. Committee of lunatic.]—**Where a lunatic was entitled to a lease for seven, fourteen, or twenty-one years of a house which it was desirable to surrender at the expiration of the first seven years, & the intended committee's security could not be completed in time for notice to be given in the usual way to determine the tenancy, the ct. appointed the lunatic's wife committee of that part of the estate consisting of the house, without security, & authorised her to give notice to determine the tenancy.—*Re LAMBERT* (1879), 40 L. T. 205, L. J.

*See, further, LUNATICS.*

**6548. Guardian of Infant—Infants Property Act, 1830 (c. 65), ss. 12, 14.]—**The provisions of above Act, for the surrender of a lease to which an infant is entitled, apply to a lease to which an infant is only beneficially entitled, the legal estate being vested in a trustee for him.—*Re GRIFFITHS* (1885), 29 Ch. D. 248; 54 L. J. Ch. 742; 53 L. T. 262; 33 W. R. 728.

*See, further, INFANTS, Vol. XXVIII.*

**6549. Assignee.]—***BAYNTON v. MORGAN*, No. 6725, *post*.

**B. Who may Accept.**

**6550. One joint tenant.]—***ANON.* (1405), Y. B. 5 Edw. 4, fo. 4, pl. 7.

**Annotation:—***Refd.* Cannan v. Hartley (1850), 9 C. B. 634.

**6551. —.]—***TURNER v. HARDEY*, No. 6662, *post*.

**6552. —.]—***DODD v. ACKLOM*, No. 6545, *ante*.

**6553. Guardian in socage.]—***WILLIS & WHITEWOODS CASE* (1589), 1 Leon. 322; 74 E. R. 293.

**Annotation:—***Refd.* Doe d. Biddulph v. Poole (1848), 11 Q. B. 713.

**6554. Lessee—From underlessee.]—***HUGHES v. ROBOTHAM* (1593), Cro. Eliz. 302; Poph. 30; 78 E. R. 554.

**Annotations:—***Consd.* Burton v. Barclay (1831), 7 Bing. 745. *Refd.* Dighton v. Greenvil (1690), 2 Vent. 321.

**6555. —.]—**A. in 1861, granted an underlease to B., for twenty-one years from Michaelmas, 1861, at the yearly rent of £50. In 1864 he granted an underlease of the same premises to C. for twenty-one years from Michaelmas, 1863, at the same rent. B. never attorned to C.:—*Held:* inasmuch as there was no attornment,

the demise to C. did not pass the reversion to him, but only an *interesse termini*; & in order to establish C.'s underlease, a surrender by B. to A., & not to C., was the effectual & proper course.—*EDWARDS v. WICKWAR* (1866), L. R. 1 Eq. 403; 35 L. J. Ch. 309; 12 Jur. N. S. 158; 14 W. R. 363.

**Annotation:—***Refd.* Horn v. Beard, [1912] 3 K. B. 181.

**6556. Sequestrator.]—**A. being tenant of premises under an indenture of lease granted by B., a sequestration issued out of the Ct. of Chancery against the latter. A. then signed the following instrument: "I hereby attorn, & become the tenant to C. & D., two of the sequestrators named in the writ of sequestration issued in the said suit in Chancery, & to hold the same for such time & on such conditions as may be subsequently agreed upon":—*Held:* deft. not having received possession of the premises from C. & D., might dispute their title, & the lease not being proved to have been surrendered, was an answer to the action.—*CORNISH v. SEARELL* (1828), 8 B. & C. 471; 1 Man. & Ry. K. B. 703; 6 L. J. O. S. K. B. 254; 108 E. R. 1118.

**Annotations:—***Refd.* Doe d. Linsey v. Edwards (1836), 5 Ad. & El. 95; Doe d. Chawner v. Boulter (1837), 1 Nev. & P. K. B. 650; Doe d. Wright v. Smith (1838), 8 Ad. & El. 255; Jolly v. Arbuthnot (1859), 4 De G. & J. 224; Carlton v. Bowcock (1884), 51 L. T. 659. *Mentd.* Morton v. Woods (1869), L. R. 4 Q. B. 293.

**6557. Mortgagor—Lease made before mortgage.]—**A mtgor. before mtge. let a farm to P. as tenant from year to year. After the mtge., P. let deft. into possession in his stead, & informed the mtgor. of the fact, & the mtgor. subsequently received the rent from the hands of deft.:—*Held:* the tenant's term was still in P., there being no effectual surrender, & consequently the mtgee. could not maintain ejectment against deft. without a notice to quit.—*CADLE v. MOODY* (1861), 30 L. J. Ex. 385; 7 Jur. N. S. 1249.

**6558. —Concurrence of mortgagee—Lease made under statutory provisions—Conveyancing & Law of Property Act, 1881 (c. 41), s. 18 (1).]**—A mtgor. in possession who has granted a lease under the statutory power conferred on him by above Act, sect. 18, sub-sect. 2, has no power to accept a surrender of the lease without the concurrence of his mtgee.—*ROBBINS v. WHYTE*, [1906] 1 K. B. 125; 75 L. J. K. B. 38; 94 L. T. 287; 54 W. R. 105; 22 T. L. R. 106; 50 Sol. Jo. 141.

**Mortgagor or mortgagee in possession.]—***See, now, Law of Property Act, 1925 (c. 20), s. 100.*

**6559. Assignee of reversion—Rent assigned separately—Agreement to defeat assignee of rent.]—**Lands were subject to a lease of a way-leave at a certain rent for sixty-three years, which the lessee had the power of determining. The land & rent were sold separately by auction in two lots, & were purchased by two different persons. After some time, the purchaser of the land entered into an arrangement with the lessee, to put an end to the lease, & entered into a different one, in order to defeat the right of the purchaser of the rent:—*Held:* this was contrary to equity, & the right of the purchaser of the rent was made good out of the new contract.—*WOOD v. LONDON-DEURY (MARQUIS)* (1847), 10 Beav. 465; 16 L. J. Ch. 460; 12 Jur. 735; 50 E. R. 661.

**Annotation:—***Mentd.* Nokes v. Gibbon, Nokes v. Fish, Nokes v. Baker (1857), 5 W. R. 400.

**6560. —Rent reserved to lessor.]—**Pltfs. sublet a portion of premises, of which they had a lease, to deft. They afterwards assigned their interest in the premises to B., & agreed in writing with B., that notwithstanding this assignment they should

p. ———.]—Under an agreement not reduced into writing for the letting of a farm for twenty-one years, a dispute arose between the parties & the tenant determined on surrendering the farm, & did surrender the same on the termination of the first year, having previous to the said termination given verbal notice to his landlord

**Sect. 2.—Surrender: Sub-sect. 2, A. (a) & (b), & B.; sub-sect. 3, A.]**

parts of it as should not be sold after Aug. 1, & before Sept. 1, following, should be divided into two equal lots between A. & B.; & that £100 should be paid by B. to C., the principal tenant, as a remuneration for his giving up possession of his farm at the Michaelmas following; & C. agreed to give up possession of his farm accordingly. No part of the estate was sold by Sept. 1, but some portions were sold subsequently, & the remainder was divided between A. & B., but such division was not completed till the following Mar. C. continued in possession, by the desire of A. & B., until that time, & then quitted:—*Held*: the agreement was not a surrender of A.'s term.

No particular words are necessary to make a surrender if it sufficiently appear to be the intention of both parties that the term should immediately cease; but this is an agreement for it to cease in futuro (PARKE, B.).—WEDDALL v. CAPES (1836), 1 M. & W. 50; 1 Gale, 432; Tyr. & Gr. 430; 5 L. J. Ex. 111; 150 E. R. 341.

*Annotation*:—*Consd.* Doe d. Murrell v. Milward (1838), 3 M. & W. 328.

**6574. —“Renounce, disclaim & surrender.”**—Where the lessors of *pltf.*, for the purpose of establishing their title, relied on the following document signed by three out of four of the representatives of a tenant from year to year: “We hereby renounce & disclaim, & also surrender & yield up to the lessor, all right, title, interest, use, trust, term & terms of years whatsoever, unto the churchwardens & overseers for the time being, & possession of & in all that messuage, etc., in the parish of A., formerly in the possession of,” etc.:—*Held*: the instrument was a surrender, not a disclaimer.—DOE d. WYATT v. STAGG (1839), 5 Bing. N. C. 564; 7 Scott, 690; 9 L. J. C. P. 73; 3 Jur. 1127; 132 E. R. 1217.

**6575. Action to compel surrender—No agreement in lease.**—A lease being far spent, & the under-lessee refusing to surrender, the lessee brought his bill to compel a surrender. The bill was dismissed, there being no agreement in the lease for that purpose.—COLCHESTER v. ARNOTT (1700), Prec. Ch. 124; 2 Vern. 383; 24 E. R. 60.

**(b) Cancellation of Lease.**

**6576. No surrender.**—ROE d. BERKELEY (EARL) v. YORK (ARCHBP.), No. 6567, *ante*.

**6577. —**—A. demised certain premises to B., which B. demised to C. reserving rent; the interest of B. was afterwards sold to D., upon which D. obtained from A. a new lease, the lease to B. having been cancelled; B. & D. afterwards distrained for rent, in the name of D.; upon which occasion, D. declared that the premises belonged to him:—*Held*: in an action of trespass against B., D., & others, their servants, the cancellation & new lease did not operate as a surrender of the interest of B., & rent being due to B. by effluxion of time, debts. were justified in making the distress, though in the name of D.—WOOTLEY v. GREGORY (1828), 2 Y. & J. 536; 148 E. R. 1031.

*Annotation*:—*Refd.* Trent v. Hunt (1853), 9 Exch. 14.

of his intention so to surrender:—*Held*: a verbal notice was sufficient in the circumstance to justify the surrender of the premises.—GLEESON v. QUIRK (1854), 4 Nfld. L. R. 25.—NFLD.

*q. By acts of devisee—What acts constitute surrender.*—GREENE v. GREENE (1881), 6 Nfld. L. R. 287.—NFLD.

**PART XXIV. SECT. 2, SUB-SECT. 2.—A. (b).**

**6576 i. No surrender.**—The cancelling of a lease is not such a surrender in law as to dispense with the necessity for a surrender in writing under Stat. Frauds.—MAGENIS v. MAC-CULLOUGH (1714-1727), Gilb. Ch. 235; 25 E. II. 163.—IR.

**6578. —**—The mere cancelling in fact of a lease is not a surrender of the term thereby granted within Stat. Frauds, which requires such surrender to be by deed or note in writing, or by act or operation of law. Nor, where such a lease appears to have been once in the possession of the lessee, who entered into possession of the property, will the fact of the lease being produced by the lessor in a cancelled state, unaccompanied by any other evidence, be sufficient to warrant a presumption that there has been a valid surrender.—DOE d. COURTAIL v. THOMAS (1829), 9 B. & C. 288; 4 Man. & Ry. K. B. 218; 7 L. J. O. S. K. B. 214; 109 E. R. 107.

*Annotations*:—*Refd.* Doe d. Rogers v. Rogers (1833), 5 B. & Ad. 755. *Mentd.* Doe d. Egremont v. Date (1842), 11 L. J. Q. B. 220; Wortham v. Pemberton, Newenham v. Pemberton (1847), 1 De G. & Sm. 644; *Re* Chancellor (1850), 16 L. T. O. S. 323.

**6579. —Consent of both parties.**—The cancelling a lease by the mutual consent of both parties does not destroy the estate vested in the lessee, & the lessor may therefore maintain an action of debt on the demise, for the recovery of the rent.—WARD (LORD) v. LUMLEY (1860), 5 H. & N. 87; 29 L. J. Ex. 322; 1 L. T. 376; 24 J. P. 150; 8 W. R. 184; 157 E. R. 1112.

*Annotations*:—*Refd.* Oakley v. Monck (1866), 4 H. & C. 251; Shaw v. Lomas (1888), 59 L. T. 477.

**6580. Production of cancelled lease—By lessor—No presumption of valid surrender.**—DOE d. COURTAIL v. THOMAS, No. 6578, *ante*.

**B. Failure of Purpose Inducing Surrender.**

**6581. Consideration of new lease—New lease void—Whether surrender binding.**—ZOUCH d. ABBOT & HALLET v. PARSONS, No. 6646, *post*.

**6582. —**—A lease being granted in consideration of the surrender of a former lease, which was in fact surrendered by deed under seal:—*Held*: the first lease did not become revived by the circumstance of the second not being binding on the successor.—DOE d. ROCHESTER (BP.) v. BRIDGES (1831), 1 B. & Ad. 847; 9 L. J. O. S. K. B. 113; 109 E. R. 1001.

*Annotations*:—*Refd.* Doe d. Egremont v. Forwood (1842), 3 Q. B. 627; Doe d. Egremont v. Courtenay (1848), 11 Q. B. 702; Doe d. Biddulph v. Poole (1848), 11 Q. B. 713. *Mentd.* Stevens v. Joacocks (1848), 11 Q. B. 731; Couch v. Steel (1854), 3 E. & B. 402; Lamplugh v. Norton (1889), 22 Q. B. D. 452; Clegg, Parkinson v. Earby Gas Co., [1896] 1 Q. B. 592; Johnston & Toronto Type Foundry Co. v. Toronto Consumers Gas Co., [1898] A. C. 447; Pasmore v. Oswaldtwistle U. D. C., [1898] A. C. 387; Devonport Corp'n. v. Tozer, [1902] 2 Ch. 182; Hulme v. Ferranti, [1918] 2 K. B. 426; R. v. Poplar B. C. (No. 1), [1922] 1 K. B. 72; Waghorn v. Collison (1922), 127 L. T. 8; Phillips v. Britannia Hygienic Laundry Co., [1923] 2 K. B. 832; Everett v. Griffiths, [1924] 1 K. B. 941.

**6583. —**—DOE d. EGREMONT (EARL) v. COURTENAY, No. 6639, *post*.

**Compare Sub-sect. 3, B. (c), *post*.**

**6584. Misconception of purpose of surrender—Improvement of land—Anticipated benefit to adjoining land.**—S. having for some years held a piece of ground under the East India Co., which they proposed to take for the purpose of public improvement, a negotiation took place for S. surrendering the land & re-acquiring it on condition of giving up possession on one month's notice. At the time of proposing the surrender,

**PART XXIV. SECT. 2, SUB-SECT. 2.—B.**

**r. Consideration of new lease—Refusal of lessor to execute surrender & lease.**—*Re* LONGFORD'S (EARL) (TRUSTEE OF COOKE) ESTATE (1880), 5 L. R. Ir. 99.—IR.

S. believed the improvement in question was a new road, which would greatly benefit his adjacent property, & such was also at first the intention of the co. It seemed, however, the co. varied the nature of the improvement ultimately contemplated. S. afterwards, without any definite notice of the improvement, surrendered the land & executed an agreement reciting the transaction & referring generally to the improvement as "a public improvement," without further describing it, & agreeing to quit at a month's notice:—*Held*: the co. were entitled at law to bring an ejectment for the land, & S. had no defence; but his remedy, if any, was in equity.—*DOSSEE v. DOE d. EAST INDIA CO.* (1859), 1 L. T. 345; *sub nom.* *ANUNDO-MOHEY DOSSEE v. EAST INDIA CO.*, 8 W. R. 245, P. C.

## SUB-SECT. 3.—BY OPERATION OF LAW.

## A. In General.

**6585. Question of fact—Series of ambiguous facts—Collective evidence of surrender—Duty of judge.**—*REEVE v. BIRD*, No. 6677, *post*.

**6586. Assent of lessor—Necessity for.**—In pleading a surrender of a lease it need not be shown that the lessor entered after the agreement to surrender; but the lessor's assent must be shown.

If the grantee for life of a rent accept a lease of the land from the reversioner & the lease is afterwards surrendered, the rent revives.—*PETO v. PEMBERTON* (1628), Cro. Car. 101; Hut. 94; 79 E. R. 689.

*Annotations*.—*Refd.* *Thompson v. Leach* (1690), 2 Vent. 198. *Mentd.* *Cage v. Acton* (1699), 1 Ld. Raym. 515.

**6587.** ———.]—*PAGE v. MANN & GARDINER*, No. 6680, *post*.

**6588.** ——— **Acceptance under mistake of fact—Induced by tenant—Absence of fraud.**—Pltf. let a house to deft., a naval officer, for a term of years subject to a proviso that "should the tenant be ordered away from Portsmouth by the Admiralty he may determine this agreement by giving to the landlord one quarter's notice in writing." During the continuance of the tenancy deft. received an order from the Admiralty to join a ship for foreign service, but shortly afterwards that order was cancelled. Subsequently to the cancellation deft., purporting to act under the terms of the agreement & in the belief that he was thereby entitled to do so, gave pltf. a quarter's notice of his intention to give up possession. Pltf., in the belief that deft. was at that time under orders from the Admiralty to leave, resumed possession of the house on the expiry of the notice & advertised it for sale. Subsequently pltf. discovered the true facts, & brought the action to recover the rent which had accrued in the interval:—*Held*: (1) deft. was under the circumstances not entitled to give the notice to terminate the tenancy, & as the non-disclosure of the cancellation of the Admiralty's order was not fraudulent, the fact that pltf. accepted the notice under a mistake induced by the act of deft. did not prevent that acceptance from working a surrender by operation of law; but (2) the giving of the notice was a breach of an implied contract in respect of which

pltf. was entitled to recover the amount of the rent due as damages.—*GRAY v. OWEN*, [1910] 1 K. B. 622; 79 L. J. K. B. 389; 102 L. T. 187; 26 T. L. R. 297, D. C.

**6589. Release by lessee of all demands—Corresponding release by lessor.**—*ANON.* (1572), Dal. 85, (45); 123 E. R. 294.

**6590. Delivery of lease to lessor—With lessor's consent.**—If the indenture of lease is given up to the lessor & accepted by him, this is a surrender in law.—*ANON.* (1648), Clay. 131.

**6591. Bargain & sale—By tenant & reversioner.**—Bargain & sale by tenant for years & the reversioner operates as a surrender by the tenant & a bargain & sale by the reversioner.—*CHALLONER v. DAVIES* (1698), 1 Ld. Raym. 400; 91 E. R. 1166.

**6592. Agreement to end term—Conditional agreement—Non-performance of condition.**—One being in possession of premises as tenant from year to year under an agreement for a lease of fourteen years, & the rent being in arrear, entered into an indenture with his landlords, whereby reciting such tenancy & arrears of rent accrued, & that he had agreed to quit & to deliver up the premises to them, & that a valuation should be made of his effects on the premises by two indifferent persons, to be chosen, etc., & that the same should in the meantime be assigned & delivered up to a trustee for the landlords; the deed assigned his effects on the premises to such trustee, on trust to have the valuation made, & out of the amount to retain the arrears of rent, & pay the residue to the tenant:—*Held*: the tenant not having in fact quitted the possession, nor any valuation having been made of his effects, such agreement to quit, etc., being conditional, & the condition not performed, nor the agreement in any manner acted upon, did not operate as a surrender of the tenant's legal term from year to year, & consequently, the right of the landlords to distrain for the arrears of rent continued after six months from the making of the indenture.—*COUPLAND v. MAYNARD* (1810), 12 East, 134; 104 E. R. 53.

**6593.** ——— **Performance by tenant only.**—To an action upon an indenture of lease for non-payment of rent, & for non-repair of the premises, deft. proposed to plead, *inter alia*, as a defence on equitable grounds under Common Law Procedure Act, 1854 (c. 125), s. 83, a plea to the effect that it was agreed between pltf. & deft., that the latter should surrender the tenancy to pltf., by yielding up possession of such portion of the premises as was in the occupation of deft., & by permitting pltf. to receive all future rents of such part of the premises as was occupied by deft.'s tenants, & by permitting the tenants to attorn to pltf., deft. to pay a certain sum of money, & give up certain machinery all of which was to be done by deft., & accepted by pltf., in satisfaction of the covenants of the lease; & that the lease & counterpart should be respectively given up to be cancelled. The plea then alleged, that, in pursuance of such agreement, deft. paid pltf. the said sum of money, & gave up the machinery, & delivered the lease to him, & that pltf. excused himself from delivering up the counterpart; that deft. accordingly withdrew from the possession of

## PART XXIV. SECT. 2, SUB-SECT. 3.—A.

**1. Question of fact—Series of ambiguous facts—Collective evidence of surrender.**—Acts relied on as showing the acceptance by the landlord of the

surrender of a lease & as effecting a surrender by operation of law must be such as are not consistent with the continuance of the term; & using the key left by the tenants at the landlord's office, putting up a notice that the premises are "to let," making some

trifling repairs, & cleaning the premises, are ambiguous acts which are not sufficient for this purpose.—*ONTARIO INDUSTRIAL LOAN & INVESTMENT CO. v. O'DEA* (1895), 22 A. R. 349.—*CAN.*

a. ——— *No presumption by court.*

**Sect. 2.—Surrender: Sub-sect. 3, A. & B. (a).]**

the premises which he occupied, & had never since been in the enjoyment or occupation thereof, or in the receipt of the rents; & that he had always permitted pltf. to receive the same, & the tenant to attorn. The plea then contained an averment of performance by deft. of all other conditions precedent & that deft. was ready & willing to do all things necessary to be done by him, for putting an end to the tenancy; & that the action was brought in fraud, & breach of the said agreement, & that it was wholly the fault & laches of pltf. that the surrender was not completed. Upon an application to plead several matters, the ct. refused to allow this plea to be pleaded with other pleas, as not disclosing an equitable defence within Common Law Procedure Act, 1854 (c. 125); on the ground that a ct. of equity would require the execution by deft. of a valid surrender of the term as a condition precedent to staying the action, & the superior cts. of common law have no power to enforce such condition.—*MINES ROYAL SOCIETIES v. MAGNAY* (1854), 10 Exch. 489; 3 C. L. R. 171; 24 L. J. Ex. 7; 24 L. T. O. S. 203; 18 Jur. 1028; 3 W. R. 75; 156 F. R. 531; *subsequent proceedings, sub nom. MAGNAY v. MINES ROYAL CO.* (1855), 3 Drew. 130.

*Annotations:—***Refd.** *Chilton v. Carrington* (1855), 16 C. B. 206; *Steele v. Haddock* (1855), 10 Exch. 643; *Wodehouse v. Farebrother* (1855), 5 E. & B. 277; *Hunter v. Gibbons, Dudley v. Gibbons* (1856), 26 L. J. Ex. 1; *Wood v. Copper Miners Co.* (1856), 17 C. B. 561.

**6594. — Unequivocal change of possession must ensue.]—**An agreement by landlord & tenant that the term shall be put an end to, acted upon by the tenant's quitting the premises, & the landlord by some unequivocal act taking possession, amounts to a surrender by operation of law.

The tenant left the key at the counting-house of the landlord, & the latter, though he at first refused to accept it, afterwards put up a board to let the premises, & used the key to show them, & painted out the tenant's name from the front:—**Held:** sufficient evidence of a surrender by operation of law.—*PHENE v. POPPLEWELL* (1862), 12 C. B. N. S. 334; 31 L. J. C. P. 235; 6 L. T. 247; 8 Jur. N. S. 1104; 10 W. R. 523; 142 E. R. 1171.

*Annotations:—***Distd.** *Oastler v. Henderson* (1877), 2 Q. B. D. 675; *Re Panther Lead Co.* (1896), 65 L. J. Ch. 499.

**6595. — —.]—**To effect a surrender of a lease by operation of law there must be an agreement by landlord & tenant that the term shall be put an end to, acted upon by the tenant's quitting

the premises & the landlord, by some unequivocal act, taking possession.

A landlord's accepting the keys of demised premises "without prejudice" & endeavouring to let them is not such an unequivocal act as to constitute a surrender by operation of law.—*Re PANTHER LEAD CO.*, [1896] 1 Ch. 978; 65 L. J. Ch. 499; 44 W. R. 573; 12 T. L. R. 327; 40 Sol. Jo. 437; 3 Mans. 165.

*Annotations:—***Mentd.** *Cohen v. Popular Restaurants*, [1917] 1 K. B. 480; *Re Dieckmann*, [1918] 1 Ch. 331.

**What amounts to delivery of possession.]—**See Sub-sect. 3, D., *post*.

**6596. Acts amounting to estoppel.—Independent of intention of parties.]—**A surrender by deed is unnecessary, where the former lessee is the party who takes the new lease, as the fact of his so doing is evidence that the new lease has been accepted by him, & such acceptance operates as a surrender in law; but it is not enough that the lessee agrees to an act done by the reversioner. *Semble:* a demise of premises by the reversioner to a stranger, with the consent of the lessee in possession, will not amount to a surrender by operation of law.

The term "surrender by operation of law" is properly applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, & which would not be valid if his particular estate continued to exist. Thus when lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not the power to make the new lease, & as the lessor could not grant the new lease until the prior one had been surrendered, the acceptance of such new lease is of itself a surrender of the former one. Such surrender is the act of the law, & takes place independently of, & even in spite of, the intention of the parties.—*LYON v. REED* (1844), 13 M. & W. 285; 13 L. J. Ex. 377; 3 L. T. O. S. 302; 8 Jur. 762; 153 E. R. 118.

*Annotations:—***Fold.** *Croagh v. Blood* (1845), 3 Jo. & Lat. 133; *Nickolls v. Atherstone* (1847), 10 Q. B. 944; *Oastler v. Henderson* (1877), 2 Q. B. D. 675. **Refd.** *Doc d. Hill v. Fry* (1845), 6 L. T. O. S. 83; *Cannan v. Hartley* (1850), 9 C. B. 634; *Mines Royal Societies v. Magnay* (1854), 10 Exch. 489; *Davidson v. Gent* (1857), 1 H. & N. 714; *Ward v. Lumley* (1860), 29 L. J. Ex. 322; *Grinwood v. Moss* (1872), 1 L. R. 7 C. P. 360; *Phillips v. Miller* (1875), L. R. 10 C. P. 420; *Wallis v. Hands*, [1893] 2 Ch. 75; *Fenner v. Blake*, [1900] 1 Q. B. 426; *Serjeant v. Nash* (1903), 89 L. T. 112.

**6597. —.]—***BESSELL v. LANDSBERG*, No. 6710, *post*.

—.]—See **ESTOPPEL**, Vol. XXI., p. 289, Nos. 1022-1031.

—*YUKON TRUST CO. v. POPICH* (YUK.) (1908), 8 W. L. R. 852.—**CAN.**

**b. —.]—***RUMBALL v. HOSKINS* (1909), 11 W. L. R. 250.—**CAN.**

**c. Assent of lessor.—Acceptance by agent.]—***CARRELL v. CARSON* (1818), 1 Nfld. L. R. 131.—**NFLD.**

**6594 i. Agreement to end term.—Unequivocal change of possession must ensue.]—**To establish that a lease has been surrendered by operation of law, it is necessary to prove acts from which that inference follows, & which are unequivocally referable to an agreement between lessor & lessee that the respective abandonment, & resumption of possession shall terminate the lease.—*BUCHANAN v. BYRNES* (1906), 3 C. L. R. 704.—**AUS.**

**6594 ii. —.]—***CARPENTER v. HALL* (1865), 16 C. P. 90.—**CAN.**

**6594 iii. —.]—***ANDERSON v. ANDERSON* (1887), 21 L. T. 35.—**IR.**

**d. —.]—***COCKBURN v. COCKBURN*, [1921] N. Z. L. R. 652.—**N.Z.**

**6597 i. Acts amounting to estoppel.]—***BUCHANAN v. BYRNES*, [1906] S. R. Q. 92.—**AUS.**

**6597 ii. —.]—**The giving up & cancelling the lease by the tenant, though not of itself a surrender of the term, is yet a strong circumstance to be considered:—**Held:** the subsequent conduct of the tenant in this case must be taken to be, on the principle of estoppel, an implied surrender of his lease.—*DOE d. BURR v. DENISON* (1850), 8 U. C. R. 185.—**CAN.**

**6597 iii. —.]—***GLYNN v. COGHLAN*, [1918] 1 I. R. 482.—**IR.**

**6597 iv. —.]—***THOMPSON v. FRIEDLANDER* (1886), 4 N. Z. L. R. C. A. 168.—**N.Z.**

**e. Conveyance in fee to lessee.]—**A conveyance in fee from a lessor to his lessee during the term is a surrender of the term.—*DOE d. MCPHERSON v. HUNTER* (1847), 4 U. C. R. 449.—**CAN.**

**f. Consent of lessee to conveyance of reversion.]—**The mere consent of the

lessee to a conveyance by the owner of the land of his interest in the reversion will not constitute a surrender of the lease by the operation of law. He must be a party to some act done, the validity of which he is estopped from disputing, & which would not be valid if the lease had continued to exist.—*BARBIT v. COWPERTHWAITE* (1855), 3 All. 254.—**CAN.**

**g. Acquiescence of lessee in sale of part to third person.]—***HORTON v. MACCONNICHY* (1859), 9 C. P. 186.—**CAN.**

**h. Delivery of copy of lease.]—***ACHE-SON v. MCMURRAY* (1877), 41 U. C. R. 484.—**CAN.**

**k. Irregular notice of intention to exercise option to renew.—Whether operating as surrender.]—**Deft. had a lease with an option of a further term, upon the stipulation that he should give six months' notice in writing of his intention to exercise the option. Deft. gave the notice, but did not sign it:

*B. Tenant taking New Tenancy.**(a) In General.*

**6598. General rule—Operates as surrender.]—**WROTESLEY v. ADAMS (1560), 1 Plowd. 189; 2 Dyer, 177 b; 75 E. R. 290.

*Annotations:—Mentd.* Voal v. Roberts (1590), Cro. Eliz. 199; Doddington's Case (1594), 2 Co. Rep. 32 b; Bath's (Bp.) Case (1605), 6 Co. Rep. 34 b; Oshey v. Hicks (1610), Cro. Jac. 263; Shrewsbury's Case (1610), 9 Co. Rep. 46 b; Podger's Case (1612), 9 Co. Rep. 104 a; Edwards v. Woodden (1633), Cro. Car. 323; Swyft v. Eyres (1639), Cro. Car. 546; Foote v. Berkley (1666), O'Brigg. 527; Thomas v. Sorroll (1673), Freem. K. B. 85; Bankers Case (1695), Skin. 601; Beal v. Simpson (1698), 1 Ld. Raym. 408; Phillips v. Salisbury (Bp.) (1699), 12 Mod. Rep. 321; Holdday v. Fletcher (1727), 2 Stra. 781; Malden v. Bartlett (1750), Park. 105; Doe d. Harris v. Greathed (1806), 8 East, 91; Holford v. Bailey (1849), 13 Q. B. 426; Morroll v. Fisher (1849), 4 Exch. 591; Re Bellamy, Elder v. Pearson (1883), 25 Ch. D. 620; Cowen v. Truettitt, [1898] 2 Ch. 551; Norman v. Norman, [1919] 1 Ch. 297.

**6599. ———.]—**MELLOWS v. MAY, No. 6653, *post*.

**6600. ———.]—**THOMSON v. TRAFFORD (1593), Poph. 8; 79 E. R. 1131; *sub nom.* TOMPSON & TRAFFORD'S CASE, 2 Leon. 188.

*Annotations:—Refd.* Doe d. Biddulph v. Poole (1848), 11 Q. B. 713. *Mentd.* Lyn v. Wyn (1665), O. Brigg. 122; Winter v. Loveden (1697), 1 Ld. Raym. 267.

**6601. ———.]—**Acceptance of a second lease is a surrender of the first.—HUTCHINS v. MARTIN (1598), Cro. Eliz. 605; 78 E. R. 848.

**6602. ———.]—**Lessee for life accepting lease for years.—BERNARD v. BONNER (1648), Aleyn, 58; 82 E. R. 915.

**6603. ———.]—**DAVISON d. BROMLEY v. STANLEY, No. 6645, *post*.

**6604. ———.]—**Second lease by parol.—DODD v. ACKLOM, No. 6545, *ante*.

**6605. ———.]—**LYON v. REED, No. 6596, *ante*.

**6606. ———.]—**During a lease for years, the reversioner in fee granted a new lease for years to the same tenant.—*Held*: the second term operated as a surrender of the former term, but the reversioner's estate did not thereby become an estate in possession, so as to be the terminus from which the statutory limitation, Real Property Limitation Act, 1833 (c. 27), ss. 3, 5, began to run.—CORPUS CHRISTI COLLEGE, OXFORD (PRESIDENT & SCHOLARS) v. ROGERS (1879), 49 L. J. Q. B. 4; 44 J. P. 216, C. A.

*Annotations:—Expld.* Eccl. Comrs. of England & Wales v. Rowe (1880), 5 App. Cas. 736. *Refd.* Eccl. Comrs. for England v. Treumer, [1893] 1 Ch. 166; East Stonehouse U. C. v. Willoughby, [1902] 2 K. B. 318.

**6607. Second lease by guardian in socage.]—**WILLIS & WHITEWOODS CASE (1589), 1 Leon. 322; 74 E. R. 293.

*Annotation:—Consd.* Doe d. Biddulph v. Poole (1848), 11 Q. B. 713.

**6608. Whether new lease must commence immediately—Acceptance of future lease.]—**A lessor

made a lease of a manor for thirty years, excepting all woods & underwoods growing or being on the manor. & afterwards made a second lease to the same lessee of all the woods & underwoods growing or being on the manor, for the term of sixty-two years, without impeachment of waste, & afterwards made a third lease of the said manor to the said lessee for thirty years without exception, to begin at a day to come, viz. from the expiration of the said first lease for thirty years.—*Held*: by the acceptance of a future lease to begin divers years after, the said lease of the wood for sixty-two years was presently surrendered.—IVE'S CASE (1597), 5 Co. Rep. 11 a; 77 E. R. 64; *sub nom.* IVE v. SAMS, Cro. Eliz. 521.

*Annotations:—Refd.* Doe d. Biddulph v. Poole (1848), 11 Q. B. 713. *Mentd.* Rowles v. Mason (1612), 2 Brownl. 192; Lilford's Case (1614), 11 Co. Rep. 46 b; Whilster v. Paslow (1618), Cro. Jac. 487; Bullen v. Denning (1826), 5 B. & C. 842.

**6609. ———.]—**PARKER v. BRIGGS (1893), cited 37 Sol. Jo. at p. 452, C. A.

**6610. ———.]—**A new letting to an old tenant, commencing immediately, operates as a surrender of the original term, because the lessor could have no power to create the new term if the original term had subsisted; & for a like reason, a new letting to a third party, with the assent of the original tenant, has the same operation.

A house being let to A., A. died, leaving B. & C. her exors. B. continued to pay the rent, & it appeared to be the intention of both B. & the landlord that B. should be substituted in the tenancy; but C., the other exor., knew nothing of the intended change.—*Held*: such change was inchoate only, & not perfected; & therefore A.'s estate still continued liable on the lease.—M'DONNELL v. POPE (1852), 9 Hare. 705; 20 L. T. O. S. 13; 16 Jur. 771; 68 E. R. 697.

*Annotation:—Refd.* Davison v. Gent (1857), 1 H. & N. 744.

**6611. New lease of part—Surrender of part only.]—**FISH v. CAMPION (1601), 2 Roll. Abr. 498.

*Annotation:—Refd.* Doe d. Biddulph v. Poole (1848), 11 Q. B. 713.

**6612. ———.]—**Where a bishop, having free warren by prescription over the demesne & tenemental lands of a manor whereof he was seized *jure ecclesie*, accepted a grant from the Crown to himself & successors of free warren over the demesne lands of all his manors in England:—*Held*: even admitting the grant to have the effect of extinguishing the prescription as to the demesne lands, which the et. considered to be at least doubtful, it could not affect it over the other lands of the manor.

The case of a tenant for years or for life of Blackacre & Whiteacre accepting from his lessor a new lease of Blackacre only. This is no doubt a surrender by operation of law of Blackacre, but in no respect affects the title to Whiteacre

—*Held*: there was a surrender by operation of law.—GREENWOOD v. BANCROFT (1912), 20 W. L. R. 816; 2 D. L. R. 417.—CAN.

**1. Destruction of premises by fire—Surrender at option of tenant—Custom.]—**The destruction of premises by fire entitles the lessee to surrender the lease under the custom prevailing in the town of St. John's.—COWELL v. MACRAIRE (1819), 1 Nfld. L. R. 170.—NFLD.

**m. ———.]—**NEWMAN v. MEACHER (1819), 1 Nfld. L. R. 182.—NFLD.

**n. ———.]—**DUGGAN & MAHON v. BARTER (1820), 1 Nfld. L. R. 209.—NFLD.

**o. ———.]—**R. v. LILLY

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(1823), 1 Nfld. L. R. 373.—NFLD.

**p. ———.]—**R. v. ARROLL (1831), 2 Nfld. L. R. 57.—NFLD.

**q. ———.]—**Effect of holding over.—The mere holding of ground for a short time after the house erected upon it had been destroyed by fire, for the purpose of removing the wreck of the property, will not deprive the tenant of his right to surrender his lease under custom of the town of Saint John's.—TRIMMINGHAM & Co. v. BRINE (1819), 1 Nfld. L. R. 158.—NFLD.

**r. Extent of doctrine.]—**The doctrine of surrender by act & operation of law applies as well to a term created by deed as to one created by parol.—GAULT v. SHEPARD (1886), 14 A. R. 203.—CAN.

PART XXIV. SECT. 2, SUB-SECT. 3.—*B. (a).*

**6598 i. General rule—Operates as surrender.]—**A surrender by deed of an old lease is unnecessary, where the party taking the new lease is the former lessee, as the fact of his so doing is evidence that the new lease has been accepted by him, & such acceptance operates as a surrender in law.—WHITTEN v. McDOUGALL (1880), 6 Nfld. L. R. 239.—NFLD.

**t. New lease of part.]—**SELDON v. BUCHANAN (1893), 24 O. R. 349.—CAN.

**u. New demise by assignee of reversion.]—**Where a tenant, with the knowledge & consent of his landlord, takes a lease from another person, to whom the landlord has transferred the

**Sect. 2.—Surrender: Sub-sect. 3, B. (a) & (b) i. & ii.]**

(ALDERSON, B.).—**CARNARVON (EARL) v. VILLEBOIS** (1844), 13 M. & W. 313; 14 L. J. Ex. 233; 153 E. R. 130.

**Annotations:—Mentd.** Doe d. King William IV. v. Roberts (1844), 13 M. & W. 520; R. v. Bedfordshire (1855), 4 E. & B. 535.

**6613. New lease for shorter term.]**—If lessee for a thousand years, takes a new lease but for five years, this is a surrender of his first lease; & so it shall be, if a copyholder do take a lease by indenture of the lord of his copyhold estate, this is a surrender of his copyhold (HAUGHTON, J.).

If a copyholder of inheritance takes a lease by indenture for years, by this his copyhold is gone, & this is a surrender of the inheritance; but if he take a lease to himself for life, there peradventure it shall be another case; but without all question, where he takes it to himself, to his wife, & to his son, for their lives, the inheritance is not here surrendered & gone, but this still remains in him, & this shall be in judgment of law but as a surrender to his use for his life, after to his wife for her life, & after to the use of his son for life, & it is a clear case, that this shall be so & by this way, & by this construction, all may well stand together (DODDERIDGE, J.).—**BELFIELD v. ADAMS** (1615), 3 Bulst. 80; 81 E. R. 69.

**6614. —.]**—**DODD v. ACKLOM**, No. 6545, ante.

**6615. Conditions of new tenancy not performed—Valuation—Sureties.]**—A subsisting tenancy is not determined by an agreement, whereby the landlord lets to his tenant at a valuation, to be made by two persons, & stipulating that the tenant is to give sureties to answer for the rent, if no valuation be made, & no sureties given.—**JOHN v. JENKINS** (1832), 1 Cr. & M. 227; 3 Tyr. 170; 2 L. J. Ex. 83; 149 E. R. 384.

**Annotations:—Refd.** Chapman v. Bluck (1838), 1 Arn. 27; Jones v. Reynolds (1841), 1 Q. B. 506. **Mentd.** Harris v. Thirkell (1852), 20 L. T. O. S. 98.

**6616. One of lessees not party to new lease—Change of landlord.]**—Settled Estates Act, 1877 (c. 18), s. 7, does not authorise an equitable tenant for life, not being a lessor, to take a surrender which is not sanctioned by the ct.

Certain customary freeholds were demised by a lease of June 15, 1877 to two lessees, for twenty-one years from Christmas, 1876, at a rental of £130. The lease was determinable at the expiration of the fourteenth year, on the lessor or lessees giving to the other of them, "or his or their representatives or assigns," a written notice of such intention. The lessor died in Dec. 1877, having devised & bequeathed his customary freeholds & leaseholds to trustees in trust for his wife, M., during her widowhood, & then to other beneficiaries. On Dec. 21, 1889 one of the two lessees gave notice to M. of his intention to quit & yield up possession of the leasehold premises at Christmas, 1890. On Aug. 13, 1890, M. purporting to act under Settled Estates Act, 1877 (c. 18), granted a lease of the same premises to one of the two original lessees for seven years from Christmas, 1890, at the reduced rent of £100. The licence of the lord of the manor for this lease was not obtained. In an action by the trustees & beneficiaries of the original lessor against the two lessees:—**Held**: the old lease was not surrendered

by operation of law, inasmuch as it was voidable if not void.

Defts. say a surrender of the old lease has been effected by operation of law by the grant of the new lease. I think this contention is untenable. The trustees who were the landlords under the old lease, were not parties to the new lease, nor was one of the lessees under the old lease a party to the new lease. . . . Now, no doubt, if a lessor & a lessee agree, even verbally, to determine a lease, & that is acted upon & followed up by the lessor taking possession of the demised premises, or doing that which amounts to his taking possession, then the lease is determined (ROMER, J.).—**EASTON v. PENNY** (1892), 67 L. T. 290; 41 W. R. 72; 8 T. L. R. 779.

**What amounts to new tenancy.]**—See Sub-sect. 3, B. (b), post.

**(b) What Amounts to New Tenancy.**

**i. Agreement for New Lease.**

**6617. Agreement between lessor & stranger—Lessee no party.]**—An agreement between the lessor & a stranger that the lessee shall have a new lease is no surrender.—**PORRY v. ALLEN** (1590), Cro. Eliz. 173; 78 E. R. 430.

**Annotation:—Refd.** Brewer v. Hill (1794), 2 Anst. 413.

**6618. Lease to old lessee & another jointly.]**—Tenant from year to year entered into an agreement, during a current year, for a lease to be granted to him & B.; & from that time B. entered, & occupied jointly with him:—**Held**: by this agreement & the joint occupation under it, the former tenancy was determined, although the lease contracted for was never granted.

If a sole tenant agrees to occupy, & does occupy jointly with another, that puts an end to the former sole tenancy (BAYLEY, J.).—**HAMERTON v. STEAD** (1824), 3 B. & C. 478; 5 Dow. & Ry. K. B. 206; 3 L. J. O. S. K. B. 33; 107 E. R. 811. **Annotations:—Refd.** Doe d. Biddulph v. Poole (1848), 17 L. J. Q. B. 143; Anderson v. Mid. Ry. (1861), 3 E. & E. 614. **Mentd.** Knight v. Bennett (1826), 3 Bing. 361.

**6619. Parol agreement.]**—In an action of debt for rent on a demise for seven years deft. pleaded that whilst the demise was in force, & before the accrual of the rent, it was agreed between him & pltf. that pltf. should make certain alterations, & that in consideration thereof he, deft., should relinquish his interest under the demise, & take a new lease for seven years; & until such new lease should be tendered, that he should remain tenant from year to year; that pltf. did make the alterations, & that he, deft., in pursuance of the agreement, relinquished his interest under the lease, & entered upon the premises under the agreement; & that, by means of the said premises, he deft. was tenant from year to year, & that his title under the lease was surrendered. Issue was taken on this plea, & at the trial no written agreement was proved, but the jury found a verdict for deft.:—**Held**: the agreement was an entire agreement, & the part relative to a lease for seven years being required to be in writing under Stat. Frauds, no part of it could be proved by parol.

In order to constitute a surrender by act & operation of law, there must be a legal agreement. . . . I cannot help observing how dangerous it would be to allow any departure from the law, which has gone on step by step, until the doctrine

reversion, this amounts to a surrender in law.—**LEWIS v. BROOKS** (1851), 8 U. C. R. 576.—**CAN.**

**b. Subsequent lease not incompatible**

**with prior lease.]**—The rule that the acceptance of a second lease by the lessee operates as an implied surrender of the prior lease does not apply to cases where the subsequent

lease is not incompatible with the prior lease.—**MANAYADAM THIRUMALPAD v. PARRY & CO.** (1925), 1 L. R. 48 Mad. 815.—**IND.**

has become rather startling. The consequence would be, that, whenever a landlord chose to say that he would take less than the full amount of rent, it would be a question for the jury, whether the parties did not intend to create a new tenancy, which would be a surrender of the previous term by act & operation of law (MARTIN, B.).—**FOQUET v. MOOR** (1852), 7 Exch. 870; 19 L. T. O. S. 205; 155 E. R. 1202; *sub nom.* **FORQUET v. MOORE**, 22 L. J. Ex. 35.

*Annotation*.—**Reid**. **Young v. Austen** (1869), L. R. 4 C. P. 553.

**6620. Agreement acted on by lessor—Increased rent.**—A fire having occurred upon leasehold premises, the lessor entered. Subsequently an executory agreement was entered into between the parties for a new lease at an increased rent, as was evidenced by letters which passed between them, in one of which a suggestion was made that a memorandum should be indorsed upon the old lease, referring to the increase of rent. This was not carried out, but payments of the increased rent were demanded, & made, but under protest by the lessee's solr. Upon the bkpcy. of the lessee, the lessor distrained for rent at the increased rate. The county ct. judge held that the old lease was still subsisting, & that consequently the old rental alone could be distrained for:—**Held**: the old lease was surrendered by operation of law, & the agreement for an increased rent having been made & acted upon, the distress for such increased rent was lawful.—**Re YOUNG, Ex p. VITALE** (1882), 47 L. T. 480.

**6621. Agreement not specifically enforceable.**—A tenant of premises under a lease being desirous of surrendering it & obtaining a new lease, it was on Apr. 5, 1910, agreed between the tenant & the lessor that the lessor should upon the performance of certain conditions by the tenant grant to him such lease for the proposed term, which was to commence as from Lady Day, 1910. The agreed conditions were not in fact performed until after Apr. 28, 1910, the date of the coming into force of the Finance (1909–10) Act, 1910 (c. 8). In June, 1910, the lessor granted to the tenant the new lease in pursuance of the agreement. The Crown thereupon claimed from the lessor reversion duty on the benefit accruing to him by the determination of the old lease after the coming into force of the Act:—**Held**: as the tenant had not performed the conditions before Apr. 29, 1910, he was not entitled at that date to specific performance of the agreement to grant the lease, & could not then be treated as being in the same position as if the lease had been granted; the agreement for the lease, not being under the circumstances equivalent to a lease, did not operate as a surrender by operation of law of the old lease; the old lease was not determined until the grant of the new one; & the lessor was consequently liable to reversion duty.—**INLAND REVENUE COMRS. v. DERBY (EARL)**, [1914] 3 K. B. 1186; 84 L. J. K. B. 248; 109 L. T. 827.

## ii. Change in Terms of Tenancy.

**6622. Restriction of lessor's power to determine—Memorandum indorsed on lease.**—**GOODRIGHT d. NICHOLLS v. MARK**, No. 6821, *post*.

**6623. Alteration of rent—Increase in respect of improvements.**—A landlord who had demised premises for a term of years at £50 a year, agreed with his tenant to lay out £50 in making certain

improvements upon them, the tenant undertaking to pay him an increased rent of £5 a year during the remainder of the term, of which several years were unexpired, to commence from the quarter preceding the completion of the work:—**Held**: the landlord, having done the work, might recover arrears of the £5 a year against the tenant, though the agreement had not been signed by either party; for it was not a contract for any interest in or concerning lands within Stat. Frauds; nor was it, according to that statute, an agreement "not to be performed within one year from the making thereof," no time being fixed for the performance on the part of the landlord.

The only way in which it could be taken to be rent would be that this contract creates a new demise at an increased rent, & that therefore, by operation of law, the old lease is surrendered by such new demise (LITLEDAL, J.).—**DONELLAN v. READ** (1832), 3 B. & Ad. 899; 1 L. J. K. B. 269; 110 E. R. 330.

*Annotations*.—**Consd.** **Maples v. Pepper** (1856), 18 C. B. 177; **Reeve v. Jennings**, [1910] 2 K. B. 522. **Reid**. **Lambert v. Norris** (1837), 2 M. & W. 333. **Mentd.** **Cherry v. Heming** (1849), 4 Exch. 631; **Roberts v. Tucker** (1849), 3 Exch. 632; **Smith v. Neale** (1857), 2 C. B. N. S. 67; **Miles v. New Zealand Alford Estate Co.** (1886), 32 Ch. D. 268.

**6624. — Reduction—Verbal agreement.**—By a written agreement, plffs. let to deft. certain premises at a rent of 20s. a week, payable as demanded; four weeks' notice to quit from any day to be sufficient. During the continuance of this tenancy, plffs. verbally agreed with deft. to accept 16s. a week, which was accordingly paid, & on two occasions, deft. submitted to a distress for that amount:—**Held**: no new demise was thereby created, & consequently the county ct. had no jurisdiction under 9 & 10 Vict. c. 95, s. 122, the rent being above £50.—**CROWLEY v. VITRY** (1852), 7 Exch. 319; **Cox, M. & H.** 582; 21 L. J. Ex. 135; 18 L. T. O. S. 276; 16 J. P. 360; 155 E. R. 968.

*Annotation*.—**Mentd.** **Re Harrington** (1853), 2 E. & B. 669.

**6625. — — — — —**—**FOQUET v. MOOR**, No. 6619, *ante*.

**6626. — — — — —**—**L.** demised to **H.** a farm & premises for one year certain, & afterwards from year to year, determinable at six months' notice, at the annual rent of £130. In the middle of the first year, **H.** gave his landlord notice to determine the tenancy at the end of the year, which notice was inoperative. At the end of the year, **H. & L.** met, & believing that the former tenancy was at an end, came to an agreement that the rent should be reduced by £30:—**Held**: there was a release of the existing term, & a new demise at the reduced rent.—**HODGES v. LAWRENCE** (1854), 18 J. P. 347.

*Annotation*.—**Mentd.** **C. L. Ry. v. City of London Land Tax Comrs.**, [1911] 2 Ch. 467.

**6627. — — — — —**—**Proportionate to surrender of part of premises.**—The mere surrender of a small part of demised premises & proportionate reduction of the rent does not in itself amount to a surrender by operation of law of the old tenancy, & the creation of a new one.—**HOLME v. BRUNSKILL** (1878), 3 Q. B. D. 495; 47 L. J. Q. B. 610; 38 L. T. 838; 42 J. P. 757, C. A.

*Annotations*.—**Consd.** **Baynton v. Morgan** (1888), 21 Q. B. D. 101. **Reid**. **Freeman v. Evans**, [1922] 1 Ch. 36. **Mentd.** **Webster v. Petre** (1879), 4 Ex. D. 127; **Ward v. National Bank of New Zealand** (1883), 8 App. Cas. 755; **Taylor v. Bank of New South Wales** (1886), 11 App. Cas. 596; **Bolton v. Salmon**, [1891] 2 Ch. 48; **Mortgage Insee. Corp'n v. Pound** (1895), 64 L. J. Q. B. 394; **Re Debtor** (No. 14 of

## PART XXIV. SECT. 2, SUB-SECT. 3.—B. (b) ii.

c. *Alteration of rent.*—On the facts:—**Held**: neither the increase nor reduction of the rent operated as a surrender of the term.—**PRONGUEY v. GURNEY** (1874), 36 U. C. R. 53; (1875), 37 U. C. R. 347.—**CAN.**

**Sect. 2.—Surrender: Sub-sect. 3, B. (b) ii. & iii., & (c).]**

1913) (1913), 82 L. J. K. B. 907; *Egbert v. National Crown Bank*, [1918] A. C. 903; *Norwich Union Fire Insce. Soc. v. Colonial Mutual Fire Insce.*, [1922] 2 K. B. 461.

**6628.** ————.]—*Pltf.*, while lessee of five rooms from *defts.* for a term, entered into negotiations with them by which he was to hold three only of the rooms at a diminished rent, & on the next quarter day paid & took a receipt for rent at the lesser rate. There was evidence that the parties intended a written agreement to be prepared, embodying the terms of the new arrangement, but they ultimately disagreed, & such agreement was never, in fact, signed. On the following quarter day *defts.* claimed rent of *pltf.* under the old lease, which he repudiated. There was evidence that *pltf.* had given up possession of two of the rooms:—*Held*: the jury were justified in finding that there was a new tenancy, & therefore there was a surrender by operation of law.—*JONES v. BRIDGMAN* (1878), 39 L. T. 500; 43 J. P. 112.

**6629. Change of premises—New rooms substituted for old.]**—*A.*, who was tenant of a house, let certain rooms on the ground-floor thereof to *B.*, under a written agreement, for one year, & so on from year to year, subject to a quarter's notice, with a stipulation that no action, distress, or other proceeding should be prosecuted by or on behalf of *A.* in respect of the rent, unless he should have previously paid the rent due from himself to the superior landlord, & should have produced his receipt for the same to *B.* Upon *B.*'s death, *C.*, her daughter & extrix., continued to occupy the premises for some time upon the same terms as her mother had occupied them, & she afterwards agreed verbally with *A.* to give up the rooms on the ground floor, & to take other rooms on the first-floor in lieu of them, upon the same terms as to rent & otherwise:—*Held*: the substitution of the rooms on the first-floor for those on the ground-floor, was not an alteration by parol of the terms of the original written agreement, but a new contract.—*GILES v. SPENCER* (1857), 3 C. B. N. S. 244; 20 L. J. C. P. 237; 21 J. P. 727; 3 Jur. N. S. 820; 5 W. R. 883; 140 E. R. 734.

*Annotation*:—*Mentd.* *Re River Swale Brick & Tile Works* (1883), 52 L. J. Ch. 638.

**6630. Agreement for earlier determination—Parol variation.]**—*Deft.* was tenant to *pltf.* from year to year of a Lady Day holding. In Dec., being desirous of surrendering his tenancy at an earlier date than that for which he could then give a valid notice to quit, he entered into an oral agreement with *pltf.* to surrender at the following Midsummer. On the faith of this agreement *pltf.*, with *deft.*'s knowledge & assent, sold the premises to a purchaser with the right to possession at Midsummer. At Midsummer *deft.* refused to give up possession; whereupon *pltf.* brought ejectment:—*Held*: the action was maintainable upon the ground that the agreement of Dec., although bad as an agreement to surrender by reason of its not being in writing, as required by Stat. Frauds, amounted to an acceptance of a new tenancy to end at Midsummer, & the acceptance of that new tenancy worked a surrender of the old one by operation of law; upon the ground that *deft.* by his conduct in allowing *pltf.* to contract an obligation to his purchaser on the faith of the agreement was estopped from disputing that his original tenancy was one which terminated at Midsummer.—*FENNER v. BLAKE*, [1900] 1 Q. B. 426; 69 L. J. Q. B. 257; 82 L. T. 149; 48 W. R. 392, D. C.

**iii. Other Cases.**

**6631. Party entitled to future lease—Becoming entitled to current term—Marriage with tenant.]**—*ANON.* (1551), Benl. 24; 73 E. R. 948.

**6632. Personal representative taking new lease—Subsequent acceptance from devisee of term—Of devisee's interest.]**—*CARTER v. LOVE* (1594), Moore, K. B. 358; 72 E. R. 627.

**6633. Second lease in trust.]**—*GIE v. RIDER* (1662), 1 Sid. 75; 82 E. R. 978.

**6634. Lease & release to uses—To lessee & stranger.]**—*Lessee* for years & a stranger accept a lease & release to uses; the former lease for years is not thereby surrendered nor extinguished, either for the whole or in part.—*HOWE v. STYLE* (1675), 1 Freem. K. B. 392; 3 Keb. 283, 309, 430, 452; 2 Lev. 126; 89 E. R. 291; *sub nom.* *FOUNTAIN v. COKE*, 1 Mod. Rep. 107.

*Annotations*:—*Refd.* *Ratcliffe's Case* (1720), 1 Stra. 267. *Mentd.* *Doe d. Atkyns v. Horde* (1777), 2 Cowp. 689.

**6635. Second lease to one of two lessees.]**—*C.* granted a lease for twenty-one years to *L.* & *T.* of certain mines on his estate. The mines were part of the estate which on the marriage of his son he had settled on that son for life & after the death of such son to secure a jointure on his wife for life with remainder over to the sons of the marriage in tail, with remainder over, with power to the said son to demise in possession for twenty-one years, reserving best rent. The son, tenant for life, before the expiration of the first mentioned lease, granted a lease to *L.* alone of the mines for twenty-six years. *L.* & *T.* on the faith of this last mentioned lease incurred expenses. After some years, a bill was filed to set aside the lease as not conforming to the power & as not reserving the most improved rent:—*Held*: the first lease must be presumed to have been surrendered; & the second lease bound the remainderman for twenty-one years.—*CAMPBELL v. LEACH, LEACH v. CAMPBELL* (1775), Amb. 740; 27 E. R. 478.

*Annotations*:—*Mentd.* *Medwin v. Sandham* (1789), 3 Swan. 685; *Re Smyth, Ex p. Smyth* (1818), 1 Swan. 337; *Morgan v. Milinan* (1852), 10 Hare, 279; *Daly v. Beckett* (1857), 24 Beav. 114; *Clegg v. Rowland* (1866), L. R. 2 Eq. 160.

**6636. Acceptance of tenancy at will—By tenant from year to year.]**—*DOE d. GRAY v. STANION*, No. 6144, ante.

**(c) New Lease Void or Voidable.**

**6637. Voidable—Whether term surrendered.]**—*A* man makes a lease by deed, & afterwards enfeoffs & takes back an estate to himself & his wife in tail, & then lessee takes a new lease by parol, this is a surrender of the former, though the wife may avoid it after the death of her husband.—*WHITLEY v. GOUGH* (1557), 2 Dyer, 140 b; 73 E. R. 306.

*Annotations*:—*Consd.* *Roe d. Berkeley v. York* (Archbp.) (1805), 6 East, 86; *Doe d. Biddulph v. Poole* (1848), 11 Q. B. 713.

**6638.** ————.]—*LLOYD v. GREGORY* (1638), Cro. Car. 501; W. Jo. 405; 79 E. R. 1032; *sub nom.* *FLUDD v. GREGORY*, 2 Roll. Abr. 495.

*Annotations*:—*Expld.* *Zouch d. Abbot v. Parsons* (1765), 3 Burr. 1794. *Consd.* *Roe d. Berkeley v. York* (Archbp.) (1805), 6 East, 86. *Refd.* *Lyn v. Wyn* (1665), O. Bridg. 122; *Southwell* (Chapter of Collegiate Church of) v. *Lincoln* (Bp.) (1675), 1 Mod. Rep. 204; *Thompson v. Leach* (1695), 1 Ld. Raym. 313; *Wilson v. Sewell* (1766), 4 Burr. 1976; *Doe d. Egremont v. Forwood* (1842), 11 L. J. Q. B. 321; *Doe d. Biddulph v. Poole* (1848), 11 Q. B. 713.

**6639.** ———— *Interest not in accordance with contract.]*—*Tenant* in fee demised the land by indenture for a term depending on certain lives, & then devised his estate to his son for life, with remainders over, & with a power to tenant for life

to grant leases. After testator's death, & during the above term, the son granted the lessee a fresh lease of the land, & the new indenture of lease set forth that it was granted in consideration of the surrendering up into the hands of the lessor by the lessee at or before the delivery thereof of the lease first granted which surrender is hereby made & accepted accordingly. The new lease was a bad execution of the power. One of the lives mentioned in the first lease was still existing:—*Held*: the surrender was inoperative, & the first lease remained in force; & this, whether the second lease at the time of the demise was void or only voidable at the will of the tenant for life, & whether the surrender was implied or express; the ground of decision being that the new lease did not pass an interest according to the contract, & therefore the acceptance of it, though with express words as above stated did not affect an absolute surrender.

In case of an express surrender, so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional to be void in case the grant should be made void (COLE-RIDGE, J.).—*DOE d. EGREMONT (EARL) v. COURTENAY* (1848), 11 Q. B. 702; 17 L. J. Q. B. 151; 11 L. T. O. S. 25; 12 Jur. 454; 116 E. R. 636.

*Annotations*:—*Consd.* Zick v. London United Tramways, [1908] 2 K. B. 126. *Fold.* Canterbury Corp'n. v. Cooper (1909), 100 L. T. 597. *Refd.* Noble v. Ward (1867), L. R. 2 Exch. 135; Knight v. Williams, [1901] 1 Ch. 256; Morris v. Baron, [1918] A. C. 1.

**6640.** ———.]—*EASTON v. PENNY*, No. 6016, ante.

**6641. Void—Whether term surrendered.]—Re ST. SAVIOURS, SOUTHWARK** (1614), Lanc, 21; 10 Co. Rep. 66 b; 145 E. R. 266.

*Annotations*:—*Mentd.* Needler v. Winchester (Bp.) (1614), Hob. 220; R. v. Kempe (1694), 1 Ld. Raym. 49; Bankers Case (1695), Skin. 601; R. v. Eastern Archipelago Co. (1853), 1 E. & B. 310; Bostock v. North Staffordshire Ry. (1855), 24 L. J. Q. B. 225.

**6642.** ———.]—*WATTS v. MAYDELL* (1629), Litt. 268; Hut. 104; 124 E. R. 240; *sub nom.* MAYDELL & WATTS CASE, Litt. 279.

*Annotations*:—*Refd.* Wilson v. Sewell (1766), 1 Wm. Bl. 617; Neale v. Mackenzie (1836), 1 M. & W. 747; Doe d. Biddulph v. Poole (1848), 11 Q. B. 713.

**6643.** ———.]—*LLOYD v. GREGORY* (1638), Cro. Car. 501; W. Jo. 405; 79 E. R. 1032; *sub nom.* FLUDD v. GREGORY, 2 Roll. Abr. 405.

*Annotations*:—*Expld.* Zouch d. Abbot v. Parsons (1765), 3 Burr. 1794. *Consd.* Roe d. Berkeley v. York (Archbp.) (1805), 6 East, 86. *Refd.* Lyn v. Wyn (1665), O. Bridg. 122; Southwell (Chapter of Collegiate Church of) v. Lincoln (Bp.) (1675), 1 Mod. Rep. 204; Thompson v. Leach (1695), 1 Ld. Raym. 313; Wilson v. Sewell (1766), 4 Burr. 1974; Doe d. Egremont v. Forwood (1842), 11 L. J. Q. B. 321; Doe d. Biddulph v. Poole (1848), 11 Q. B. 713.

**6644.** ———.]—It was not reasonable in itself nor could it be the intent of the parties that an acceptance of a bad lease should be an implied surrender of a good one (*per cur.*).—*WILSON v. SEWELL* (1766), 1 Wm. Bl. 617; 4 Burr. 1975; 96 E. R. 359.

*Annotations*:—*Appld.* Doe d. Egremont v. Courtenay (1848), 11 Q. B. 702. *Consd.* Doe d. Biddulph v. Poole (1848), 11 Q. B. 713. *Refd.* Roe d. Berkeley v. York (Archbp.) (1805), 6 East, 86. *Mentd.* Bevan v. Haggood (1860), 1 John. & H. 222; Boyce v. Edbrooke, (1903) 1 Ch. 836; Adair v. New River Co. & Metropolitan Water Board (1908), 25 T. L. R. 193; *Re* Lacon's Settlement, Lacon v. Lacon, [1911] 1 Ch. 351.

**6645.** ———.]—Acceptance of a second good lease will operate as a surrender of the former. But the reason does not hold in the case of accepting a new void lease (LORD MANSFIELD).—*DAVIDSON d. BROMLEY v. STANLEY* (1768), 4 Burr. 2210; 98 E. R. 152.

*Annotations*:—*Appld.* Doe d. Egremont v. Courtenay (1848), 11 Q. B. 702. *Consd.* Doe d. Biddulph v. Poole (1848), 11 Q. B. 713. *Refd.* Roe d. Berkeley v. York (Archbp.) (1805), 6 East, 86.

**6646.** ———.]—No surrender, express or implied, in order to, or in consideration of, a new lease, would bind; if the new lease is absolutely void; for the cause, ground & condition of the surrender fails (LORD MANSFIELD).—*ZOUCH d. ABBOT & HALLET v. PARSONS* (1765), 3 Burr. 1794; 1 Wm. Bl. 575; 97 E. R. 1103.

*Annotations*:—*Refd.* Doe d. Egremont v. Forwood (1842), 3 Q. B. 627. *Mentd.* Madden v. Whitto (1787), 2 Torm. Rep. 159; ——— v. Handcock (1810), 17 Ves. 383; Baylis v. Dinoley (1815), 3 M. & S. 477; Nelson v. Stocker (1859), 32 L. T. O. S. 368; Skottowe v. Williams, Williams v. Skottowe (1860), 7 Jur. N. S. 118; Spackman v. Evans (1868), L. R. 3 H. L. 171; Burnaby v. Equitable Reversionary Interest Soc. (1885), 28 Ch. D. 416; Carter v. Silber, Carter v. Hasluck, [1892] 2 Ch. 278; Thurstan v. Nottingham Permanent Benefit Bldg. Soc., [1902] 1 Ch. 1; Leslie v. Shell, [1914] 3 K. B. 607.

**6647.** ———.]—*DOE d. EGREMONT (EARL) v. COURTENAY*, No. 6039, ante.

**6648.** ———.]—Tenant for life, with a leasing power, demised premises, in 1784, for ninety-nine years, on three lives. In 1788, the lessee being desirous to sell his term in part of the premises, it was arranged that the lessor should grant to the intended vendee a lease of this parcel, & grant the original lessee a fresh lease of the unsold residue. Indentures of lease were executed accordingly. The fresh lease to the original lessee purported to be made in consideration of the surrender of the prior lease & granted a term of ninety-nine years on the same three lives to commence from the date of the fresh lease. This lease was not a due execution of the power; but the premises were held under it till 1845 when ejectment was brought by parties in remainder, the lives not having terminated:—*Held*: the acceptance of the fresh lease, which had been avoided contrary to the intention of the parties thereto, & had thus failed to pass the interest contracted for, was not in itself a surrender of the prior lease, but worked no more than a surrender conditioned to be void if the new grant should fail.—*DOE d. BIDDULPH v. POOLE* (1848), 11 Q. B. 713; 17 L. J. Q. B. 143; 11 L. T. O. S. 25; 12 Jur. 450; 116 E. R. 641.

*Annotations*:—*Refd.* Noble v. Ward (1867), L. R. 2 Exch. 135; Morris v. Baron, [1918] A. C. 1.

**6649.** ———.]—A lessee, notwithstanding a surrender of his term by operation of law, retains an interest in the lease, & on the granting of a new lease to him by the lessor is entitled to retain the old lease.

The surrender of an old lease, implied from the acceptance of a new lease, is subject to an implied condition that the new lease is valid.—*KNIGHT v. WILLIAMS*, [1901] 1 Ch. 256; 70 L. J. Ch. 92; 83 L. T. 730; 49 W. R. 427; 45 Sol. Jo. 164.

**6650.** ———.]—Deft. was in possession of certain premises, of which a lease for three hundred years was granted in 1599 by plffs., the corp'n. of Canterbury, & which would expire in 1890. In 1892 an arrangement was entered into between the parties, by the terms of which, in consideration of the surrender by deft. of the old lease,

**PART XXIV. SECT. 2. SUB-SECT. 3.—B. (c).**

**6641 i. Void—Whether term surrendered.]—The acceptance of a void lease by the lessee cannot be a surrender**

by operation of law of a prior & subsisting lease to the same lessee.—*BLAKE v. LANE* (1876), 2 V. L. R. L. 54.—*AUS.*

**6641 ii.** ———.]—*BRINKLEY v.*

*M'MUNN* (1) (1893), 32 L. R. Ir. 532.—*IR.*

**6641 iii.** ———.]—*JOHNSTON v. SIMMON* (1883), 2 N. Z. L. R. 210 (S. C.).—*N.Z.*

**Sect. 2.—Surrender: Sub-sect. 3, B. (c), & C. (a) & (b) i.]**

pltf. agreed to grant her a lease for her life free of rent. Deft. duly handed over the old lease, & received in exchange a lease for her life, which was in fact invalid by reason of not complying with Municipal Corporations Act, 1882 (c. 50), s. 108. In 1908 an action was brought by pltf. to recover possession of the property. Deft. set up that as she had surrendered the old lease in 1892, & the lease granted to her was invalid, Stat. Limitations began to run from that date, & that, as she had been in possession for more than twelve years since 1892, defts. were not entitled to recover possession of the premises:—*Held*: the lease of 1892, being an invalid one, there was no effectual surrender of the lease of 1599 which was given in exchange for it, & Stat. Limitations did not commence to run until the expiration of the old lease in 1899.—*CANTERBURY CORPN. v. COOPER* (1909), 100 L. T. 597; 73 J. P. 225; 53 Sol. Jo. 301; 7 L. G. R. 908, C. A.

**6651.** ———.]—*ROE d. BERKELEY (EARL) v. YORK (ARCHBP.)*, No. 6567, *ante*.

**6652.** ———.]—S. who was the tenant of a shop for a term of three years from Mar. 14, 1905, in Jan. 1906 sold all his effects in the shop to pltf. & agreed to stand possessed of the lease in trust for him. S. then informed the landlord that he desired to transfer his tenancy to pltf., & after negotiations, a new lease was granted by the landlord to pltf. for three years from Feb. 14, 1906. On May 15, 1905, defts. had served upon the landlord a notice to treat for the purchase of the shop but neither S. nor pltf. had any knowledge of that notice. In 1907 defts. entered upon the premises & took possession without any notice to pltf.:—*Held*: the grant of the new tenancy being ineffectual by reason of the notice to treat, the surrender of the former tenancy was inoperative, & pltf. was entitled to compensation in respect of his interest in the original term of three years.—*ZICK v. LONDON UNITED TRAMWAYS, LTD.*, [1908] 2 K. B. 126; 77 L. J. K. B. 942; 98 L. T. 841; 72 J. P. 251; 24 T. L. R. 577; 52 Sol. Jo. 456, C. A.

*Annotation*:—*Refd. Canterbury Corpn. v. Cooper* (1908), 99 L. T. 612.

**6653.** ———.]—**Lease for lives—Accepted by lessee for life.**—If a lessee for life accept a second lease for three lives, it is a surrender of the first lease, notwithstanding the second lease is void, as being made to commence from a day to come.—*MELLOWS v. MAY* (1601), Cro. Eliz. 874; *Moore, K. B. 636*; 78 E. R. 1099.

*Annotations*:—*Consd. Doe d. Biddulph v. Poole* (1848), 11 Q. B. 713. *Refd. Hamerton v. Stead* (1824), 3 B. & C. 478.

**C. Creation of New Tenancy with Third Party.**

**(a) Lease to Third Party.**

**6654. Grant with consent of lessee—Whether operative as surrender.**—*LYON v. REED*, No. 6593, *ante*.

**PART XXIV. SECT. 2, SUB-SECT. 3.—C. (a).**

**6654 i. Grant with consent of lessee—Whether operative as surrender.**—*BECKFORD v. BRANDLE* (1920), 50 D. L. R. 450.—*CAN.*

**6654 ii.** ———.]—Where the holder of a lease by deed acquiesces in the grant of a fresh lease to another, person the term created by the original lease is impliedly surrendered.—*JOHNSTON v. SIMMONS* (1883), 2 N. Z. L. R. 216 (S. C.).—*N. Z.*

**d. New demise of part to third party.**—*KYLE v. STOCKS* (1871), 31 U. C. R. 47.—*CAN.*

**e.** ———.]—*RAMSAY v. STAFFORD* (1877), 28 C. P. 229.—*CAN.*

**f. Necessity for consent of lessee.**—Deft., being a yearly tenant, left before the end of his term, & pltf. re-let the premises to another. There was no evidence of a consent or request from deft. to pltf. to re-let:—*Held*: pltf. could not recover rent for the unexpired portion of the term.—

**6655.** ———.]—*DAVISON v. GENT*, No. 6658, *post*.

**6656.** ———.]—**Surrender of possession—At or about time of new lease.**—The grant of a new lease in possession, with the oral assent merely of a person in possession under a prior subsisting lease, does not operate as a surrender in law of the prior lease; such grant & mere oral assent not being sufficient to take the case out of the operation of Stat. Frauds. s. 3. There is no surrender by operation of law, unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents.—*WALLIS v. HANDS*, [1893] 2 Ch. 75; 62 L. J. Ch. 586; 68 L. T. 428; 41 W. R. 471; 9 T. L. R. 288; 37 Sol. Jo. 284; 3 R. 351.

**6657.** ———.]—**Evidence of consent—Cancellation of original lease.**—A. having granted a lease to B. for twenty-one years, before the expiration of that term granted another lease of the same premises to C. No surrender in writing to B.'s interest was shown, but the lease granted to him was produced from A.'s custody, with the seals torn off; & it was proved to be the custom to send in the old lease to A.'s office, before a renewal was made, & which old leases were thereupon cancelled by A.'s officer:—*Held*: this was evidence from which the jury might presume that B. had assented to the grant of the lease to C., so as to determine his interest by act & operation of law.—*WALKER v. RICHARDSON* (1837), 2 M. & W. 882; *Murp. & H. 251*; 6 L. J. Ex. 229; 150 E. R. 1016.

*Annotations*:—*Consd. Lyon v. Reed* (1844), 13 M. & W. 285. *Refd. Nickells v. Atherstone* (1847), 10 Q. B. 944; *Doe d. Biddulph v. Poole* (1848), 11 Q. B. 713; *Davison v. Gent* (1857), 1 H. & N. 744. *Mentd. A.-G. v. Glyn* (1841), 12 Sim. 84; *Myers v. Perigal* (1851), 11 C. B. 90; *Kearns v. Cordwainers Co., Cordwainers Co. v. Kearns* (1859), 6 C. B. N. S. 388; *Ashton v. Jones* (1860), 28 Beav. 460; *Re Royal Naval School, Seymour v. Royal Naval School*, [1910] 1 Ch. 806.

**6658.** ———.]—**New tenant in possession of lease & premises.**—The doctrine of *Thomas v. Cook*, No. 6660, *post*, that when a lessor grants a new lease to a third party, with consent of the former lessee, there is a surrender by act & operation of law, is not to be considered as overruled, & will be acted upon by the ct.; & possession by a third party of a lease & of the demised premises, & his obtaining a renewal of the lease according to usage, under which the old lease was delivered up & cancelled, was held to be evidence of the assent of the original lessee.—*DAVISON v. GENT* (1857), 1 H. & N. 744; 26 L. J. Ex. 122; 28 L. T. O. S. 291; 3 Jur. N. S. 342; 5 W. R. 229.

*Annotations*:—*Consd. Wallis v. Hands*, [1893] 2 Ch. 75. *Refd. Williams v. Eyton* (1858), 27 L. J. Ex. 176; *Walker v. Gode* (1861), 6 H. & N. 594; *Baring v. Abingdon*, [1892] 2 Ch. 374. *Mentd. Hoartley v. Banks* (1859), 28 L. J. C. P. 144.

**6659.** ———.]—**Sufficiency of consent—By parol.**—*WALLIS v. HANDS*, No. 6656, *ante*.

**(b) Acceptance of New Tenant.**

**i. In General.**

**6660. Specific acceptance—With assent of lessee.]**

—A. being tenant from year to year, underlet the

*MATTHIAS v. PACE* (1882), 3 R. & G. 366.—*CAN.*

**g. Necessity for notice of release—Where lessor retains rights against original lessee.**—*CROZIER v. TREVARTON* (1914), 32 O. L. R. 79; 22 D. L. R. 199.—*CAN.*

**PART XXIV. SECT. 2, SUB-SECT. 3.—C. (b) i.**

**6660 i. Specific acceptance—With assent of lessee.**—A tenancy by lease under seal may be surrendered by a

premises to B., & the original landlord, with the assent of A., accepted B. as his tenant, but there was no surrender in writing of A.'s interest; rent being subsequently in arrear, the landlord distrained on B.'s goods:—*Held*: these circumstances constituted a valid surrender of A.'s interest by act & operation of law within Stat. Frauds, s. 3.—*THOMAS v. COOK* (1818), 2 B. & Ald. 119; 2 Stark. 408; 106 E. R. 310.

*Annotations*:—*Distd.* Doe d. Huddleston v. Johnston (1825), M'Cle. & Yo. 141; Johnston v. Huddleston (1825), 4 B. & C. 922; R. v. Stow Bardolph (1830), 1 B. & Ad. 219; Graham v. Whichelo (1832), 1 Cr. & M. 188. *Appld.* Walker v. Richardson (1837), 2 M. & W. 891. *Distd.* Turner v. Hardey (1842), 9 M. & W. 770. *Consd.* Dodd v. Acklom (1843), 6 Man. & G. 672. *Distd.* Lyon v. Reed (1844), 13 M. & W. 285. *Distd.* Doe d. Hull v. Wood (1845), 14 M. & W. 682. *Consd.* Nickells v. Atherstone (1847), 10 Q. B. 944. *Expld.* M'Donnell v. Pope (1852), 9 Harc. 705. *Apprvd.* Davison v. Gent (1857), 1 H. & N. 744. *Consd.* Wallist v. Hands, [1893] 2 Ch. 75. *Refd.* Reeve v. Bird (1834), 4 Tyr. 612; Goro v. Wright (1838), 8 Ad. & El. 118; Bessel v. Lansberg (1845), 9 Jur. 576; Mines Royal Societies v. Magnay (1854), 10 Exch. 489; Phené v. Popplewell (1862), 8 Jur. N. S. 1104.

**6661.** ———.]—A. demises to B., who undertakes to C. In the middle of both terms it is agreed between A. & B., that B.'s tenancy shall cease, & between A. & C. that C. shall hold under A. for a longer term. This arrangement enures as a surrender from B. to A., & a new demise from A. to C.—*R. v. BANBURY (INHABITANTS)* (1834), 1 Ad. & El. 136; 3 Nev. & M. K. B. 292; 2 Nev. & M. M. C. 210; 3 L. J. M. C. 76; 110 E. R. 1159. *Annotations*:—*Mentd.* R. v. Gosforth (1834), 1 Ad. & El. 226; Stamper v. Sunderland Overseers (1868), L. R. 3 C. P. 388.

**6662.** ———.]—By all lessors.]—To an action for use & occupation, for a quarter's rent from Lady Day to Midsummer, 1841, deft. pleaded, that by an agreement between pltf's., exors. of T., & deft., deft. agreed to take of pltf's., exors. as aforesaid, the premises in question; that it was afterwards agreed between them & W., that W. should become tenant to pltf's. from Lady Day, 1841, & that deft. should be discharged from all liability to subsequent rent; that deft. accordingly gave up possession to W., & pltf's. accepted him as tenant:—*Held*: this plea was not proved by evidence that one of pltf's. had so agreed to accept W. as tenant in lieu of deft.—*TURNER v. HARDEY* (1842), 9 M. & W. 770; 1 Dowl. N. S. 954; 11 L. J. Ex. 277; 152 E. R. 326.

**6663.** ———.]—Old tenant remaining in possession.]—Where a landlord has agreed to accept another person as his tenant, to whom a lease is to be granted, & the outgoing tenant remains in possession, there is no surrender by operation of law until a lease has been executed, & the lessee admitted into possession.—*TYLER v. HOOKE*, (1855), 25 L. T. O. S. 60, 100; 19 J. P. 326.

**6664.** ———.]—Assent fraudulently obtained.]—Where a tenant proposed to his landlord another person to be tenant in his stead, he knowing that the person he proposed had recently compounded with his creditors, & the landlord accepted that person as tenant, without making any inquiry:—*Held*: under these circumstances the surrender of the tenancy had been fraudulently obtained; & the new tenant proving insolvent, the old one remained liable.—*BRUCE v. RULER* (1828), 2 Man. & Ry. K. B. 3; 6 L. J. O. S. K. B. 228.

*Annotation*:—*Consd.* Gray v. Owen, [1910] 1 K. B. 622.

written agreement by the lessor to accept third parties as tenants at the request of the lessee, & by the acceptance of rent from them.—*SABELBERG v. SCOTT* (1879), 5 V. L. R. (L.) 414.—AUS.

**6660 H.** ———.]—*LOUGHEED v. TARRANT* (1893), 2 Terr. L. R. 1; 13

C. L. T. 473.—CAN.

**6660 III.** ———.]—*McKEOWN v. LECHTZIER* (1913), 26 W. L. R. 264; 5 W. W. R. 778; 15 D. L. R. 15.—CAN.

**6660 IV.** ———.]—*DUFF v. GILMOOR* (1879), O. B. & F. 200.—N.Z.

**6665. Occupation by third person.]—TAYLOR v. CHAPMAN**, No. 6562, ante.

**6666.** ———.]—*Semble*: an agreement between a landlord & a tenant from year to year that another tenant shall be substituted in his place who is accordingly substituted determines the tenancy of the first tenant.—*STONE v. WHITING* (1817), 2 Stark. 235, N. P.

*Annotations*:—*Distd.* Doe d. Huddleston v. Johnston (1825), M'Cle. & Yo. 141. *Consd.* Lyon v. Reed (1844), 13 M. & W. 285; Nickells v. Atherstone (1847), 10 Q. B. 944.

**6667.** ———.]—Necessity for consent of landlord.]—A. demised a farm to B. under an agreement to hold from Michaelmas, 1799, to Michaelmas, 1816, at a yearly rent. A. died, & devised the premises to C. who, in 1813, put them up to sale by auction. D. became the purchaser, & also agreed to buy B.'s outstanding term, without C.'s knowledge or assent. D. having let E. into possession, became bkpt. In 1814, C. by letter to B. admitted that E. occupied the premises, & afterwards demanded rent from him. C. & D.'s assignees afterwards executed mutual deeds of release, & D.'s assignees released E.:—*Held*: C. was entitled to recover the rent from 1813 to 1816, from B. as there had been no surrender in writing, of his interest to D. & as C. had not assented to E.'s being let into possession.—*MATTHEWS v. SAWELL* (1818), 8 Taunt. 270; 129 E. R. 387; *sub nom.* MATHEWS v. SAWELL, 2 Moore, C. P. 262.

*Annotation*:—*Consd.* Nickells v. Atherstone (1847), 10 Q. B. 944.

**6668.** ———.]—A tenant took a house for a year at the rent of £10, occupied until a few weeks before the end of the year, then entirely abandoned the possession. After the tenant abandoned possession, another person occupied the house, but, as it did not appear that that other person had been accepted by the landlord as tenant, the ct. were of opinion that the tenancy was not determined between the landlord & the tenant who had taken the house for a year.—*R. v. STOW BARDOLPH (INHABITANTS)* (1830), 1 B. & Ad. 219; 9 L. J. O. S. M. C. 5; 109 E. R. 769.

**6669.** ———.]—By widow of tenant—With permission of administrator.]—W., being tenant from year to year to H., died, leaving his widow in possession. J., some time after, took out administration to deceased, & the widow continued in possession, paying rent to H., with the knowledge of J., who never objected to such payment or made any demand for the rent:—*Held*: there was no evidence of a surrender by operation of law so as to create the relation of landlord & tenant between H. & the widow.—*DOE d. HULL v. WOOD* (1845), 14 M. & W. 682; 15 L. J. Ex. 41; 6 L. T. O. S. 102; 9 Jur. 1060; 153 E. R. 649.

*Annotations*:—*Mentd.* R. v. Halifax (1855), 4 E. & B. 647; R. v. Thornton (1860), 2 E. & E. 788; Brighton Corp'n. v. Brighton Grdn's. (1880), 5 C. P. D. 368.

**6670. Premises re-let by auction—After parol agreement to determine—New tenant not let into possession.]—Where a tenant from year to year by a Lady Day holding agreed by parol with his landlord's agent, to quit at the ensuing Lady Day, which was within half a year; & the premises were re-let by auction, at which the tenant attended & bid, but the new tenant was not let into possession:—*Held*: the tenancy was not**

*h. Change in partnership.]—GAULT v. SHEPARD* (1886), 14 A. R. 203.—CAN.

*k. Intention of parties—Lease to continue to exist—No surrender.]—Held*: there was no surrender by operation of law, & creation of a tenancy from year to year in a third party, by the change of possession &

**Sect. 2.—Surrender: Sub-sect. 3, C. (b) i. & ii., D. (a) & (b).]**

determined; there not having been either a sufficient notice to quit, or a surrender by operation of law, within the meaning of Stat. Frauds, s. 3.—**DOE d. HUDDLESTON v. JOHNSTON** (1825), *M'Cle. & Yo.* 141; 148 E. R. 359; *subsequent proceedings, sub nom.* **JOHNSTONE v. HUDLESTONE** (1825), 4 B. & C. 922.

**Annotations:—Distd.** **Dodd v. Acklom** (1843), 6 Man. & G. 872; **Phene v. Popplewell** (1862), 12 C. B. N. S. 334. **Refd.** **Nicholls v. Atherstone** (1847), 16 L. J. Q. B. 371; **Doe d. Blidulph v. Poole** (1848), 11 Q. B. 713; **Cannan v. Hartley** (1850), 9 C. B. 634; **Furnivall v. Grove** (1860), 8 C. B. N. S. 496. **Mentd.** *Re Bebington's Tenancy*, **Bebington v. Wildman**, [1921] 1 Ch. 559.

**6671. Change in partnership—Instructions for new lease—New lease not prepared—Rent accepted from new partners.]—Defts., W. & H., having entered into an agreement with pltf. for a lease of premises for the purpose of carrying on a partnership business, for the term of three years, to be extended by notice to seven, after they had dissolved partnership with the knowledge of pltf., gave him a joint notice to extend the term; subsequent to that notice H. applied to him to grant a new lease to himself & a new partner, S., when pltf. gave H. a letter to his attorney, expressing his readiness to grant the proposed lease, & directing his attorney to prepare one accordingly. This letter was never delivered to the attorney, or communicated to W., but pltf. afterwards gave a receipt for rent to the new firm of H. & S.:—*Held*: these circumstances did not amount to a surrender of the extended term, or the substitution of a new tenant, but defts. were jointly liable for rent in arrear in an action on the agreement for a lease.—**GRAHAM v. WHICHELO** (1832), 1 Cr. & M. 188; 3 Tyr. 201; 2 L. J. Ex. 70; 149 E. R. 368.**

**Annotation:—Consd.** **M'Donnell v. Pope** (1852), 9 Hare, 705.

**6672. Exchange between tenants—Holding under different landlords—Steward acting for both landlords.]—A. being a tenant of a close under B., & C. being tenant of another close under D., agreed without writing to exchange, & to pay each other's rent. Each took possession of the other's close pursuant to such arrangement, which was assented to by E., who was the steward of both the landlords:—*Held*: the transaction was a substitution of A. as tenant in the place of C., whose interest was surrendered by operation of law.—**BEES v. WILLIAMS** (1835), 2 Cr. M. & R. 581; 1 Gale, 332; Tyr. & Gr. 23; 150 E. R. 248.**

**Annotation:—Refd.** **Nickells v. Atherstone** (1847), 10 Q. B. 944.

**6673. Mortgage with attornment clause—Bankruptcy of mortgagee—Conveyance of premises by trustee in bankruptcy—Assent of mortgagee.]—*Re* **JOHNSON, Ex p. HYDE v. CASH** (1897), 41 Sol. Jo. 368.**

**ii. Presumption of Acceptance.**

**6674. Rent paid by third person.]—An acceptance of a surrender of a lease is not to be presumed from the circumstance of the rent having been paid, not by the original tenant, but by a third person.—**COPELAND v. WATTS** (1815), 1 Stark. 95, N. P.**

**6675. — In occupation of premises.]—**THOMAS v. COOK**, No. 6660, *ante*.**

payment of rent by him with the assent of the original lessees, as what the parties intended was that the lease should continue to subsist.—**CLIFFORD v. REILLY** (1869), 1 R. 4 C. L. 218.—**IR.**

**PART XXIV. SECT. 2, SUB-SECT. 3.—C. (b) ii.**

**6675 i. Rent paid by third person—In occupation of premises.]—**MCLEOD v. DARCH** (1857), 1 C. P. 35.—**CAN.****

**6675 ii. — — —.]—**YUKON TRUST****

**6676. — — —.]—**Deft., who had occupied under a lease which expired at Lady Day, 1829, paid a quarter's rent on Midsummer Day, 1829, deducting something for repairs; he was not afterwards seen on the premises, but the rent was paid at irregular intervals by L., who was in occupation for the ensuing two years:—*Held*: it was correctly left to a jury to find whether the lessor had accepted L. as a tenant, & the jury having found for deft., the ct. refused to set aside the verdict.—**WOODCOCK v. NUTH** (1832), 8 Bing. 170; 1 Moo. & S. 317; 131 E. R. 365.****

**Annotation:—Mentd.** **Bayley v. Bradley** (1848), 5 C. B. 396.

**6677. — — — Premises advertised for sale.]—A. the tenant of a house, three cottages, & a stable & yard, let at an entire rent, for a term of seven years, before the expiration of the term assigned all the premises to B. for the remainder of the term, the house & cottages being in the possession of undertenants, & the stable & yard in that of A. The landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of a quarter. B. took possession of the stable & yard only. The occupiers of the cottages having left them after the assignment, & before the expiration of the term, the landlord re-let them. A. paid no rent after the assignment, but the landlord received rent from the undertenants. Before the expiration of the term the landlord advertised the whole of the premises to be let or sold:—*Held*: this was a surrender by operation of law of all the premises.**

*Semble*: when a number of facts, which singly may be ambiguous, amount collectively to an unequivocal proof of fact, *e.g.* the surrender of a term, a judge is not bound to submit them formally to a jury unless the counsel expressly desires it.—**REEVE v. BIRD** (1834), 1 Cr. M. & R. 31; 4 Tyr. 612; 3 L. J. Ex. 282; 149 E. R. 980.

**6678. — — —.]—**M'DONNELL v. POPE**, No. 6610, *ante*.**

**6679. — — —.]—Receipts for rent received by a landlord from a third party:—*Held*: evidence of a surrender by operation of law, putting an end to the liability of the former tenant.—**LAURANCE v. FAUX** (1861), 2 F. & F. 435, N. P.**

**6680. Distress on goods of new occupant.]—A tenant by his own act alone, & contrary to the terms on which he holds, cannot dissolve the relationship of landlord & tenant, & discharge himself, from the liabilities to which he is thereby subject. But where the landlord, by the express acceptance of a second tenant, or by acts which clearly show such an acceptance, as the distraining upon the second tenant, & neglecting, during several years to apply to the first tenant for payment of rent in arrear indicates that he considers the first tenancy at an end, the first tenancy is discharged from his liability.**

Two persons, partners, occupied premises under an agreement for a lease to be granted to them jointly, but after sometime dissolved partnership, when one of them quitted the premises, & the landlord subsequently received rent from, & several times distrained upon, the partner who continued to occupy, making no application to the partner who had quitted for five years, nor proceeding against him for twelve years:—*Held*: there was good evidence for a jury to conclude that the relationship of landlord & tenant with respect to

**Co. v. MURPHY** (Y. T.) (1905), 2 W. L. R. 298.—**CAN.**

**6675 iii. — — —.]—**MICKLEBOROUGH v. STRATHY** (1911), 18 O. W. R. 206; 2 O. W. N. 537; 23 O. L. R. 33.—**CAN.****

the partner who had left the premises, had been determined, & the landlord could not recover against him in an action for use & occupation.—**PAGE v. MANN & GARDINER** (1827), 6 L. J. O. S. K. B. 63.

### D. Delivery of Possession.

#### (a) In General.

**6681. Licence to quit—Yearly tenancy—Parol licence.]—MOLLETT v. BRAYNE**, No. 6563, *ante*.

**6682.** ———.]—Upon a tenancy from year to year determinable at a quarter's notice the lessor licences the tenant to quit in the middle of a quarter, & the tenant quits & the lessor accepts possession. This is a surrender by operation of law, destroying the right to rent for the whole or any part of the current quarter.—**GRIMMAN v. LEGGE** (1828), 8 B. & C. 324; 2 Man. & Ry. K. B. 438; 6 L. J. O. S. K. B. 321; 108 E. R. 1063.

*Annotations:—***Consd.** Slack v. Sharpe (1838), 8 Ad. & El. 366. **Apld.** Dodd v. Acklom (1843), 6 Man. & G. 672. **Consd.** Furnivall v. Grove (1860), 8 C. B. N. S. 496. **Apld.** Phene v. Popplewell (1862), 12 C. B. N. S. 331. **Refd.** Gore v. Wright (1838), 8 Ad. & El. 118; Ackland v. Lutley (1839), 9 Ad. & El. 879; Morrison v. Chadwick (1849), 7 C. B. 266; Collis v. Evanson (1865), 12 L. T. 672. **Mentd.** Thomas v. Williams (1834), 3 L. J. K. B. 202.

**6683. Agreement for possession—Principal part of premises.]—An agreement between landlord & tenant, for the latter to give up the principal part of a farm to the former, who was to purchase the stock thereon at a valuation, & the tenant was to hold over half the house without paying rent, & deliver up at a subsequent day, requires a surrender stamp under Stamp Act, 1815 (c. 181), sched. Part I., as such agreement operates as a surrender of the term.—**WILLIAMS v. SAWYER** (1821), 3 Brod. & Bing. 70; 6 Moore, C. P. 226; 129 E. R. 1208.**

*Annotation:—***Distd.** Weddall v. Capes (1836), Tyr. & Gr. 430.

**6684.** ——— **On discharge from further rent.]—**Debt for £63, rent for two years & one quarter, due Mar. 25, 1837, reserved on a demise for forty-five years, at £28 *per annum*. Plea, that before any of the sum claimed became due, & more than two years & a quarter before Mar. 25, 1837, & before Dec. 25, 1834, viz. Apr. 17, 1834, pltf. & deft. agreed that deft. should give up, & pltf. take, possession of the premises before Dec. 25, 1834, in consideration whereof deft. should be discharged from the rent which would have become due for the occupation after Dec. 25, 1834; that possession was given up by deft. & accepted by pltf. accordingly; & that pltf. entered on Apr. 17, 1834, & had held ever since, & deft. had not held since; “& the said tenancy & deft.’s said interest were thereby then surrendered & extinguished”:—**Held**: on this plea, the objection did not arise whether the term was shown upon the record to be regularly surrendered according to Stat. Frauds, s. 3; the defence being merely an executed contract that, in consideration of deft.’s giving up possession, pltf. should abandon his claim to the rent: & such defence was valid.—**GORE v. WRIGHT** (1838), 8 Ad. & El. 118; 3 Nev. & P. K. B. 243; 1 Will. Woll. & H. 260; 7 L. J. Q. B. 147; 2 Jur. 840; 112 E. R. 780.

*Annotations:—***Distd.** Washington v. Harthan (1841), 10 L. J. Q. B. 253. **Foldd.** Smith v. Lovell (1850), 10 C. B. 6. **Distd.** Furnivall v. Grove (1860), 8 C. B. N. S. 496.

**Refd.** Nickells v. Atherstone (1847), 10 Q. B. 944; Giles v. Spencer (1857), 3 C. B. N. S. 244; Phene v. Popplewell (1862), 12 C. B. N. S. 334.

**6685.** ———.]—A. & B. were tenants of certain chambers to one C. at a certain rent, payable quarterly; & in consideration that A. & B. would underlet the chambers to D. at a certain rent, payable quarterly, D. promised A. & B. that he would pay the said rent to C., & that, if he should not do so, he would indemnify A. & B. in respect thereof, & pay the same to them: & the breach assigned was, non-payment by D. of the rent due from A. & B. to C. Plea stated, that, before the rent became due from A. & B. to C., it had been agreed between A., for & on behalf of himself & B., & with his authority, & D., that D. should deliver up the possession of the chambers to A., & that, in consideration thereof, D. should be discharged from further liability for rent; & that D. did accordingly deliver up possession to A., which he on behalf of himself & B. accepted:—**Held**: this plea set up a good defence by way of executed contract.—**SMITH v. LOVELL** (1850), 10 C. B. 6; 1 L. M. & P. 794; 20 L. J. C. P. 37; 138 E. R. 3; *sub nom.* COLES & SMITH v. LOVELL, 16 L. T. O. S. 304; 15 Jur. 250.

**6686.** ——— **Return of goods distrained.]—**Deft. having distrained the goods of pltf., for arrears of rent, the latter signed the following undertaking: “In consideration of Mr. C. giving me the household furniture distrained for rent due to him, but the furniture only, I undertake to give him possession of the premises held by my late husband, on or before one week from this date.” At the expiration of the week, pltf. having in the meantime acted upon agreement by removing part of the furniture, & selling other part, deft. & others entered & took possession. In an action of trespass for such entry:—**Held**: the above memorandum sustained a plea of leave & licence.—**FELTHAM v. CARTWRIGHT** (1839), 5 Bing. N. C. 569; 7 Scott, 695; 9 L. J. C. P. 67; 3 Jur. 606; 132 E. R. 1219.

**6687. Directions to under-tenant to attorn—To superior landlord.]—**(1) An information having been filed in Chancery to set aside an improvident lease of parish lands, & judgment being in favour of prosecutor, the parish officers claimed possession from G. holding as one of the assignees of the original lease. G. wrote to his undertenant to attorn, which was done, & rent was paid for several years to the parish:—**Held**: what G. did amounted to a surrender.

(2) The same parish officers having demanded possession from F., who held another part of the premises as assignee in trust for other persons, F. declined to take a lease from the parish or to attorn, or to direct his undertenant to attorn, & refused to do anything:—**Held**: there was nothing done by F. which amounted to surrender.—**GRAY v. BALLS, FIELD v. MERRISON** (1861), 5 L. T. 395; 26 J. P. 5.

#### (b) Delivery of Key.

**6688. General rule—Delivery accepted by lessor.]—**Lessee for years having agreed with the lessor to surrender his lease, delivers up the key, which the lessor accepts, but afterwards refuses to take the surrender of the lease. Deceit the lessee

### PART XXIV. SECT. 2, SUB-SECT. 3.— D. (a).

1. Agreement for possession—Lessee remaining in common possession with lessor—Lessor to have right of possession.]—**COFFIN v. DANARD** (1865), 24 U. C. R.

### 267.—CAN.

m. ———.]—**WATSON v. MOGGEY** (1904), 15 Man. L. R. 241.—CAN.

n. ——— *In event of sale.*]—**RE BAGSHAW & O’CONNOR** (1918), 42 O. L. R. 466; 42 D. L. R. 596; 14

### O. W. N. 54.—CAN.

### PART XXIV. SECT. 2, SUB-SECT. 3.— D. (b).

**66881 General rule—Delivery accepted by lessor.]—HART v. JOST** (1894), 27 N. S. R. 243.—CAN.

**Sect. 2.—Surrender: Sub-sect. 3, D. (b) & (c).]**

should be discharged of the rent.—**NATCHBOLT v. PORTER** (1689), 2 Vern. 112; 23 E. R. 682.

**6689. — Possession by landlord.**—If a landlord in the middle of a quarter accepts from his tenant the key of the house demised, under a parol agreement that upon her then giving up the possession, the rent shall cease, & she never afterwards occupies the premises, he cannot recover in an action for the use & occupation of the house, for the time subsequent to his accepting the key.—**WHITEHEAD v. CLIFFORD** (1814), 5 Taunt. 518; 128 E. R. 791.

**Annotations:—***Reid. Walls v. Atcheson* (1826), 11 Moore, C. P. 379; *Grimman v. Legge* (1828), 8 B. & C. 324; *Gore v. Wright* (1838), 8 Ad. & El. 118. *Dodd & Davies v. Acklom* (1843), 13 L. J. C. P. 11; *Nickells v. Atherstone* (1847), 10 Q. B. 944; *Hilton v. Tucker* (1888), 57 L. J. Ch. 973. *Mentd. Nation v. Tozer* (1834), 1 Cr. M. & R. 172.

**6690. — — — — —.**—The lessee of certain premises erected a greenhouse thereon, which, though a fixture by agreement with the lessor, deft., he was entitled to remove. He subsequently assigned the greenhouse by a bill of sale, & the assignee immediately entered under the powers of the bill of sale. The greenhouse was put up to auction a month after the entry, but not sold. Ten days after the auction the keys of the premises were given up to deft. by the auctioneer, who had been in possession for the assignee, & deft. took possession; on the same day the assignee had notice of the surrender. The lessee made no attempt or claim to recover the premises after the entry under the bill of s.e. Between three & four weeks after possession had been given up to deft. the assignee sold the greenhouse to pltf., who claimed to be entitled to enter & remove it:—**Held:** the facts showed a surrender by operation of law, & the greenhouse, not having been removed by the assignee within a reasonable time after notice of the surrender, had become the property of deft., & could not be removed.—**MOSS v. JAMES** (1878), 38 L. T. 595, C. A.

**6691. — — — — —.**—Debt for use & occupation for half a year ending in May, 1840. Plea, never indebted. At the trial it appeared that deft. was tenant to pltf. from year to year, & that, in Apr. 1839, it was agreed that the tenancy should be determined at the following Martinmas; & that, at that time, deft. accordingly delivered up the keys of the premises & paid the rent then due:—**Held:** evidence of this agreement was admissible under the plea never indebted.—**WASHINGTON v. HARTMAN** (1841), 10 L. J. Q. B. 253; 6 Jur. 127.

**6692. — — — — —.**—**DODD v. ACKLOM**, No. 6545, *ante*.

**6693. Agreement to give up key—Key not delivered—No surrender.**—By agreement in writing, dated May 20, 1824, deft. "agreed to let pltf. two upper rooms, & part of a lower room as a workshop & smithy, & to find power for three lathes, etc.; deft. agreed to pay rent for the above, £61 per year, to be paid quarterly in cash; & that three months' notice was to be required on each party." Pltf. took possession of the rooms the same day, & deft. found the power. On Aug. 20, deft. served pltf. with a written notice of that date, to quit the rooms on Nov. 20, following. Pltf. did not then object to the notice, but held over

after Nov. 20, from which day deft. ceased to find the power. On Jan. 19, 1825, pltf. & deft. settled their accounts up to Nov. 20, preceding, when pltf. agreed to give up the key of the rooms; but afterwards refused to do so, saying "that the notice was bad"; to which deft. replied, "then there would soon be another quarter's rent due." In an action by pltf. for damages for the discontinuance of the power by deft.:—**Held:** the agreement was a demise of a tenement, creating a tenancy which could not be determined but by a notice ending with the current year, except by custom; & pltf.'s agreeing to give up the key when he did, was no acquiescence in the notice served upon him, & no surrender of his tenancy within Stat. Frauds; though such an acquiescence, if established, would have been a bar to the action.—**BROWN v. BURTINSHAW** (1826), 7 Dow. & Ry. K. B. 603.

**6694. Delivery on last day of tenancy—Not necessarily surrender.**—A house was demised, *habendum* for twenty-one years from Mar. 25, 1809, paying rent on certain days, of which Mar. 25 was one. The estate of which it formed part had been devised by the landlord to trustees to receive the rents & apply them to certain purposes. After the landlord's death, & before the trusts were completely executed, & during the tenancy, the reversion was sold. For a year after this sale, the purchaser received the rents, but, during the subsequent years, from Christmas, 1817 to Lady Day, 1830, they were received by the trustees. The trusts were completely executed in 1821. On Mar. 25, 1830, the lessee came to the house, no one being therein, gave the key to the trustees, & departed. The trustees entered; & the purchaser, who had been present at the above proceeding, & had come to take possession, entered also, but was put back by the trustees, & they remained on the premises:—**Held:** (1) if the lessee's term had expired the reversioner's entry would have been good, notwithstanding the entry of the trustees; but the term, under the above lease, did not expire till the end of Mar. 25, 1830; (2) the acts of the lessee on that day did not necessarily import a surrender or a forfeiture.—**ACKLAND v. LUTLEY** (1839), 9 Ad. & El. 879; 1 Per. & Dav. 636; 8 L. J. Q. B. 164; 112 E. R. 1446.

**Annotations:—***As to (1) Reid. R. v. St. Mary, Warwick* (1853), 22 L. J. M. C. 109; *Isaacs v. Royal Insee.* (1870), L. R. 5 Exch. 298; *Slidetham v. Holland*, [1895] 1 Q. B. 378; *Meggison v. Groves*, [1917] 1 Ch. 158; *Ralkes v. Ogle*, [1921] 1 K. B. 576. *Generally, Mentd. Collier v. McBean* (1865), 34 L. J. Ch. 555; *Brakspear v. Barton*, [1924] 2 K. B. 88.

**6695. Delivery by agent—Wife of tenant.**—**DODD v. ACKLOM**, No. 6545, *ante*.

**6696. Delivery to unauthorised person—No surrender—Clerk to official assignee.**—A. was tenant to B. of rooms, for a term of years. Upon the bkpcy. of B., A. sent the key of the rooms to the official assignee, where it was left with a clerk, who was told that it was the key of the rooms which A. had occupied. A. immediately quitted possession, & no further communication took place:—**Held:** not to amount to a surrender by act or operation of law.

Here there is nothing but the fact of the key being brought to the clerk of the official assignee. It is contended that he was bound to receive anything brought to the office for his master.

**6688 H. — — — — —.**—**GOLD v. ROSS** (1903), 10 B. C. R. 80.—**CAN.**

*o. Mere delivery not conclusive.*—The giving up of the key is not of itself a surrender in law.—**CARPEN-**

**TER v. HALL** (1865), 16 C. P. 90.—**CAN.**

*p. — — — — —.*—**Held:** the lessor had not by receiving the key of the demised premises, putting up a "To let"

notice, accepted a surrender of the lease. Such acts are not conclusive, the intention must be looked at.—**MCBRIDE v. INESON** (1915), 35 O. L. R. 173; 9 O. W. N. 299.—**CAN.**

That may be so; but it does not follow that this was an acceptance by the master (MAULE, J.).—**CANNAN v. HARTLEY** (1850), 9 C. B. 634; 19 L. J. C. P. 323; 15 L. T. O. S. 184; 14 Jur. 577; 137 E. R. 1040.

**6697.** ——— **Housekeeper.**—**PEARSE v. BOULTER** (1860), 2 F. & F. 133.

**6698. Delivery under protest—Compulsory repairs—Landlord entering to rebuild.**—On Nov. 4, 1858, A. let certain premises to B. for a term of four years from Michaelmas preceding, at a yearly rent payable quarterly, the agreement containing the following condition: "The condition of this agreement being binding on the said B., is, that the said A. shall make good & support the floor of the warehouse of the said premises, etc., within twenty-eight days of the date of this agreement: if not done, this agreement to be void." Within the twenty-eight days, A. entered with workmen, & afterwards departed, stating that he had made all secure. B. paid rent at Christmas & at Lady Day. Early in Apr. 1859, the warehouse floor having broken in, the attention of the comr. of sewers was called to the state of the premises, & the result was that in May an order was made upon A., under 18 & 19 Vict. c. 122, directing him to secure & repair the same. At the end of Apr., A. informed B. that he was about to pull down the premises, & offered to assist B. in removing his printing-presses & plant. After the date of the comr.'s order, A. entered the premises & pulled down the ground floor storey, including the warehouse floor, & took no steps to replace or repair it. B. thereupon obtained other premises, & he & his undertenants were out, & on June 23, B. sent A. the key, with a letter stating that he had been forced out of the premises by A.'s wilful & unnecessary destruction of the warehouse floor, etc. A. received the key, read the letter, & said nothing, & a few days afterwards entered & pulled down the whole house, for the purpose of re-building it:—**Held**: these facts showed an agreement for a determination of the tenancy on June 23, & consequently A. could not sue for the quarter's rent. **Qu.**: whether they amounted to a surrender or an eviction.—**FURNIVALL v. GROVE** (1860), 8 C. B. N. S. 496; 30 L. J. C. P. 3; 141 E. R. 1259.

**6699.** ——— **Advertisement.**—**SMITH v. ROBERTS** (1892), 9 T. L. R. 77, C. A.

**6700. Refusal to accept surrender—Subsequent advertisement to relet.**—**PHENE v. POPPLEWELL**, No. 6594, *ante*.

**6701.** ——— **Pltfs. let a house to deft.** for seven years from Lady Day, 1868. Def. entered & occupied till Michaelmas when he left England for America. He left the keys with an agent to dispose of the house if he could, if not, to make the best bargain he could with pltfs. for the surrender of the term. The agent was unable to find a tenant & gave the keys in Dec. 1868, to pltfs. They employed a house agent to let the house, & he put up bills in the house & advertised it to let, but the house was not let till Lady Day, 1872, when a new tenant went in. In 1870, for a short time, some workmen of pltfs.' occupied two rooms in the house for the purpose of pltfs.' saddlery business. Pltfs. having sued def. for rent from Michaelmas, 1868, to Lady Day, 1872:—**Held**: there had been no possession of the house

by pltfs. so inconsistent with the continuance of deft.'s term as to estop pltfs. from alleging the continuance of it, so as to effect a surrender of the term by operation of law.—**OASTLER v. HENDERSON** (1877), 2 Q. B. D. 575; 46 L. J. Q. B. 607; 37 L. T. 22, C. A.

**Annotations**:—**Fold.** *Re Panther Lead Co.* (1896), 65 L. J. Ch. 499. **Mentd.** *Kreih v. Burrell* (1878), 10 Ch. D. 420.

**6702.** ——— **Pltfs. let a house to deft.** for three years from Michaelmas, 1881. He entered & occupied till May, 1884, when he sent the keys to pltfs., who in vain attempted to return them to him. They used them in Aug. to go into the house & do some necessary repairs to prevent it falling into a ruinous condition. By an agreement made with deft. previously to May, 1884, they had put up bills in the house after he had left it, & also a board in front of it, advertising it to be let. In Aug. they entered into an agreement with another tenant to give him possession at Michaelmas, 1884. Pltfs. having sued deft. for rent from Lady Day to Michaelmas, 1884:—**Held**: there had been no possession of the house by pltfs. so inconsistent with the continuance of deft.'s term as to estop pltfs. from alleging the continuance of it so as to effect a surrender by operation of law.—**SMITH v. BLACKMORE** (1885), 1 T. L. R. 267.

*See, also*, No. 6707, *post*.

**6703.** ——— **Re PANTHER LEAD CO., No. 6595, ante.**

**6704.** ——— **Occasional use of premises by landlord.**—**OASTLER v. HENDERSON**, No. 6701, *ante*.

**6705.** ——— **Landlord entering for necessary repairs.**—**SMITH v. BLACKMORE**, No. 6702, *ante*.

*See, also*, No. 6710, *post*.

**6706.** ——— **Keys accepted "without prejudice."**—**Re PANTHER LEAD CO., No. 6595, ante.**

#### (c) Tenant Quitting Premises.

**6707. Advertisement to re-let by landlord.**—In *assumpsit* for use & occupation of apartments which deft. had quitted without giving notice, pltf. having put up a bill to let the apartments, will not prevent his recovering.—**REDPATH v. ROBERTS** (1800), 3 Esp. 225, N. P.

**Annotations**:—**Distd.** *Walls v. Atcheson* (1826), 2 C. & P. 268. *Phene v. Popplewell* (1862), 12 C. B. N. S. 334. **Reid.** *Bessel v. Lamsberg* (1815), 9 Jur. 576.

— **After keys delivered.**—*See Nos. 6700–6703, ante.*

**6708. Premises re-let to new tenant.**—Where a lessee quitted, in the middle of his term, apartments which he had taken for a year, & the lessor let them to another tenant:—**Held**: she could not recover in an action for use & occupation against the lessee for a subsequent portion of the year during which the apartments had been unoccupied; & by the admission of another tenant she dispensed with the necessity of a written surrender.—**WALLS v. ATCHESON** (1826), 3 Bing. 402; 2 C. & P. 268; 11 Moore, C. P. 379; 130 E. R. 591; *sub nom.* **WATTS v. ATCHESON**, 4 L. J. O. S. C. P. 154.

**6709.** ——— **Def. held premises as tenant to pltf. under a memorandum of agreement for three years.** He left the premises in the first year. On application being then made by pltf. for rent due, deft., by letter, authorised pltf. to let the premises to any one else. Pltf. then let them to another tenant for three years, & gave him possession:—

#### PART XXIV. SECT. 2, SUB-SECT. 3.—D. (c).

**6708 i. Premises re-let to new tenant.**—Premises were rented to G. who abandoned them. The landlord then

leased the premises to another tenant who took possession:—**Held**: the abandonment of the premises by G. & the taking of possession by the new tenant under his lease affected a surrender of G.'s tenancy by operation

of law.—**BRUCE v. SMITH** (Alta.), [1923] 3 D. L. R. 887; [1923] 2 W. W. R. 327.—**CAN.**

*q. Abandonment after destruction of premises by fire.*—**NIXON v. MALTRY** (1882), 7 A. R. 371.—**CAN.**

**Sect. 2.—Surrender: Sub-sect. 3, D. (c), E. & F.; sub-sects. 4, 5 & 6.]**

**Held:** in an action of debt on the original agreement, these facts constituted a surrender by operation of law.—**NICKELLS v. ATHERSTONE** (1847), 10 Q. B. 944; 116 E. R. 358; *sub nom.* **NICHOLLS v. ATHERSTONE**, 16 L. J. Q. B. 371; 11 Jur. 778.

**Annotations:—****Consd.** **Oastler v. Henderson** (1877), 2 Q. B. D. 575. **Refd.** **Cannan v. Hartley** (1850), 9 C. B. 634; **Davison v. Gent** (1857), 1 H. & N. 744; **Walker v. Gode** (1861), 6 H. & N. 594. **Mentd.** **Locking v. Parker** (1872), 8 Ch. App. 35, n.

—**See, also, Sub-sect. 3, C., ante.**

**6710. Subsequent entry of landlord for repairs.]—**

Tenant from year to year gave his landlord notice to quit, ending at a time within half a year. The landlord at first acquiesced, but ultimately refused to accept the notice; the tenant quitted according to his notice, & the landlord entered & did some repairs:—**Held:** the tenancy was not determined.

The authorities as to surrender by operation of law were considered lately in the Ct. of Exch.: & I think it was said that a surrender would not result from the mere conduct of parties unless some act had been done which took effect as an estoppel (**PATTESON, J.**).—**BESSELL v. LANDSBERG** (1845), 7 Q. B. 638; 14 L. J. Q. B. 355; 9 Jur. 576; 115 E. R. 630.

**Annotation:—****Refd.** **Pheno v. Popplewell** (1862), 12 C. B. N. S. 331.

—**After key delivered.]—See, also, Nos. 6698, 6699, 6702, ante.**

**6711. Landlord in profitable occupation.]—**In an action by A. against B. for rent on a demise from quarter to quarter, with the rent payable one quarter in advance, deft. pleaded a surrender by operation of law:—**Held:** if a tenant have left a house unoccupied, & the landlord enter & be in the profitable occupation of the house, he cannot recover rent from the tenant for any time after such profitable occupation; but if he merely puts a person into the house to take care of it & prevent depredations, it would be otherwise.—**BIRD v. DEFONVIELLE** (1846), 2 Car. & Kir. 415.

**6712. Caretaker put in by landlord.—To prevent depredations.]—****BIRD v. DEFONVIELLE**, No. 6711, *ante*.

**E. Change in Position of Tenant.**

**6713. Appointment as bailiff—Lessee of manor.]**

—A lease for years was granted by the Bishop of Ely, of the Manor of Totteridge. The Bishop's successor by deed reciting the lease, granted the lessee the office of bailiff of the same manor, which it was contended constituted a surrender:—**Held:** if lessee for years of a manor be afterwards made bailiff, it is no surrender for the office of bailiff has not an interest in the land, but only an authority & it has not any part of the thing demised.—**GAGE v. PEACOCK** (1605), Noy, 12; 74 E. R. 983.

**Annotation:—****Refd.** **R. v. Patteson** (1832), 4 B. & Ad. 9.

**6714. ——— Lease of bailiwick.]—**If the lessee for years of a manor, with exception of wards,

marriages, reliefs, etc., afterwards take a lease of the bailiwick of the manor, this shall not operate as a surrender of the first lease, notwithstanding the exception is void. A bailiff of a manor, although he has no interest in the land, may receive rents, take fealty, etc.—**GYBSON v. SEARL** (1607), Cro. Jac. 176; 79 E. R. 154.

**Annotation:—****Refd.** **Roe d. Berkeley v. York** (Archbp.) (1805), 6 East, 86.

**6715. Appointment as servant of lessor—Lessee of ferry.]—**

The owner of a ferry demised it to A. by parol at a certain annual rent. The latter, at the end of a few weeks, finding it unprofitable, proposed to become the servant of the former as boatman, & to account to him for all money received from passengers, upon being allowed fixed daily wages. This was assented to by the owner of the ferry, & A. became his servant, & received the stipulated wages:—**Held:** there was a surrender of A.'s interest in the ferry by act & operation of law.—**PETER v. KENDAL** (1827), 6 B. & C. 703; 5 L. J. O. S. K. B. 282; 108 E. R. 610.

**Annotations:—****Mentd.** **R. v. G. N. Ry.** (1849), 14 Q. B. 25; **R. v. North & South Shields Ferry** (1852), 22 L. J. M. C. 9; **Matthews v. Peach** (1855), 20 J. P. 244; **Royal v. Yaxley** (1872), 20 W. R. 903; **A.-G. v. Simpson**, [1901] 2 Ch. 671; **Hammerton v. Dysart**, [1916] 1 A. C. 57.

**F. Irregular Notice to Quit.**

**6716. Whether operative as surrender.]—**

A tenant held under a demise from Mar. 26, for one year then next ensuing, & fully to be completed & ended, & so from year to year, for so long as the landlord & tenant should respectively please. The tenant, after having held more than one year, gave a parol notice to the landlord less than six months before Mar. 25, that he would quit on that day, & the landlord accepted & assented to the notice:—**Held:** (1) on demurrer in replevin, the tenancy was not thereby determined, there not having been either a sufficient notice to quit, or a surrender in writing, or by operation of law, within Stat. Frauds.

(2) Distress for Rent Act, 1737 (c. 19), s. 18, only applied to cases where the tenant had the power of determining his tenancy by a notice, & where he actually gave a valid notice to determine it.—**JOHNSTONE v. HUDLESTONE** (1825), 4 B. & C. 922; 7 Dow. & Ry. K. B. 411; 4 L. J. O. S. K. B. 71; 107 E. R. 1302; *previous proceedings, sub nom.* **DOE d. HUDDLESTON v. JOHNSTON, M'Cle. & Yo.** 141.

**Annotations:—****As to (1) Apd.** **Doe d. Murrell v. Milward** (1838), 1 Horn & H. 79. **Refd.** **Cadby v. Martinez** (1840), 11 Ad. & El. 720; **Bossell v. Landsberg** (1845), 7 Q. B. 638; **Giddins v. Dodd** (1856), 20 J. P. 580; **Furnivall v. Grove** (1860), 8 C. B. N. S. 496; *Re* **Bebington Tenancy, Bebington v. Wildman**, [1921] 1 Ch. 559. **As to (2) Refd.** **Northcott v. Roche** (1921), 37 T. L. R. 364. **Generally, Mentd.** **Weddall v. Capes** (1836), 1 Gale, 432; **Phillips v. Miller** (1875), 32 L. T. 638.

**6717. ——— Right of landlord.]—**If a tenant from year to year give a notice to quit, not expiring with the year, the landlord, if the notice be in writing, & signed by the tenant, may, if he pleases, treat this irregular notice as a surrender of the tenancy.—

**PART XXIV. SECT. 2, SUB-SECT. 3.—E.**

**r. Appointment as caretaker.]—**Upon the surrender to the head landlord of a farm, held under a lease for lives, upon the day of surrender, he informed deft., a sub-yearly tenant of a house upon the farm of the surrender by his immediate lessor, & deft. acquiesced in it. Deft., who was a ploughman at weekly wages to the landlord, agreed to continue in possession of the house as caretaker, until

some other house could be procured for him by the landlord:—**Held:** the agreement entered into by the parties amounted to a surrender in law, by deft.; his occupation of the house being inconsistent with the possession of any estate in the premises.—**LAMBERT v. M'DONNELL** (1864), 15 L. C. L. R. 136.—**IR.**

**PART XXIV. SECT. 2, SUB-SECT. 3.—F.**

**6716 i. Whether operative as sur-**

**render.]—**A notice by a lessor to lessees to give up possession was irregular in that it failed to state at or within which time possession was required. The notice was treated by the lessees as valid & effective:—**Held:** the lease had been surrendered by operation of law.—**RE ARBITRATION ACT, MASTERS & McDOUGALL v. STEPHEN, STEPHEN & MASTERS & McDOUGALL**, [1925] 4 D. L. R. 684; [1925] 3 W. W. R. 493.—**CAN.**

ALDENBURGH v. PEAPLE (1834), 6 C. & P. 212, N. P.

Annotation:—*Dtd.* Doe d. Murrell v. Milward (1838), 3 M. & W. 328.

**6718. — Notice in futuro.**—A yearly tenant, holding from Christmas, gave a half-year's notice in writing to determine his tenancy at Midsummer:—*Held*: in an action of ejectment brought upon this notice, the tenancy was not thereby determined, as it was not a sufficient notice to quit, & in futuro it would not operate as a surrender by a notice in writing within Stat. Frauds.

I am very thoroughly of opinion that there cannot be a surrender to take place in futuro (PARKE, B.).—DOE d. MURRELL v. MILWARD (1838), 3 M. & W. 328; 1 Horn. & H. 79; 7 L. J. Ex. 57; 150 E. R. 1170.

Annotations:—*Refd.* Bessell v. Landsberg (1845), 14 L. J. Q. B. 355; Parker v. Briggs (1893), 37 Sol. Jo. at p. 452; *Re* Bobington's Tenancy, Bobington v. Wildman, [1921] 1 Ch. 559.

#### SUB-SECT. 4.—SURRENDER IN FUTURO.

**6719. Ineffective.**—WEDDALL v. CAPES, No. 6573. *ante*.

**6720. —**—DOE d. MURRELL v. MILWARD, No. 6718. *ante*.

**6721. Agreement for surrender—Necessity for consideration.**—K., holding lands under the see of D. for a renewable term of twenty-one years, demised them, in 1787, to two persons for a like term, with a *tolies quolies* covenant for renewal. These sold their interest in part of the lands, & divided the rest equally among them. On the death of one, his share passed to his two sons, A. & B.; the share of the other was sold to P. A. & B. obtained a renewal of the lease of all the lands to themselves in 1822, without P.'s knowledge, & then mortgaged them to M., & obtained a judgment in ejectment against P., who thereupon filed a bill against them & M., & obtained, in 1826, a decree for an account & reconveyance of his part, on payment of his proportion of the renewal fines & costs. W., who had been the attorney of A. & B. in all these matters, obtained an assignment of their interest in 1829. P. did not take up the decree of 1826, but he made several payments to W. in respect of the renewal fines & costs, & urged him to convey to him his part of the lands, & grant a renewal; but being in distress, he signed an agreement to surrender his lands to W., & take part of them as his tenant:—*Held*: the agreement signed by P. to surrender was without consideration, & void, & he was entitled to the value of his lands while they were in the possession of W., & to a reconveyance & renewal upon payment of the balance found due from him.—WALLACE v. PATTON (1846), 12 Cl. & Fin. 491; 8 E. R. 1501, H. L.

Annotation:—*Mentd.* Galbraith v. Cooper (1860), 8 H. L. Cas. 315.

**6722. —**—BADELEY v. VIGURS (1854), 4 E. & B. 71; 2 C. L. R. 1627; 23 L. J. Q. B. 377; 23 L. T. O. S. 297; 1 Jur. N. S. 159; 119 E. R. 28.

#### SUB-SECT. 5.—SURRENDER OF PART.

**6723. Less than whole term—Lessee retaining reversion—No surrender.**—As touching the surrender, if lessee for a hundred years grants unto his lessor all his term, excepting one year, this is no surrender, clearly, & so likewise it is if there be a saving to himself, a month, a week, or a day; this is no surrender (COKE, C.J.).—BACON v.

WALLER (1616), 3 Bulst. 203; 1 Roll. Rep. 387; 81 E. R. 171.

Annotation:—*Mentd.* Pugh v. Leeds (1777), 2 Cowp. 714.

**6724. —**—It is laid down in 2 Roll. Abr. 497 (L.) 30, "if a lessee grants part of his estate to his lessor, whereby a reversion continues in himself, this is no surrender" (TINDAL, C.J.).—BURTON v. BARCLAY (1831), 7 Bing. 745; 5 Moo. & P. 785; 9 L. J. O. S. C. P. 231; 131 E. R. 288.

**6725. Part of demised premises—Good.**—Pltf., by deed, demised to deft. a house & premises for twenty-one years at the yearly rent of £50, & the lease contained a covenant by deft. to pay the rent during the continuance of the term. Deft. assigned the term, & the assignee surrendered to pltf. a portion of the premises, upon which was a scullery, pltf. in consideration thereof paying the assignee £25 & building a new scullery on another part of the premises. The rent apportionable for the part surrendered was £4 a year. In an action upon the covenant for a quarter's rent less the sum apportioned for the part surrendered:—*Held*: deft., by assigning his interest in the term, empowered the assignee to surrender any part of the premises; therefore, there had not been any eviction of deft. by pltf.; & deft., notwithstanding the surrender, was still liable on the covenant.—BAYNTON v. MORGAN (1888), 22 Q. B. D. 74; 58 L. J. Q. B. 139; 53 J. P. 166; 37 W. R. 148; 5 T. L. R. 99, C. A.

Annotation:—*Consd.* Matthey v. Curling, [1922] 2 A. C. 180.

#### SUB-SECT. 6.—ASSIGNMENT TO REVERSIONER RESERVING RENT.

**6726. Whether effective as surrender.**—WINSTON v. PINKNEY (1673), 3 Keb. 137; 2 Lev. 80; 84 E. R. 639; *sub nom.* WINTON v. PINKNEY, T. Raym. 222; *sub nom.* WILSTON v. PINKNEY, 1 Vent. 242; *subsequent proceedings*, *sub nom.* CARTWRIGHT v. PINKNEY (1675), 3 Keb. 488.

Annotation:—*Mentd.* Brownlow v. Hewley (1696), 1 Ld. Raym. 82.

**6727. —**—CARTWRIGHT v. PINKNEY (1675), 3 Keb. 488; 1 Vent. 272; 84 E. R. 837; *sub nom.* CARTWRIGHT v. PINKNEY, Freem. K. B. 398.

**6728. —**—If a lessee for years re-demise his whole term to the lessor, with a reservation of rent, it operates as a surrender of the original lease; & therefore he cannot maintain debt for rent against the exor. of the original lessor, but must seek relief in equity; but if a lessee assign his whole term to a stranger he may bring debt for the rent reserved on the contract against him or his personal representatives.—FLOYD v. LANGFIELD (1677), Freem. K. B. 218; 89 E. R. 155; *sub nom.* LOYD v. LANGFORD, 2 Mod. Rep. 174.

Annotations:—*Refd.* Baker v. Gostling (1834), 1 Bing. N. C. 19. *Mentd.* Pluck v. Digges (1831), 5 Bl. N. S. 31.

**6729. —**—SMITH v. MAPLEBACK, No. 6730, *post*.

**6730. Reservation of annual payment—Sum in gross.**—Where a lease came into the hands of the original lessor by an agreement entered into between him & the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, & should pay a particular sum over & above the rent annually towards the goodwill already paid by such assignee"; such agreement operates as a surrender of the whole term. The sum in the agreement is considered as a sum to be paid annually in gross, not as rent; & the assignee cannot distrain either for that or

**Sect. 2.—Surrender:** Sub-sects. 6, 7 & 8, A., B. & C. (a) & (b).]

for the original rent; but he has a remedy by *assumpsit* for the sum reserved for the goodwill.—**SMITH v. MAPLEBACK** (1786), 1 Term Rep. 441; 99 E. R. 1186.

**Annotations:**—**Refd.** *Preece v. Corrie* (1828), 5 Bing. 24; *Doe d. Courtall v. Thomas* (1829), 9 B. & C. 288; *Pollock v. Stacy* (1847), 9 Q. B. 1033. **Mentd.** *R. v. Fauntleroy* (1824), 2 Bing. 413; *Ford v. Beech* (1848), 11 Q. B. 852; *Charles v. Alton* (1854), 2 C. L. R. 1764.

**SUB-SECT. 7.—SURRENDER OF SATISFIED TERM.**  
**See REAL PROPERTY; SALE OF LAND.**

**SUB-SECT. 8.—EFFECT OF SURRENDER.**

**A. In General.**

**See, now, Law of Property Act, 1925 (c. 20), s. 139.**  
**6731. Covenant to leave land fallowed.—Not discharged by surrender.**—**AUSTIN v. MOYLE** (1805), Noy, 118; 74 E. R. 1083.

**Lease to commence on determination of former term.—Surrender of former term.**—**See Nos. 1209, 1210, ante.**

**B. On Lessor.**

**6732. Decree against lessee & those claiming under him.—Liability of lessor during term.**—**ANON.** (undated), Toth. 61; 21 E. R. 123.

**6733. Whether period of limitation runs against lessor from surrender.—Second lease granted.**—**CORPUS CHRISTI COLLEGE, OXFORD (PRESIDENT & SCHOLARS) v. ROGERS**, No. 6606, *ante*.

**6734. ———.**—In 1805, R., then Chancellor of the Cathedral Church of St. Paul, London, & parson of the parish church of Ealing, granted a lease for three lives of the glebe lands & hereditaments, of which he was seised in fee. In 1807, the tenants under the lease of 1805 granted a sub-lease of part of the property for ninety-nine years, determinable on the dropping of the same lives as in the principal lease. The last of such lives dropped in 1874. On Aug. 24, 1832, the persons then entitled to the lease of 1805 surrendered such lease to R., & on the following day R. granted a fresh lease for three lives. The last of such lives dropped in 1891. Pltfs., who claimed through R., had ever since the death of R., in 1839, received the rent reserved by the lease of 1832. Defts., claiming through the sub-lessee, had been since 1874 in actual possession of the lands without title. Pltfs. claimed recovery of possession & mesne profits, on the ground that their title first accrued in 1891. Defts. claimed to be entitled in fee, on the ground that pltfs.' title first accrued in 1874, & they claimed the benefit of Stat. Limitations:—**Held:** by the lease of Aug. 1832, an immediate estate passed to the lessees therein named, & not a mere right in the nature of an *interesse termini* to a future estate, to come into existence on the determination of the sub-lease; & moreover, such lease was by 4 Geo. 2, c. 28, s. 6, a valid lease, & was a lease which, passing an estate to the new lessees, prevented the grantor, & those

claiming under him, from seeking to recover the lands till that lease had expired; & therefore, pltfs.' title did not accrue till 1891 when the last life dropped.—**ECCLESIASTICAL COMRS. FOR ENGLAND v. TREEMER**, [1893] 1 Ch. 166; 62 L. J. Ch. 119; 68 L. T. 11; 41 W. R. 166; 9 T. L. R. 78; 37 Sol. Jo. 66; 3 R. 136.

**6735. ———. Tenant claiming by adverse possession to lessee.**—Where a trespasser on land let on lease has as against the lessee acquired a title under Stat. Limitations & the lessee subsequently surrenders the lease to the lessor, the lessor has no right of re-entry, & the period of limitation does not begin to run, until the expiration of the term for which the lease was granted.—**WALTER v. YALDEN**, [1902] 2 K. B. 304; 71 L. J. K. B. 693; 87 L. T. 97; 51 W. R. 46; 18 T. L. R. 668.

**6736. Lessor's right of action against trespasser.**—The contemporaneous surrender & renewal of a lease will not prevent the accrual to the lessor of a right of action against a trespasser.—**ECCLESIASTICAL COMRS. OF ENGLAND & WALES v. ROWE** (1880), 5 App. Cas. 736; 49 L. J. Q. B. 771; 43 L. T. 353; 45 J. P. 36; 29 W. R. 159, H. L.

**Annotations:**—**Consd.** *Ecccl. Comrs. for England v. Tremer*, [1893] 1 Ch. 166. **Refd.** *East Stonehouse U. C. v. Wiloughby*, [1902] 2 K. B. 318. **Mentd.** *Irish Church Commission v. Grant* (1884), 10 App. Cas. 14.

**C. On Parties Claiming under Lessee.**

**(a) In General.**

**See, now, Law of Property Act, 1925 (c. 20), s. 150.**

**6737. Interest not affected.**—Where tenant from year to year underlet part of the premises, & then gave up to his landlord the part remaining in his own possession, without either receiving a regular notice to quit the whole, or giving notice to quit to his sub-lessee, or even surrendering that part in the name of the whole, supposing that any thing short of a regular notice to quit from the landlord to his immediate tenant would after such sub-letting have determined the tenancy in the whole; yet the landlord cannot entitle himself to recover against the sub-lessee, there being no privity of contract between them, upon giving half a year's notice to quit in his own name, & not in the name of the first lessee; for as to the part so underlet, the original tenancy still continued undetermined.

The surrender of the lessee would not destroy any interest which a stranger claiming under him had acquired in the term in the meantime (**BAYLEY, J.**).—**PLEASANT (LESSEE OF HAYTON) v. BENSON** (1811), 14 East, 234; 104 E. R. 590.

**Annotation:**—**Refd.** *London & Westminster Loan & Discount Co. v. Drake* (1859), 6 C. B. N. S. 798.

**6738. ———.**—Although a surrender of a life estate to the owner of the fee is as between the parties an extinguishment of the estate surrendered, yet may it have continuance to uphold a prior interest derived under it.

J., having a lease for three lives of a manor, where, by the custom, the copyholds were demiseable by copy, made a lease for years by indenture

**PART XXIV. SECT. 2, SUB-SECT. 8.—A.**

**t. Privilege in lease.**—The owner of land with a saw mill thereon leased the mill, with a right to cut timber during his lease. The lessee assigned the lease, & the assignee afterwards surrendered it to the proprietor of the freehold:—**Held:** the right to

cut timber was only commensurate with the lease itself, & the lease having been surrendered, the right of cutting timber was at an end, except for the use of the mill.—**STEGMAN v. FRASER** (1858), 6 Gr. 628.—**CAN.**

**a. Covenant to pay for building.**—**CALGARY BREWING & MALTING CO.,**

**LTD. v. WILLIAMS** (Sask.), [1919] 1 W. W. R. 653.—**CAN.**

**PART XXIV. SECT. 2, SUB-SECT. 8.—B.**

**b. Loss of right to damages for diminution of rent.—Unless expressly reserved.**—**WALKER'S TRUSTEES v. MANSON** (1886), 13 R. (Ct. of Sess.) 1198; 23 Sc. L. R. 864.—**SCOT**

of a copyhold tenement of deft.'s father, & afterwards the estate of J. was surrendered to the lord of the fee, who made a lease of the manor to the lessor of pltf. :—*Held* : inasmuch as the lease to deft.'s father, though not warranted by the custom, & though it suspended the copyhold tenure, was nevertheless good to pass an interest to him, the lessor of pltf. should not avoid the same during the continuance of one of the three lives in the lease to J., notwithstanding the surrender of that estate.

Though a surrender operates between the parties as an extinguishment of the interest which is surrendered, it does not so operate as to third persons, who at the time of the surrender had rights, which such extinguishment would destroy. As to them, the surrender operates only as a grant, subject to their right, & the interest surrendered still has, for the preservation of their right, continuance (LORD ELLENBOROUGH, C.J.).—DOE d. BEADON v. PYKE (1816), 5 M. & S. 146; 105 E. R. 1005.

*Annotations* :—*Refd.* London & Westminster Loan & Discount Co. v. Drake (1859), 6 C. B. N. S. 798; Wheaton v. Maple, [1893] 3 Ch. 48; Wilkes v. Spooner, [1911] 2 K. B. 473.

**6739.** —[.]—The lessee of premises No. 137, High Street, East Ham, carried on therein the business of a pork butcher. The lease contained a covenant by which he covenanted not to carry on therein any noisy or offensive trade other than that of a pork butcher. He was also lessee under a different landlord of premises No. 170, in the same street, upon which he carried on the business of a general butcher. He sold & assigned to pltf. his interest in the last-mentioned premises, & the goodwill of his business as a general butcher, covenanting with pltf., *inter alia*, that he, his exors., administrators, & assigns, would not "cut, sell or deal in fresh hindquarter beef, mutton, veal, lamb, or poultry at or upon the premises No. 137, High Street, East Ham, or in connection with the business of a pork butcher now carried on there by him." He afterwards gave up business, & surrendered his lease of No. 137 to the landlord; & a new lease thereof was granted to his son by the landlord, which lease contained a covenant that the lessee would not carry on upon the premises any noisy or offensive trade other than, not "that of a pork butcher," as in the old lease, but "that of a butcher."

At the time when the landlord accepted the surrender, he had not in fact notice of the restrictive covenant entered into by the father with pltf. as regards No. 137, but the son, when the new lease was granted to him, knew of the existence of that covenant. The son afterwards set up the business of a general butcher on the premises No. 137, High Street :—*Held* : in the circumstances of the case the landlord was not affected with constructive notice of the father's covenant, & consequently, could grant to the son a lease free from the restriction of that covenant & the son therefore could not be restrained at the suit of pltf. from carrying on the business of a general butcher at No. 137.

A surrender only affects what the surrenderer can surrender, & when he has granted subordinate terms or sub-leases they are not discharged (SCRUTTON, J.).—WILKES v. SPOONER, [1911] 2 K. B. 473; 80 L. J. K. B. 1107; 104 L. T. 911; 27 T. L. R. 426; 55 Sol. Jo. 479, C. A.

(b) *Underlessees.*

See, now, Law of Property Act, 1925 (c. 20), ss. 139, 150.

**6740. General rule—Interest not affected.]—**PLEASANT (LESSEE OF HAYTON) v. BENSON, No. 6737, *ante*.

**6741.** —[.]—(1) A demise from year to year generally, by a tenant from year to year, is, in legal effect, a demise from year to year, during the continuance of such tenant's term, & may be properly pleaded as such.

(2) It is said that the term from year to year granted to the underlessee, generally, would continue though the lessee surrendered his term or merged it; that is, it would continue longer than during the continuance of the demise to the lessee: not so a demise made during the continuance of the first demise. . . . But the authority [co. Litt. 338] gives an answer to the objection, for it shows that, "in regard to strangers, not parties or privies to the surrender, the estate surrendered has, in consideration of law a continuance." Therefore although H. might have surrendered, his estate would as to [underlessee] P. have continuance (BAYLEY, J.).—PIKE v. EYRE (1829), 9 B. & C. 909; 4 Man. & Ry. K. B. 661; 8 L. J. O. S. K. B. 69; 109 E. R. 338.

*Annotations* :—*As to* (1) *Consd.* Oxley v. James (1844), 13 M. & W. 209; Weller v. Spiers (1872), 26 L. T. 866. *Refd.* Price v. Williams (1836), 1 M. & W. 6; Cattley v. Arnold, Banks v. Arnold (1859), 1 John. & H. 651. *As to* (2) *Consd.* London & Westminster Loan & Discount Co. v. Drake (1859), 6 C. B. N. S. 798.

**6742.** —[.]—At Michaelmas, 1851, W., the owner of two adjoining houses, Nos. 4 & 5, let No. 5 to A., as tenant from year to year. Deft. having become tenant to W. of No. 4, A. let him the cellars under No. 5 from year to year from Michaelmas, 1861. There was in the front cellar a gas meter communicating with the house No. 5, & it was a term of the letting that A. should be allowed to go to the meter, if necessary, whenever deft.'s premises were open. In July, 1871, it was agreed between A., W., & D., that A. should give up possession of No. 5 to W., & D. became tenant from year to year to W. from Michaelmas, 1871. Deft. was aware that No. 5 was given up by A., & re-let to D., but no notice to quit the cellars was given to deft. In Mar. 1872, D. put up in the cellars a water meter communicating with his house, without either objection or express permission of deft. Afterwards D. surrendered his interest in favour of pltf., & W. let No. 5, expressly including the cellars, to pltf. for fourteen years, from June 24, 1872. Pltf. entered into occupation, the cellars remaining occupied by deft., & pltf., without objection or permission of deft., put up more pipes & some bell wires in the cellars. In July, 1872, pltf. demanded possession of the cellars, but deft. refused to give them up without a proper notice to quit, & he retained possession till Apr. 1873. On Jan. 10, 1873, deft. cut off pltf.'s water supply by hammering up the service pipe passing through the cellars, & cut the gas pipes & bell wires. Pltf. having brought an action for being kept out of possession of the cellars & for the damages caused by deft.'s cutting the pipes, etc. :—*Held* : (1) deft. was entitled to keep possession until a proper notice to quit had been given; for the voluntary surrender by A. could not affect the interest of deft., his sub-lessee; & (2) pltf. was entitled to damages for the cutting of his pipes & wires; for a licensee, under a revocable licence, was entitled to notice of revocation & a reasonable time afterwards to remove his goods.—MELLOR v. WATKINS (1874), L. R. 9 Q. B. 400; 23 W. R. 55.

*Annotations* :—*As to* (1) *Consd.* Parker v. Jones, [1910] 2 K. B. 32. *Refd.* David v. Sabin, [1893] 1 Ch. 523; Wilkes v. Spooner, [1911] 2 K. B. 473. *As to* (2) *Consd.* Aldin v. Latimer Clark, Muirhead, [1894] 2 Ch. 437.

**Sect. 2.—Surrender: Sub-sect. 8, C. (b), (c) & (d).]**

**6743. — Surrender after right of forfeiture accrued.]**—Where a lessor re-enters on a forfeiture the rights of underlessees are gone, but where a lessor accepts a surrender from a lessee the rights of the underlessees remain although the lessee was at the time liable to forfeiture.—*GREAT WESTERN RY. CO. v. SMITH* (1876), 2 Ch. D. 235; 45 L. J. Ch. 235; 34 L. T. 267; 40 J. P. 469; 24 W. R. 443, C. A.; *affd. sub nom. SMITH v. GREAT WESTERN RY. CO.* (1877), 3 App. Cas. 165, H. L.

*Annotations:—Consd. Parker v. Jones*, [1910] 2 K. B. 32. *Mentd. Dixon v. Calc. & G. & S. W. Rys.* (1880), 5 App. Cas. 820; *Consd. Waterworks Co. v. Ritsen* (1888), 22 Q. B. D. 318; *Holliday v. Wakefield Corp.*, [1891] A. C. 81; *R. v. L. & N. W. Ry.*, [1894] 2 Q. B. 512; *G. N. Ry. v. I. R. Comrs.*, [1899] 2 Q. B. 652; *Bwiffa & Merthyr Dare Steam Collieries v. Pentypridd Waterworks Co.*, [1903] A. C. 426; *Manchester Corp. v. New Moss Colliery*, [1906] 1 Ch. 278; *Eden v. N. E. Ry.*, [1907] A. C. 400; *L. & N. W. Ry. v. Howley Park Coal & Cannel Co.*, [1911] 2 Ch. 97.

**6744. — Lessor without knowledge of forfeiture.]**—A lessee of a field under a lease containing a covenant not to underlet without the leave of the lessor underlet it without such leave to pltf., upon a yearly tenancy, & afterwards surrendered his lease to the lessor, who had no knowledge of the underlease, & who subsequently let the field to deft. Pltf. declined to give up possession, & deft. thereupon entered & turned out pltf.'s cattle. In an action brought by pltf. to recover possession of the field & damages for trespass:—*Held*: pltf.'s term was not affected by the surrender, but was still subsisting at the date of the entry by deft.; it could not be got rid of by reason of the lessor granting another lease incompatible with it; & pltf. was therefore entitled to recover.—*PARKER v. JONES*, [1910] 2 K. B. 32; 79 L. J. K. B. 921; 102 L. T. 685; 26 T. L. R. 453.

*Annotation:—Consd. Works Comrs. v. Hull*, [1922] 1 K. B. 205.

**6745. — ]**—A firm of brewers let an adjoining piece of land for fourteen years to one G. with a covenant against assigning or sub-letting without the lessors' consent. G., "for the term of the lease," sub-let to W. with the lessor's consent, & W. thereupon sub-let for the whole term to the above-mentioned co. to the knowledge, but without the consent, of G.'s lessors. Before the expiry of G.'s lease he took possession of the piece of land & surrendered his lease to his lessors. In an action by W. & the co. against G. & his lessors to recover possession:—*Held*: the sub-letting by G. "for the term of the lease" to him referred not to his interest in the tenements, but to the unexpired period of the lease, & therefore the surrender did not affect the sub-lease, & the stipulations in the lease to G. as to assignment or sub-letting did not bind W., the underlessee, & pltf. were entitled to possession.—*SLOUGH PICTURE HALL CO., LTD. v. WADE, WILSON v. NEVILLE, REID & CO., LTD.* (1916), 32 T. L. R. 542.

*Annotation:—Refd. Pole-Carew v. Western Counties & General Manure Co.* (1920), 123 L. T. 12.

**6746. Condition in underlease—Does not enure to reversioner.]**—*CHAWORTH v. PHILLIPS* (1609), Moore, K. B. 876; 72 E. R. 968.

*Annotation:—Refd. Wright v. Burroughes* (1846), 3 C. B. 685.

**6747. — To observe covenants in head lease.]**—Deft. held two plots of building land, B. & C., under a lease which contained a covenant to build the houses not less than thirty feet apart, the effect of which was to secure on plot B. a sea

view over plot C. H. having entered into a treaty with deft. for an underlease of B., made inquiries of deft. as to what could be built on the land in front. Deft. replied that he, deft., could not build on C. closer than thirty feet, as his lease did not allow it. H. after having inspected the original lease took an underlease of B., containing a covenant by deft. that he, his exors., administrators & assigns, would observe the lessee's covenants in the original lease. Deft. afterwards surrendered his lease to the ground landlord, took a new lease not containing the old restrictions, & commenced building on C. in a way which would obstruct the sea view from houses on B. belonging to pltf., who was the assignee of H.:—*Held*: (1) the rights of H., under deft.'s covenant to observe the covenants in the original lease, were not effected by deft.'s surrender of that lease, & pltf. was on that ground entitled to an injunction to restrain deft. from building in contravention of those covenants; & (2) even if by reason of the surrender the covenant was gone, pltf. was entitled to an injunction on equitable grounds, for what deft. had said to H. amounted to a representation, that deft. could not during the term of his lease build otherwise than in a particular way, which representation he was bound to make good.—*PIGGOTT v. STRATTON* (1859), 1 De G. F. & J. 33; 29 L. J. Ch. 1; 1 L. T. 111; 24 J. P. 69; 6 Jur. N. S. 129; 8 W. R. 13; 45 E. R. 271, L. C. & L. JJ.

*Annotations:—As to (1) Consd. Wheaton v. Maple*, [1893] 3 Ch. 48; *Wilkes v. Spooner*, [1911] 2 K. B. 473. *As to (2) Distd. Spicer v. Martin* (1888), 14 App. Cas. 12. *Refd. Kendall v. Hill* (1860), 2 L. T. 717; *Low v. Bouverie*, [1891] 3 Ch. 82; *Kennard v. Ashman* (1894), 10 T. L. R. 213. *Generally, Mentd. Traill v. Baring* (1864), 3 New Rep. 362; *Brabant v. Wilson* (1865), 35 L. J. Q. B. 49; *Martin v. Douglas* (1867), 16 W. R. 268; *Tulk v. Metropolitan Board of Works* (1867), 8 B. & S. 777; *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Mackenzie v. Childers* (1889), 43 Ch. D. 265; *Tomkinson v. Balkis Consolidated Co.*, [1891] 2 Q. B. 614.

**6748. — Restrictive covenant.]**—If a lessee for a term of twenty-one years, determinable by notice at the end of seven or fourteen years, at his option sub-lets the demised premises for a fixed term exceeding fourteen years, he ceases to be entitled to give a valid notice determining his own lease.

In a case, where the underlease contains a restrictive covenant binding upon the underlessor, & a notice purporting to determine the headlease is given &, in addition, a surrender of the superior term is executed, the original lessor, since he derives his title during the term through the underlessor, is bound by the covenant.

Where an underlease was of the upper floors of the demised premises only, & between the dates of the notice & the surrender the original lessor let the ground floor & basement for use as a restaurant, to which use the underlessor had covenanted that he would not put the premises retained by him:—*Held*: the restaurant keeper, as well as his lessor, was bound by the covenant of which he had constructive notice, because he knew that the entrance to the upper floors was through the ground floor, & having notice of rights over the premises demised to him, he should have inquired their nature & source, & if this had been done he would have learnt of the sub-lease & so have acquired notice of its contents.—*PHIPOS v. CALLEGARI* (1910), 54 Sol. Jo. 635.

**6749. Surrender by lessee for purpose of renewal—Right of court to compel underlessee to concur.]**—Lessee of a church lease, makes an underlease, & would have the underlessee to surrender, in order to enable him to renew with the church. There

being no covenant in the tenant's lease to surrender, the ct. cannot compel him to do it.—*COLCHESTER v. ARNOTT* (1700), 2 Vern. 383; Prec. Ch. 124; 23 E. R. 845.

**6750. — Landlord & Tenant Act, 1730 (c. 28), s. 6—Covenants similar to original lease.**—(1) A proviso in a lease, giving power of re-entry if the tenant make default in performance of any of the clauses by the space of thirty days after notice, does not apply to the breach of a covenant not to allow alterations in the premises, or permit new buildings to be made upon them without permission; & an undertenant having erected a portico contrary to the covenant, & notice having been given to him to replace the premises in their former state, which he neglected to do for thirty days:—*Held*: no forfeiture was incurred.

(2) Premises being demised & underlet, the first tenant surrendered his lease & took a new one with similar covenants. The undertenant continued in possession, & never surrendered. *Qu.*: whether special covenants in the new lease, coextensive with those in the old, as not to erect new buildings without leave, could be enforced by the head landlord against such undertenant, as "duties reserved" by the second lease, within 4 Geo. 2, c. 28, s. 6.—*DOE d. PALK v. MARCHETTI* (1831), 1 B. & Ad. 715; 9 L. J. O. S. K. B. 126; 109 E. R. 953.

*Annotations*:—As to (1) *Consd.* *Wadham v. Postmaster General* (1871), L. R. 6 Q. B. 644; *Harman v. Ainslie*, [1904] 1 K. B. 698. *Refd.* *West v. Dobb* (1870), 10 B. & S. 987; *Evans v. Davis* (1878), 10 Ch. D. 747.

**6751. —**—[Above Act, sect. 6, while it gives a lessee the right to surrender, notwithstanding his contract with his underlessee, leaves untouched the sub-interest, though it be merely an agreement for an underlease, & the effect of a new demise of the original term is to make the new lessee the assignee of the reversion of the term granted by the surrenderer.—*COUSINS v. PHILLIPS* (1865), 3 Il. & C. 892; 35 L. J. Ex. 84; 30 J. P. 199; 159 E. R. 786.

*Annotation*:—*Feld.* *Plummer & John v. David*, [1920] 1 K. B. 326.

**6752. —**—[The tenant of a farm underlet it to deft. on a yearly tenancy. He subsequently gave deft. notice to quit. During the currency of the notice he, by a parol arrangement with the owner of the farm & plff., surrendered his reversion to the owner, who thereupon & as part of the same transaction granted to plff. by parol a new tenancy from year to year to commence immediately & to run concurrently with, but subject to, the unexpired portion of deft.'s term. On the expiry of the notice to quit deft.'s rent was in arrear:—*Held*: plff. was entitled to recover the rent by virtue of above Act, sect. 6, which provides that "in case any lease shall be duly surrendered in order to be renewed & a new lease made . . . every person . . . in whom any estate for life or lives or for years shall from time to time be vested by virtue of such new lease . . . shall be entitled to the rents" payable under any underleases " & have like remedy for recovery thereof . . . as if the original leases out of which the respective underleases are derived, had been still kept on foot & continued."—*PLUMMER & JOHN v. DAVID*, [1920] 1 K. B. 326; 89 L. J. K. B. 1021; 122 L. T. 493.

—[See, now, Law of Property Act, 1925 (c. 20), s. 150.

#### (c) Mortgagees.

Mortgage generally, see MORTGAGE.

See, now, Law of Property Act, 1925 (c. 20), s. 100.

**6753. Repayment after date—Subsequent surrender & new lease.**—Lessee of a prebend mortgages his lease & after the day pays the money & then surrenders, & takes a lease from the prebend he has good equity against the mtgee. If the prebend die, equity shall not make the second lease good against the successor.—*COOK v. BAMPFIELD* (1674), 1 Cas. in Ch. 227; 22 E. R. 773.

**6754. Surrender by mortgagor & mortgagee—Effect on covenant for repayment.**—*A.-G. v. COX, PEARCE v. A.-G.*, No. 6764, *post*.

**6755. Mortgage by way of deposit of title deeds—Lessor accepting surrender without knowledge of mortgage—Priority.**—A lessee who had deposited his lease by way of equitable mtge. with B. afterwards by deed surrendered the term to the lessor. The surrenderee at the time of surrender had asked the lessee to deliver up the instrument of lease, & was falsely informed by the lessee that he had left it with a friend, but that he, the lessee, had neither assigned nor charged his interest, nor pledged the instrument of lease. The surrenderee had no actual notice that the lease had been deposited by way of mtge. with B.:—*Held*: the surrenderee had not, under these circumstances, been guilty of gross or wilful negligence, & was consequently entitled, as the holder of the legal estate, to priority over B., the prior equitable mtgee.—*BROWN v. STEDMAN* (1896), 44 W. R. 458; 40 Sol. Jo. 457.

#### (d) Third Parties.

**6756. Collateral agreement by lessee—To pay annuity during lease.**—*FORD v. HOLBOROUGH* (1593), Owen, 104; 74 E. R. 932; *sub nom.* *FORD v. HOLLINGBOROUGH*, Cro. Eliz. 313; *sub nom.* *FORTH v. HOLBOROUGH*, Poph. 39.

**6757. Grant of advowson.**—(1) If A., lessee for years of an advowson, grants the next avoidance to B., if it shall happen to become void during the term; & then surrenders the term to C. who has the inheritance, & the church becomes void before the end of the term: the grant to B. is good, & he shall have the next avoidance; for a man cannot derogate from his own grant.

(2) If lessee for years grants a rentcharge to a stranger, & after surrenders his term to the lessor, the stranger shall have the rent during the term.—*DAVENPORT'S CASE* (1610), 5 Co. Rep. 144 b; 77 E. R. 693.

*Annotation*:—As to (1) *Refd.* *Case of Comendams, Woodley v. Exeter* (Bp.) (1621), Win. 94; *Piggott v. Stratton* (1859), 1 De G. F. & J. 33. As to (2) *Refd.* *Doe d. Beadon v. Pyke* (1816), 5 M. & S. 146; *Harding v. Preece* (1882), 9 Q. B. D. 281; *David v. Sablin*, [1893] 1 Ch. 523. *Generally*, *Mentl.* *Fisher v. Wigg* (1699), 1 Ld. Raym. 622.

**6758. Grant of rentcharge.**—*DAVENPORT'S CASE*, No. 6757, *ante*.

**6759. Assignee of bill of sale.**—B., the tenant from year to year of a farm of deft., assigned by bill of sale to plff. all his property upon the farm, together with all growing & all other crops which at any time thereafter should be in or about the same or any other premises of his. On Apr. 25, after the execution of this bill of sale, deft. distrained for rent, & while in possession under that distress, he, having no knowledge of the bill of sale, agreed with B. that he would forego all claim for rent, that B. should surrender the farm to him, & that the tenancy should be determined as from June 24, next ensuing. In May, B. having made default in payment of the instalments under the bill of sale, plff. took an inventory of the goods on the farm, & put locks on the gates of the fields in which the crops were growing. Dft. then informed plff. of the agreement between himself & B.; whereon plff. removed the locks,

*Sect. 2.—Surrender: Sub-sect. 8, C. (d), 'D. & E.; sub-sect. 9. Sect. 3: Sub-sect. 1, A.]*

& shortly after gave deft. notice of the assignment to him by the bill of sale of the crops. Deft. attended to the cultivation of the crops, took possession of the farm on June 24, & reaped & sold the crops as they came to maturity. In an action of trover & for the conversion of the crops:—*Held*: although plff. was in equity entitled to relief, yet an action of trover could not be maintained; the surrender by the tenant to the landlord was a valid surrender at law, but it could not affect prejudicially the equitable rights of plff. as assignee of the crops; if there could be no valid surrender as against plff., & if the tenant must still be considered with regard to plff. to be in possession, so that plff. could claim to be by the assignment in the same position as the tenant, then plff., although entitled to the value of the crops when sold, was also liable to pay the rent of the farm & the expenses of cultivating & harvesting the crops; & as the balance on a settlement of account was in favour of deft., judgment must, in the circumstances of the case, be entered for deft.—*CLEMENTS v. MATTHEWS* (1883), 11 Q. B. D. 808; 52 L. J. Q. B. 772, C. A.

*Annotations*:—*Mentd.* Joseph v. Lyons (1884), 15 Q. B. D. 280; *Reeves v. Barlow* (1884), 12 Q. B. D. 436; *Talby v. Official Receiver* (1885), 13 App. Cas. 523; *Re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348.

#### D. On Rent and Covenants.

Rent generally, *see* Part XV., *ante*.

**6760. After surrender—Rent does not accrue.]**—In covenant for seven quarters rent, a plea showing a surrender before the last four of the seven quarters rent accrued, is bad on demurrer, because it does not go to the whole breach, & the breach is not entire, but part of it may be proved.—*BARNARD v. DUTHY* (1813), 5 Taunt. 27; 128 E. R. 595. *Annotations*:—*Refd.* *Hare v. Bures* (1857), 5 W. R. 585. *Mentd.* *King v. Greenhill* (1843), 6 Man. & G. 59.

**6761.** ———.]—*SOUTHWELL v. SCOTTER*, No. 6560, *ante*.

**6762. Rent accrued before surrender—Recoverable.]**—The lessor after re-entry for breach of a condition or surrender by the lessee may have debt for the rent accrued before.—*WALKER'S CASE* (1587), 3 Co. Rep. 22 a; cited in *Lat. at p. 260*; 76 E. R. 676; *sub nom.* *WALKER v. HARRIS, Moore, K. B. 351*; cited in *Cro. Eliz. at p. 556*.

*Annotations*:—*Consd.* *Heliar v. Casebrooke* (1665), 1 Keb. 923. *Refd.* *Humble v. Glover* (1594), *Cro. Eliz.* 328; *Overton v. Sydal* (1597), *Cro. Eliz.* 555; *Broom v. Hore* (1598), *Cro. Eliz.* 633; *Marrow v. Turpin* (1599), *Cro. Eliz.* 715; *Iremonger v. Newsam* (1627), *Lat. 260*; *Cook v. Harris* (1698), 1 *Ld. Raym.* 367; *Reeve v. Bird* (1834), 4 *Tyr.* 612; *Neale v. Mackenzie* (1835), 4 *L. J. Ex.* 185; *Re Russell Road Purchase Moneys* (1871), *L. R.* 12 Eq. 78; *Swansca Corp'n. v. Thomas* (1882), 10 Q. B. D. 48. *Mentd.* *March v. Brace* (1613), 2 *Bulst.* 151; *Wynno v. Boughy* (1666), *O. Bridg.* 570; *Thursby v. Plant* (1669), 1 *Wms. Saund.* 230; *Windsor (Dean & Chapter) v. Gover* (1670), 2 *Wms. Saund.* 296; *Jenkins v. Hermitage* (1674), *Freem. K. B.* 377; *Anon.* (1675), 2 *Mod. Rep.* 7; *Bankers' Case* (1695), *Skin.* 601; *Morley v. Attenborough* (1849), 3 *Exch.* 500; *Elchholz v. Banister* (1864), 17 *C. B. N. S.* 708.

**6763.** ——— Under covenant to pay.]—*BARNARD v. DUTHY*, No. 6760, *ante*.

#### PART XXIV. SECT. 2, SUB-SECT. 8.—D.

**67601. After surrender—Rent does not accrue.]**—*CONNOLLY v. COON* (1896), 23 A. R. 37.—*CAN.*

**6760 ii.** ———.]—Where the lessor agrees, in writing, with an assignee of the lease to accept a surrender without prejudice to his rights against the original lessee & takes actual or constructive possession of the premises,

there is a surrender of the lease by operation of law, & the lessor is not entitled to subsequent rent from the original lessee.—*CLEMENTS v. RICHARDSON* (1888), 22 *L. R. Ir.* 535.—*IR.*

**6760 iii.** ———.]—Where, in the event of destruction of the premises by fire, there is an established custom which gives the lessee the right to surrender the premises, he is released from all obligation to pay rent if he exercises his right.—*KITCHEN v. FENE-*

**6764.** ———.]—(1) A mtgor. represented to an intending purchaser that the estate was only liable to a mtge. for £20,000 to G. & co., an additional sum of £10,000 being secured on the mtgor.'s personal property. The whole sum had in fact been originally secured on the land, & G. & co. denied that they had ever done anything to part from their security on the land. After the death of the mtgor. G. & co. filed a bill of foreclosure, & obtained from the purchaser the whole £30,000:—*Held*: as between the purchaser & the exors. of the mtgor., the representations made by the mtgor. to the intending purchaser, were equivalent to a contract with him, & the personal property of the mtgor. was liable to the extent of the £10,000.

(2) Where a lease, containing a personal covenant for the payment of rent, is surrendered, the personal covenant is independent of the estate in the property, & as to rent previously due, is not affected by the surrender, but the lessor remains a specialty creditor for the rent which accrued due before the surrender.—*A.-G. v. Cox, PEARCE v. A.-G.* (1850), 3 H. L. Cas. 240; 10 E. R. 93, H. L.; *varying S. C. sub nom. GREENWOOD v. TAYLOR* (1845), 14 Sim. 505.

*Annotations*:—*As to (2) Refd.* *Re Morrish, Ex p. Hart Dyke* (1882), 22 Ch. D. 410; *Lybbe v. Hart* (1885), 29 Ch. D. 8; *Shaw v. Lomas* (1888), 59 L. T. 477; *Revill v. Bethell*, [1918] 1 K. B. 638. *Generally, Mentd.* *Re Oriental Commercial Bank, Ex p. Muxondoff* (1868), *L. R.* 6 Eq. 582; *Re Barned's Banking Co., Forwoods' Claim* (1869), 5 Ch. App. 18.

**6765.** ——— Claim for use & occupation.]—The right to recover rent accrued due, & which has been reserved on a parol demise, is not extinguished by a surrender of the term by operation of law, notwithstanding the absence of a personal covenant by the tenant to pay such rent, but can be enforced by an action for the use & occupation of the premises demised, under the provisions of Distress for Rent Act, 1737 (c. 19), s. 14.—*SHAW v. LOMAS* (1888), 59 L. T. 477; 52 J. P. 821.

**6766. Liability for breaches committed before surrender.]**—A surrender of a lease involves this, that there shall be a giving back to the lessor of the entirety of the property which is comprised in the lease, with a corresponding release of the tenant from the covenants contained in the lease (*COTTON, I. J.*).—*Re FUSSELL, Ex p. ALLEN* (1882), 20 Ch. D. 341; 51 L. J. Ch. 724; 47 L. T. 65; 30 W. R. 601, C. A.

*Annotations*:—*Refd.* *Re Morrish, Ex p. Hart Dyke* (1882), 22 Ch. D. 410; *Lybbe v. Hart* (1885), 29 Ch. D. 8.

**6767.** ———.]—A question has been raised as to what are the rights of a landlord who has accepted from his lessee a surrender of the lease before the term is expired. To my mind it is clear beyond dispute that by accepting that surrender & terminating the continuance of the lease he does not in any way waive or get rid of accrued rights of action in respect of breaches of the covenants of the lease during the time that the lease existed. His lessee entered into those covenants & was bound to keep them, & if he broke them there were vested causes of action, & there is nothing in the legal operation of the surrender which takes

*LON* (1893), 7 Nfld. L. R. 740.—*NFLD.*  
c. ———.]—*FITZGERALD v. MANDAS* (1910), 16 O. W. R. 425; 21 O. L. R. 312; 1 O. W. N. 878.—*CAN.*

**6766 i. Liability for breaches committed before surrender.]**—*LYONS v. ANDERSON* (1886), 13 R. (Ct. of Sess.) 1020; 23 Sc. L. R. 732.—*SCOT.*

**d. Rent paid in advance.]**—*PERRIN v. ANTLERS REALTY CO., LTD.* (1914), 20 B. C. R. 28.—*CAN.*

away from the reversioner any of those vested causes of action (FLETCHER MOULTON, L.J.).—DALTON v. PICKARD (1911), [1926] 2 K. B. 545, n. C. A.

**6768.** —.]—A surrender of a lease by a tenant operates only to release him from liability on the covenants taking effect after the date of the surrender, leaving him liable for past breaches; & this is so even though the surrender was made by agreement with the landlord.

A tenant negotiated with his landlord for a surrender of his lease on terms which had no connection with a discharge of the tenant from liability for past breaches of covenant, & in the result the landlord agreed that, if the tenant would pay the rent up to a certain future date & would give up possession, he would "release him," without saying from what:—*Held*: the release, though in general terms, must be read as limited to the matters which were in the contemplation of the parties at the time when the release was given, & consequently did not release the tenant from liability for past breaches of the covenant to repair.—RICHMOND v. SAVILL, [1926] 2 K. B. 530; 70 Sol. Jo. 875, C. A.

#### *E. As Merger.*

*See* Sect. 3, sub-sect. 4, *post*.

#### SUB-SECT. 9.—RELIEF IN EQUITY.

**6769. Defective surrender.**—]—Chancery will help a defect in a surrender.—SMITH v. SMITH (1636), 1 Rep. Ch. 108; 21 E. R. 521.

**6770. Surrender necessary to complete title.—Long period of quiet enjoyment.**—]—PRISKE v. PALMER (1677), 2 Rep. Ch. 129; 21 E. R. 636.

#### SECT. 3.—MERGER.

##### SUB-SECT. 1.—INTENTION OF PARTIES.

#### *A. In General.*

*See, generally*, EQUITY, Vol. XX., pp. 503–514, Nos. 2329–2423.

*See now*, Law of Property Act, 1925 (c. 20), s. 185.

**6771. Court guided by intent.**—]—Bkpt. being the lessee under a lease for forty-six years subject to a former lease for twenty years deposited it by way of equitable mtge. He afterwards purchased the remainder of the term granted by the first lease, & deposited that lease also with the same parties for securing a further sum:—*Held*: the first lease was not under these circumstances merged in the second, & the depositaries were good equitable mtgees. under both deposits.

Merger & extinguishment are now considered as matter of intention (SIR JOHN CROSS).—*Re DIX, Ex p. WHITBREAD* (1841), 2 Mont. D. & De G. 415, Ct. of R.

**6772.** —.]—In dealing with questions of merger, the principle by which the ct. is guided is the intention; & in the absence of express intention, either documentary or verbal, the ct. looks to the benefit of the person in whom the two estates became vested. V. entered into possession of a portion of certain settled estates under an agreement for a lease of ninety-nine years made with the tenant for life; & subsequently himself became the tenant for life. There was no proof

of express intention on the part of V. that the estates should merge, & it was clearly to his benefit that the estates should not merge:—*Held*: there was no merger.—INGLE v. VAUGHAN JENKINS, [1900] 2 Ch. 368; 69 L. J. Ch. 618; 83 L. T. 155; 48 W. R. 684.

*Annotations*:—*Reid*, Capital & Counties Bank v. Rhodes, [1903] 1 Ch. 631; Manks v. Whiteley, [1912] 1 Ch. 735; *Re Fletcher Reading v. Fletcher* (1918), 86 L. J. Ch. 139; *Westwood v. Heywood*, [1921] 2 Ch. 130.

**6773.** —.]—H. was entitled to certain houses for a term of ninety-nine years, less one day, by way of mtge. from W. W. was entitled to the property for the original term subject to the mtge., & H. was entitled to the reversion in fee expectant on the determination of the original term. Under these circumstances W. conveyed the property to H. for the unexpired residue of the original term, & H. covenanted to indemnify W. against the rents & covenants in the lease & the principal & interest secured by the mtge. H. afterwards conveyed by way of sale to W. in fee, the conveyance being expressly "subject to & with benefit of the lease," & W. then conveyed to ptfs. in fee "subject to & with benefit of the lease." H. subsequently purported to convey by way of mtge. in fee to deft., who had no notice of ptfs.' title:—*Held*: whether the original term had merged in the reversion or not, yet, inasmuch as H. & W. had dealt with one another on the footing that the term was to be deemed in existence, it would be inequitable to allow it to be treated as at an end. H. had therefore, when he purported to convey the fee to deft., an equitable estate to the extent of the leasehold interest, which, under Conveyancing Act, 1881 (c. 41), s. 63, passed to deft., & ptfs. were bound to give effect to it.

The question whether two equitable estates are merged or not is one of intention. *Qu.*: whether this rule applies where a merger of legal estate has actually taken place.—THELLUSON v. LIDDARD, [1900] 2 Ch. 635; 69 L. J. Ch. 673; 82 L. T. 753; 49 W. R. 10.

*Annotation*:—*Reid*, Capital & Counties Bank v. Rhodes (1902), 71 L. J. Ch. 573.

**6774.** —.]—The equitable rule that merger depends upon intention applies to the merger of estates as well as to the merger of charges.

In 1871 a lease was granted of a public-house for a term of ninety-nine years at a rent of £100 *per annum*. The lease contained a proviso for re-entry on default for twenty-one days in payment of the rent. This lease was assigned to deft. R. In May, 1897, R., "as beneficial owner," demised the house by way of mtge. to F. for the residue of the term, less the last day thereof. No rent was reserved by this deed, & R. covenanted to indemnify F. against the original rent. The deed contained provisions making R. in effect a trustee of the last day of the term for the mtgees. or a purchaser from them. By a deed dated July 27, 1899, the house was conveyed to R. in fee at the price of £3,650, "subject to, but with the benefit of," the lease. To enable him to complete the purchase he arranged to borrow £3,000 from ptff. bank on the security of the house; & on July 27, 1899, a mtge. to the bank was executed immediately after the conveyance to R., the £3,000 being paid by the bank directly to the vendors. The property had been described to the bank as "a freehold ground rent of £100 a year" secured on the house. At this time registration of title to

#### PART XXIV. SECT. 3, SUB-SECT. 1.—A.

**6771 i. Court guided by intent.**—]—DAYMAN v. MACDONALD (1907), 7 W. L. R. 296.—CAN.

**Sect. 3.—Merger: Sub-sect. 1, A. & B.; sub-sects. 2, 3 & 4, A.]**

land under Land Transfer Acts had been made compulsory on sale in the parish in which the house was situate. On Aug. 28, 1899, R. applied for the registration of himself as proprietor of the house, with a possessory title. On the same day he executed an instrument charging the house with the payment to the bank of the £3,000 & interest. In Apr. 1901, R. executed a deed of arrangement with his creditors to which the bank were not parties. R. took possession of the house, & the bank demanded payment of the rent of £100 from them, as well as from the trustee of the deed of Apr. 1901, but it was not paid. The bank then brought an action against R., F., & the trustee of the deed of arrangement, claiming to enforce their security by foreclosure or sale. They claimed also a declaration that the term had not merged in the fee, & that they were entitled to re-enter for non-payment of the rent:—*Held*: having regard to all the circumstances, it could not have been the intention of the parties that the term should merge in the fee; before Jud. Act, 1873 (c. 66), there would in equity have been no merger; & consequently, by sect. 25, sub-sect. 4, of Jud. Act, 1873 (c. 66), there was now no merger at law; the term was still in existence, & the bank, if the legal estate in the fee was vested in them, were entitled to enter for default in payment of the rent.—*CAPITAL & COUNTIES BANK, LTD. v. RHODES*, [1903] 1 Ch. 631; 72 L. J. Ch. 336; 88 L. T. 255; 51 W. R. 470; 19 T. L. P. 280; 47 Sol. Jo. 335, C. A.

*Annotations*:—*Apld.* *Re Fletcher, Reading v. Fletcher*, [1917] 1 Ch. 339. *Reid. Lea v. Thursby*, [1904] 2 Ch. 57. *Mentd.* *A. G. v. Odell*, [1906] 2 Ch. 47; *Re De Lecuw, Jenkins v. Central Advance & Discount Corp.*, [1922] 2 Ch. 540.

**6775.** —.]—The trustee in bkpcy. of a lessee who had created a mtge. by sub-demise disclaimed the lease. The lessee thereupon applied to the Ct. of Bkpcy. that unless the mtgee. elected to have the property comprised in the lease vested in him subject to the covenants & conditions in the lease, he should be excluded from all interest in the property. The Ct., upon this application went into the question whether the lease had been merged by reason of the lessee having purchased the reversion, & held that there was no merger, & that the lease was still subsisting at the date of the bkpcy., & made the order asked for. The order was not appealed against:—*Held*: the matter was *res judicata* & could not be tried again in another ct. *Seemle*: there was no merger, the lessee intending to keep alive the term, & it being for his benefit to do so.—*LEA v. THURSBY*, [1904] 2 Ch. 57; 73 L. J. Ch. 518; 90 L. T. 667; 20 T. L. R. 470; 11 Mans. 151.

*Annotation*:—*Reid. Re Fletcher, Reading v. Fletcher*, [1917] 1 Ch. 339.

**6776.** —.]—Testatrix gave her residue to her two daughters; the residue included the lease of a house & grounds which formed part of a larger piece of land held under the same lease. Shortly after testatrix's death the daughters purchased the freehold of the larger piece of land, & the lease of the house & grounds was subsequently assigned to the daughters by the exors. of testatrix. Ten months later the daughters mortgaged the house & grounds, reciting & assigning their leasehold & freehold interests separately. There was no direct evidence of intention as to merger:—*Held*: the mtge. deed was admissible in evidence to show what was the intention of the daughters as to merger at the time when the leasehold interest was assigned to them; from that

deed it appeared merger was not intended & the term had not therefore merged.—*Re FLETCHER, READING v. FLETCHER*, [1917] 1 Ch. 339; 86 L. J. Ch. 317; 116 L. T. 460; 61 Sol. Jo. 267, C. A.

**6777. Agreement by lessee to purchase reversion.]**—A lease is not determined at law by a contract by the lessee to purchase the reversion; but, in equity, the landlord's right to distrain is suspended pending completion of the contract, so long as the contract is subsisting & enforceable by action for specific performance; if, however, the contract is released or abandoned, or the lessee by unreasonable delay loses his right to specific performance, the landlord may then distrain.—*ELLIS v. WRIGHT* (1897), 76 L. T. 522, C. A.

**B. How Ascertained.**

**6778. Deposit of leases with same person—For separate loans.]—***Re DIX, Ex p. WHITBREAD*, No. 6771, *ante*.

**6779. Conveyance to trustee.]**—Where a lessor purchases the interest of the lessee in a term, & causes it to be assigned to a trustee in trust for him, the presumption is that he intended to prevent a merger.—*GUNTER v. GUNTER* (1857), 23 Beav. 571; 29 L. T. O. S. 244; 3 Jur. N. S. 1013; 5 W. R. 485; 53 E. R. 225.

*Annotation*:—*Reid. Belancy v. Belancy* (1867), 15 W. R. 369.

**6780. — Recital excluding merger.]**—A purchased the residue of a term of ninety-nine years at a ground rent, & the term was assigned to him. In the following year he bought the freehold reversion, & by a deed reciting that he was desirous that the term should not merge, the reversion in fee was conveyed to a trustee, subject to the term, in trust for A., his heirs, or assigns, & to be conveyed & disposed of as he or they should direct. A. afterwards made a will, giving to his wife "the whole of my personal property estate & effects of every & whatsoever kind they may be":—*Held*: the gift in the will was confined to personal estate, & did not pass the reversion in fee, but the term was a term in gross, & passed by the will as personal estate.—*BELANBY v. BELANBY* (1867), 2 Ch. App. 138; 36 L. J. Ch. 265; 16 L. T. 269; 15 W. R. 369, L. C.

*Annotations*:—*Reid. Jones v. Robinson* (1878), 3 C. P. D. 344; *Ingle v. Vaughan Jenkins*, [1900] 2 Ch. 368.

**6781. Exclusion of doctrine beneficial to party.]**—*INGLE v. VAUGHAN JENKINS*, No. 6772, *ante*.

**6782.** —.]—*LEA v. THURSBY*, No. 6775, *ante*.

**6783. Property dealt with on footing of no merger.]**—*THELLUSSON v. LIDDARD*, No. 6773, *ante*.

**6784. Evidence of intention—Contents of subsequent deed—Inconsistent with merger.]**—*Re FLETCHER, READING v. FLETCHER*, No. 6778, *ante*.

**SUB-SECT. 2.—REVERSION AND TERM HELD IN DIFFERENT RIGHTS.**

**6785. Lease held as trustee—Reversion held beneficially.]**—*CHEYNEY'S CASE* (circa 1600), 2 And. 192; 123 E. R. 615.

**6786.** —.]—A trust of a term for years was supported in equity, though the term was merged in the inheritance.—*SAUNDERS v. BOURNFORD & ALLEN* (1679), Cas. temp. Finch, 424; 23 E. R. 231.

*Annotations*:—*Reid. Capital & Counties Bank v. Rhodes*, [1903] 1 Ch. 631; *Re Fletcher, Reading v. Fletcher* (1916), 86 L. J. Ch. 139.

**6787.** —.]—P. R. having a lease for lives renewable, settles, in 1743, the lands comprised in it, on the marriage of his son, T. R.,

to the use of himself for life remainder to T. R. for life, remainder to the sons of the marriage in tail male, reversion to himself in fee. Issue of the marriage, P. R. the younger. P. R. the older, in 1749, purchases the fee of the lands in the lease, & by will in 1766, devises the inheritance to T. R. for life, remainder to P. R. the younger, for life, remainder to his sons successively in tail male; & after some other remainders, remainder to D. & W. R. (appls.), the one for life the other in tail—reversion to his own right heirs. T. R. was empowered, in case P. R. the younger refused to settle his interest in the lease to the same uses as testator had limited the inheritance, at his discretion to deprive P. R. the younger of his life estate, under the will; but this power not executed. Testator dies in 1769; settlement in 1770 on marriage of P. R. the younger, whereby the lease is conveyed to trustees, in trust for T. R. for life, remainder to P. R. for life, remainder to the issue of the marriage in tail, reversion to T. R. absolutely. P. R., in 1799, dies without ever having had issue, & T. R. conveys the reversion of the lease to R. R. (resp.), his natural son, & dies in 1805. In 1811, D. R. & W. R. become entitled, in possession, to the inheritance of the lands comprised in the lease, as the last remaindermen, under the will of P. R. the elder, & they refuse to renew the lease to R. R. on the ground that it was merged in the fee when that was purchased by P. R. the elder; or that P. R. the younger had elected to take under the will, & allowed his interest in the lease to go with the inheritance; & that the settlement on the marriage of P. R. the younger, under which T. R. took the reversion of the lease, was a fraud on the will, etc. But the ct. below decreed a renewal, & the judgment affirmed by the Lords.—*RUTTLEDGE v. RUTTLEDGE* (1828), 1 Dow. & Cl. 331; 6 E. R. 519; *sub nom.* *RUTTLEDGE v. RUTTLEDGE*, 2 Bl. N. S. 352, II. L. *Annotation*:—*Mentd.* *Gee v. Gurney* (1816), 2 Coll. 486.

**6788. Lease held by husband—Reversion in right of wife.**—The assignee of a term of years first mortgaged it for £500 & then sold it to the mtgee. for £770 more. At the date of the mtge. he had become entitled to the freehold in right of his wife under a voluntary settlement, the lease being then merged at law & the assignment to the purchaser void:—*Held*: the purchaser was in equity entitled to the premises for the residue of the term.—*THORNE v. NEWMAN* (1672), as reported in 2 Rep. Ch. 71; 3 Swan. 603; 21 E. R. 619.

*Annotations*:—*Refd.* *Nurse v. Yerworth* (1674), 3 Swan. 608; *Whittle v. Henning* (1848), 2 Ph. 731; *Chambers v. Kingham* (1878), 10 Ch. D. 743. *Mentd.* *Albenarle & Monk v. Bath* (1693), *Freem. Ch.* 193.

**6789. Lease held in right of wife—Reversion held beneficially.**—In 1881 a woman seised in fee simple of two freehold houses & possessed of a long leasehold shop, but not in either case to her separate use, married a solr. On May 10, 1883, she purchased the freehold reversion of the shop. She died in 1897 without ever having had any issue, having by her will, made in 1888, devised "all" her "freehold shop" to her trustees upon trust for sale & to pay a sum of £1,300 out of the proceeds to certain named persons, & "all the residue of the real estate over which" she "had a disposing power" to her husband for life, to whom she also bequeathed all other her personal estate absolutely, & from & after his death she devised "all other" her "real estate" to her trustees upon trust for sale & to pay & divide the net proceeds as therein mentioned. The husband, the sole surviving exor. & trustee, proved the will & elected to pay & paid estate duty on the real estate passing

on his wife's death. He went into, & remained in, possession of all her real estate until his death in 1917, without giving any acknowledgment of the title of the heir-at-law. He appointed plffs. exors. of his will which contained a devise & bequest of his real & residuary personal estate. Upon a summons for the determination of the parties entitled to the properties in question:—*Held*: as to the shop; the husband's marital interest in the term prevented merger, but as the wife had purported to deal with the whole interest in the shop, & not merely the reversion, & as the husband took a life interest in it subject to the charge of £1,300, & had accepted his wife's personal estate, he must be treated as having elected to allow his interest in the shop to pass under his wife's will.—*Re COOLE, COOLE v. FLIGHT*, [1920] 2 Ch. 536; 89 L. J. Ch. 519; 124 L. T. 61; 36 T. L. R. 736; 64 Sol. Jo. 739.

*See, now*, Married Women's Property Act, 1882 (c. 75), s. 1.

**6790. Lease held beneficially—Reversion as administrator.**—C. an administrator, granted an underlease for a term of years of land held by him as administrator. Shortly afterwards the underlessee assigned the land to C. for the residue of the term:—*Held*: there was in equity no merger of the term, & plffs. who would be entitled to the land if the term was in existence could maintain an action to establish their title to the land for the term, & for mesne profits.—*CHAMBERS v. KINGHAM* (1878), 10 Ch. D. 713; 48 L. J. Ch. 169; 39 L. T. 472; 27 W. R. 289.

*Annotation*:—*Refd.* *Capital & Counties Bank v. Rhodes*, [1903] 1 Ch. 631.

**6791. Freehold held by tenants in common—Lease surrendered to one tenant in common—Legal estate outstanding.**—A. & B. were owners in fee as tenants in common of freehold property. On the death of B., a building lease of a portion of the freehold property was granted by A. & the devisees of B. to a person who afterwards assigned all his interest under that lease to A. alone. On the death of A., his devisees & the devisees of B. granted a building lease of another portion of the freehold property to a person who assigned his interest under the lease to A.'s trustees alone. The legal estate in all the property was outstanding in a mtgee. who, subsequently to the above transactions, reconveyed the mtgd. premises to the trustees of A. & B.:—*Held*: there was no merger of the leasehold interests in the reversion in fee of A., & the leases were consequently still existing.—*BRANLON v. BRANLON* (1862), 31 L. J. Ch. 47; 5 L. T. 339; 9 W. R. 825. *Annotation*:—*Expld.* *Thellusson v. Liddard*, [1900] 2 Ch. 635.

#### SUB-SECT. 3.—FRAUD.

**6792. Reversion conveyed by fraud.**—Where the reversion in fee was by fraud conveyed to him who had the term; decreed, that it should not be merged.—*DANBY v. DANBY* (1675), *Cas. temp.* Finch, 220; 23 E. R. 121.

*See, generally*, MISREPRESENTATION & FRAUD.

#### SUB-SECT. 4.—EFFECT OF.

##### A. In General.

*See, now*, Law of Property Act, 1925 (c. 20), s. 185.

**6793. Lease to one for a term with remainders over for life—Surrender of reversion to all & their heirs.**—*ANON.* (1553), *Benl.* 23; 73 E. R. 947.

*Sect. 3.—Merger: Sub-sect. 4, A., B. & C.; sub-sect. 5. Sects. 4 & 5: Sub-sect. 1.]*

**6794. Rentcharge granted by lessee to lessor—Reversion granted to lessee.]—**Lessee for ten years granted a rentcharge unto his lessor for the years: afterwards the lessor granted the remainder in fee to the lessee:—*Held*: the rent was gone & extinct, because the lessor who had the rent, is a party to the destruction of the lease, which is the ground of the rent.—*BUCKHURST'S CASE* (1589), *Godb.* 137; 4 *Leon.* 2; 78 *E. R.* 83.

#### *B. On Underlease.*

*See Law of Property Act, 1925 (c. 20), s. 139.*

**6795. Term granted by lessee for life—Reversion purchased by grantee—Death of grantor during term—Term determined.]—***ANON.* (1500), *Dal.* 26, pl. 4; *Moore, K. B.* 20, pl. 69; 123 *E. R.* 245.

**6796. ———.]—**If a man makes a lease for life, & the lessee for life makes a lease for years, & afterwards purchases the reversion, & dies within the term, yet the lease for years is determined; & the heir in reversion may oust him, & avoid. But if one will make a lease for years where he had nothing, & afterwards purchases the land; & the lessor dies; if that be by deed indented; the heir shall be estopped to avoid it (*per CUR.*)—*ROTHWELL'S CASE* (1628), *Hct.* 91; 124 *E. R.* 367.

**Effect on covenants in underlease.]—***See Nos.* 6797–6801, *post.*

**Effect of surrender.]—***See Sect. 2, sub-sect. 8, C. (h), ante.*

#### *C. On Rent and Covenants.*

*See, now, Law of Property Act, 1925 (c. 20), ss. 139, 185.*

**6797. Covenants—Discharged—Underlease.]—**If tenant for a term of years lease for a less term & assign his reversion. & the assignee take a conveyance of the fee, by which his former reversionary interest is merged, the covenants incident to that reversionary interest are thereby extinguished.—*WEBB v. RUSSELL* (1789), 3 *Term Rep.* 393; 100 *E. R.* 639.

*Annotations:—**Refd.* *Baker v. Gostling* (1834), 1 *Bing. N. C.* 19; *Bickford v. Parson* (1848), 5 *C. B.* 920; *Magnay v. Edwards* (1853), 1 *C. L. R.* 141; *Upton v. Townend*, *Upton v. Greenlees* (1855), 17 *C. B.* 30; *London & Westminster Loan & Discount Co. v. Drake* (1859), 6 *C. B. N. S.* 798; *Manchester Brewery Co. v. Coombs*, [1901] 2 *Ch.* 608. *Mentd.* *Gibson & Johnson v. Minet & Fector* (1791), 1 *Hy. Bl.* 569; *Vernon v. Smith* (1821), 5 *B. & Ald.* 1; *Keppell v. Bailey* (1834), 2 *My. & K.* 517; *Sturgeon v. Wingfield* (1846), 15 *L. J. Ex.* 212; *Wakefield v. Brown* (1846), 9 *Q. B.* 209; *England & Wales Eccl. Comrs. v. Rowe* (1880), 5 *App. Cas.* 736; *Rogers v. Hosegood*, [1900] 2 *Ch.* 388.

**6798. ———.]—**A lease was granted in 1759 for ninety-nine years if certain parties should so long live. The lessees in 1818 demised the premises to P. for sixty-two years from Mar. 25, 1821, if their interest should so long continue, subject to a rent of £42, & various covenants with a proviso for re-entry in case of default. P. had already the reversion in fee subject to a mtg. granted by him before the last mentioned demise. By lease & release executed in 1820 to which the mtgee. was a party P. in consideration of a sum of money, part of which went to discharge the mtg., conveyed the premises in fee to a purchaser to whom the mtgee. also assigned his term; & it was stipulated that the purchaser should retain £300 of the purchase-money upon trust that, if P. should pay the £42 rent & perform the covenants contained in the lease of 1818 the purchaser should pay over to him the £300 at the expiration of the term or extinguishment of the lease of 1759 &

interest in the meantime:—*Held*: the deed of 1818 was an assignment of all the interest of the then lessees to P. & by the conveyance of 1820 that interest as well as the reversion in fee passed to the purchaser, & (the mtg. being at the same time put an end to) the term became merged in the inheritance; & consequently as soon as the term became vested in the purchaser, P. was discharged from the rent & covenants & entitled to the £300.—*THORN v. WOOLLCOMBE* (1832), 3 *B. & Ad.* 586; 110 *E. R.* 213.

*Annotation:—**Refd.* *Baker v. Gostling* (1834), 1 *Bing. N. C.* 19.

**6799. ———.]—**D. & C., co-owners of an estate, by deed demised for a term of 1,000 years a strip of land intersecting the estate for the purpose of making a canal, with the proviso that nothing should prevent D. & C. "their heirs or assigns" from using any of the land demised or any stream of water flowing over the same, or from granting any wayleaves across the same for the carriage of goods, etc., or for any other purpose in like manner as they could have used the same in case the lease had not been granted but so as not to injure the canal. The canal was made, & the estate was afterwards partitioned by deed between D. & C. the reversion in a portion of the canal being conveyed to C. & the adjoining lands on each side of that portion being conveyed to D. C. afterwards conveyed the reversion in that portion of the canal to the lessees. D. as owner of the lands intersected by that portion of the canal having claimed to grant wayleaves, etc., & build a bridge across it for the purpose of making an access from one side to the other:—*Held*: upon the true construction of the lease the proviso operated as a covenant with D. & C. as owners of the reversion & not as owners of the adjoining lands; this covenant ran with the reversion, & when the reversion in that portion of the canal became vested in the lessees there was a merger & the rights under the proviso were extinguished as to that portion of the canal.—*DYNEVOR (LORD) v. TENNANT* (1888), 13 *App. Cas.* 279; 57 *L. J. Ch.* 1078; 59 *L. T.* 5; 37 *W. R.* 193, *H. L.*

*Annotations:—**Mentd.* *Rymer v. McIlroy*, [1897] 1 *Ch.* 528; *Jones v. Consolidated Anthracite Collieries & Dynevor*, [1916] 1 *K. B.* 123.

**6800. Restrictive covenants—For benefit of neighbouring occupants.]—**The owner in fee of two plots of land demised the first for an hotel, & covenanted that he would not let any house or land, within a certain distance of it to be used as an hotel. He demised the second plot, which was within the distance, to another person. Deft. purchased the reversion of the second plot & afterwards bought up the lease of it, but, as the ct. held, with notice of the restrictive covenant relating to the first lot:—*Held*: he was in equity bound by that covenant.—*JAY v. RICHARDSON* (1862), 30 *Beav.* 563; 31 *L. J. Ch.* 398; 6 *L. T.* 177; 26 *J. P.* 356; 8 *Jur. N. S.* 689; 10 *W. R.* 412; 54 *E. R.* 1008.

*Annotation:—**Mentd.* *Luker v. Dennis* (1877), 26 *W. R.* 167.

**6801. ——— Underlease.]—**A., being possessed of a piece of land for a term of ninety-nine years, laid it out in plots, & underleased one plot to deft. for the residue of the term, less three days, deft. covenanting not to build more than 20 ft. in height on that side of his plot which adjoined a narrow passage. A. underleased another plot which abutted on the other side of the passage, to plfts. On A.'s death, the estate was sold under conditions which provided that the purchaser of the largest lot in value should take an assignment of the whole, & grant fresh underleases to the

various underlessees, for the residue of the term of ninety-nine years, less two days. Deft. purchased his own plot, & pltf. purchased their plot, which was the largest in value. Pltf. took an assignment of the whole, & granted a fresh underlease to deft. of his lot for the residue of the term less two days, at an apportioned ground rent:—*Held*: though deft.'s original underlease was merged at law, he was still bound in equity to observe his building covenant; & pltf. could obtain an injunction to restrain him from infringing it.—*BIRMINGHAM JOINT STOCK CO. v. LEA* (1877), 36 L. T. 843.

6802. — *For benefit of lessor.*—*DYNEVOR (LORD) v. TENNANT*, No. 6799, *ante*.

6803. *Rent—Discharged.*—*THORN v. WOOLLCOMBE*, No. 6798, *ante*.

#### SUB-SECT. 5.—ASSIGNMENT OF TERM AFTER MERGER.

6804. *Assignment of residue of term—Effect—New term for unexpired part of old term.*—Pltf., in consideration of £530 to be paid by A. demised to him certain premises for the term of fifty-five years, at the yearly rent of £84, & subject to covenants to repair, etc. The consideration not having been paid, A. assigned to pltf. the residue of the term then unexpired, subject to the rent & covenants, & with a power of sale. In pursuance of that power, pltf., in consideration of £500 “bargained, sold, assigned, transferred, & set over” to deft. the said premises, to hold “for the residue of the said term of fifty-five years,” subject to the yearly rent of £84, & the covenants contained in the lease to A.; & deft. covenanted to pay the rent & perform the covenants; deft. having entered on the premises:—*Held*: although the mtge. by A. to pltf. operated as a merger of the term originally granted, yet the assignment by pltf. to deft. created a new lease for the residue of the unexpired term, & consequently deft. was liable on the covenants.—*COTTEE v. RICHARDSON* (1851), 7 Exch. 143; 21 L. J. Ex. 52; 18 L. T. O. S. 172; 155 E. R. 802.

*Annotations*:—*Reid*. *Bryant v. Hancock*, [1898] 1 Q. B. 716; *Slough Picture Hall Co. v. Wade, Wilson v. Neville, Reid* (1916), 32 T. L. R. 542.

#### SECT. 4.—NOTICE TO QUIT.

See Part XXIII., *ante*.

#### SECT. 5.—OPTION TO DETERMINE.

##### SUB-SECT. 1.—IN GENERAL.

6805. *Exercise must be within reasonable time—Option given to party on coming of age—Effect of delay.*—If a tenant hold under an agreement for a lease at a yearly rent, whereby it is stipulated that the agreement shall continue for the life of the lessor, & that a clause shall be inserted in the lease giving the lessor's son power to take the house for himself when he comes of age, the son must make his election in a reasonable time after he comes of age. The delay of a year is unreason-

able, & the tenant cannot be ejected upon a half year's notice to quit, served after such a delay.—*DOE d. BROMFIELD v. SMITH* (1788), 2 Term Rep. 436; 100 E. R. 234.

*Annotation*:—*Reid*. *Holmes v. Blogg* (1817), 8 Taunt. 35.

6806. *Resumption of premises by landlord—For specific purpose—Intention to execute purpose—Bonâ fide intention.*—Construction of a covenant in a lease, that if the lessor shall be minded to set out any part of the premises for a street or streets, or to sell any part to build upon, he may resume upon certain terms. If he resumed, having a *bonâ fide* intention to build, though that cannot be acted upon, there is no equity for the tenant.—*GOUGH v. WORCESTER & BIRMINGHAM CANAL CO.* (1801), 6 Ves. 354; 31 E. R. 1090, L. C.

6807. — *By an indenture of lease dated Dec. 1906, the owners of certain hereditaments, the whole of which consisted of agricultural land, demised the same for the term of seven years from Sept. 1904. The lease reserved to the lessors full liberty for them at any time & from time to time during the term to enter upon & resume possession for building or other purposes of any part or parts of the hereditaments thereby demised, including a certain right of way adjoining the land taken, on giving to the lessee one calendar month's notice in writing & if & when land on the south side of a specified road should be so taken, leaving for the lessee a cartway thereover to afford access to the land to the south thereof which might remain subject to this lease. The lessors were to allow for all land taken for any of the purposes aforesaid an abatement from the rent at the rate of £2 per acre:—Held*: unless it was shown that the lessors desired to resume possession of the demised land for building or other purposes, the power of re-entry never arose & never became exercisable.—*SOUTHEND-ON-SEA ESTATES CO., LTD. v. INLAND REVENUE COMRS.*, [1914] 1 K. B. 515; 83 L. J. K. B. 611; 110 L. T. 102; 30 T. L. R. 141; 58 Sol. Jo. 137, C. A.; *affd. sub nom.* *INLAND REVENUE COMRS. v. SOUTHEND-ON-SEA ESTATES CO., LTD.*, [1915] A. C. 428, H. L.

6808. — *Building purposes—Treaty entered into by landlord.*—Under a proviso in a lease to deliver possession, if the premises should be wanted for building, a demand on the ground of having entered into a treaty is not sufficient; otherwise, if an agreement was alleged.—*RUSSELL v. COGGINS* (1802), 8 Ves. 34; 32 E. R. 202.

*Annotations*:—*Consd.* *Southend-on-Sea Estates Co. v. I. R. Comrs.*, [1914] 1 K. B. 515. *Reid*. *Doe d. Willson v. Phillips* (1824), 2 Bing. 13; *Liddy v. Kennedy* (1871), L. R. 5 H. L. 134.

6809. — *Building purposes “or otherwise” — “Otherwise” ejusdem generis.*—A landlord was empowered to resume possession of any part of the land demised, in case it should be required by him “for the purpose of building, planting, accommodation or otherwise”:—*Held*: (1) this did not entitle the landlord to resume possession of land required by a railway co., so as to defeat the tenant's right to compensation; (2) the word “otherwise” was to be read as being *ejusdem generis*.—*JOHNSON v. EDGWARE, ETC. RY. CO.* (1866), 35 Beav. 480; 35 L. J. Ch. 322; 14 L. T. 45; 14 W. R. 416; 55 E. R. 982.

6810. — *Proviso for resumption of any part of premises—Resumption of whole.*—(1) A lease

#### PART XXIV. SECT. 3, SUB-SECT. 4.—C.

6802 i. *Restrictive covenants—For benefit of lessor.*—*CRAIG v. GREER*, [1899] 1 I. R. 258, 282.—*IR.*

#### PART XXIV. SECT. 5, SUB-SECT. 1.

e. *Resumption of premises by landlord—Parol agreement not to enforce power given by lease—Whether valid.*—*HOYT, ETC. v. SPENCER* (1919), 19 N. S. W. L. R. 200; 20 S. R. N. S. W.

430; 36 N. S. W. W. N. 164; 27 C. L. R. 133.—*AUS.*

f. — *AYLWIN v. ROBERTSON* (1904), 7 Terr. L. R. 164.—*CAN.*

g. *Whether formal surrender necessary.*—*CARLETON v. HERBERT* (1866), 14 W. R. 772.—*IR.*

*Sect. 5.—Option to determine: Sub-sects. 1 & 2.]*

of land by indenture contained this clause, following covenants to repair, pay rent, etc. "Provided nevertheless, that in case M." (the lessor) "shall at any time be desirous of having any part of the said piece of land delivered up to him, & of such his desire shall give three calendar months' notice to C." (the lessee), "then, at the expiration of such notice, he, the said C., doth hereby covenant peaceably to surrender up, & that the said M. shall & may take peaceable possession of, such part or parts of the said land as shall be mentioned in such notice; he the said M. paying to the said C. a reasonable compensation in respect of the moneys which may have been laid out by C. in improving the condition of so much of the said piece of land as shall be so given up; & then & from thenceforth the rent reserved by this indenture shall be reduced," etc. (in proportion to the land given up); "& the remainder of the said land shall be held by C. at such reduced rent, & M. shall have the same powers & remedies in all respects as if this lease had originally been granted at such reduced rent; & all the covenants, clauses, etc., herein contained, shall be as valid for so much of the demised land as shall not be included in such notice as if the reduced rent had been the original rent, & the land originally demised had been the land not included in such notice":—*Held*: under this proviso, the lessor, giving notice, might resume all the demised land; the proviso did not operate as a mere covenant by the lessee to give up on notice, but expressly gave the lessor power to take possession; & he might do so without having first paid compensation.

(2) The lessor served a notice requiring the lessee to give possession of the whole land at the end of three months, & adding: "I hereby offer & agree to allow you a reasonable compensation for any repairs which may have been done by you":—*Held*: a sufficient offer of compensation under the proviso.—*DOE d. GARDNER v. KENNARD* (1818), 12 Q. B. 244; 11 L. T. O. S. 288; 12 Jur. 821; 116 E. R. 860.

*Annotation*:—As to (1) *Consd. Liddy v. Kennedy* (1871), L. R. 5 H. L. 134.

**6811.** — — — — —.]—A lease contained a proviso empowering the lessor "upon giving three months' notice of his intention to resume any portion of the demised premises . . . to enter into such possession." The lessor subsequently conveyed by deed his reversion to the use of himself & another as tenants in common. Shortly afterwards the tenants in common served upon the lessee a notice of resumption of the whole of the lands:—*Held*: (1) the fact that a sum "per acre" which was by the lease covenanted to be allowed as rebate upon resumption, would in the case of resumption of the whole of the lands exceed the rent per acre originally reserved would not constitute evidence of an intention to resume part only of the entire demised premises; (2) actual re-entry was not necessary under such notice; the severance of the reversion did not determine the right to resumption in pursuance of the proviso, & service of the notice upon a servant living at the house of one of the lessees, the said servant "promising to give it to him on his return home in a few days" was good service upon that lessee.—*LIDDY v. KENNEDY* (1871), L. R. 5 H. L. 134; 20 W. R. 150, H. L.

**6812.** — *Compensation to tenant.*—*DOE d. GARDNER v. KENNARD*, No. 6810, *ante*.

**6813.** — — — — —.]—*JOHNSON v. EDGWARE, ETC. Ry. Co.*, No. 6809, *ante*.

**6814.** — *Enforcement—Action for possession.*

—Lease of land for term of years with a covenant by lessee that if lessor should be desirous during the term to take all or any part of the land for building thereon, etc., it should be lawful for her to come into & enter upon all or any part to make such buildings as she should think proper, & to do all necessary acts without interruption by lessee, provided lessor gave six months' notice of such intention, with a proviso also that the lease should be void for non-performance of covenants:—*Held*: lessor having agreed with a third person to the terms of a building contract, might give six months' notice of her intention to take the whole of the land for building, & at the expiration of that time, & after refusal by the tenant to deliver up possession, might bring ejectment.—*DOE d. WILSON (LADY) v. ABEL* (1814), 2 M. & S. 541; 105 E. R. 483.

*Annotations*:—*Consd. Southend-on-Sea Estates Co. v. L. R. Courts.*, [1914] 1 K. B. 515. *Refd. Doe d. Willson v. Phillips* (1824), 2 Bing. 13; *Doe d. Gardner v. Kennard* (1818), 12 Q. B. 244; *Liddy v. Kennedy* (1871), L. R. 5 H. L. 134.

**6815.** *Effect of exercise—Operation of alternative covenants by landlord—Further option exercisable by tenant.*—An agreement between landlord & tenant that the latter shall be at liberty to quit at Lady Day, 1814, in which event the former undertakes to take the fixtures at a valuation, or to permit the tenant to let the house to a respectable tenant creates an option to be exercised by the tenant, in case he gives up the premises. A letting by the tenant to an undertenant till Lady Day, 1814, is not an exercise of his right of option.—*COLTON v. LINGHAM* (1815), 1 Stark. 39, N. P.

**6816.** — *Tenancy determined.*—A lease was granted for fourteen years, which contained a proviso that the lessor might determine the lease at the end of the first seven years, by giving six months' previous notice. The father of the lessee joined as surety in the lease, & jointly covenanted for payment of the rent & performance of the covenants. Six months before the expiration of the first seven years, the lessor gave notice to the lessee "that he should require him to deliver up possession of the premises held by him under a certain indenture, determinable as therein mentioned." The lessor subsequently agreed to permit the lessee to continue in possession, which he did until the expiration of the fourteen years:—*Held*: the original term was effectually put an end to by the above notice, at the expiration of the first seven years; & the surety was exempted from liability in respect of any subsequent breaches of covenant.—*GIDDENS v. DODD* (1856), 3 Drew. 485; 25 L. J. Ch. 451; 20 J. P. 580; 4 W. R. 377; 61 E. R. 988.

**6817.** — — — — —.]—*Assignment of lease with proviso for return of purchase-money.*—L. was the holder of a lease of premises from S. for twenty-one years, determinable at the will of either party at the end of the first seven or fourteen years. The first seven years would expire at Christmas, 1863. L. had expended considerable sums on the premises, for which he was to receive £1,800 from R., to whom he agreed to assign the lease. The agreement contained these stipulations:—"If R. is ejected by S., the £1,800 to be repaid to R. If S. exercises the power of determining the lease at Christmas, 1863, & R. leaves the house, £1,100 are to be returned to R. If at Christmas, 1863, the tenancy of R. is continued, the £1,800 to be retained by L." R. entered into possession, & his aunt, C., resided with him. In May, 1863, S. gave notice of an intention to determine the

tenancy. At Christmas, 1863, C. became lessee to S., under a new lease, at a largely increased rent. R. continued to live in the house after his aunt, C., had become the lessee. R. claimed the return of the £1,100 under the agreement. There were equitable defences, to the effect that the new arrangement was collusive as between R., S., & C., but there was no proof that R. was the person really liable under the new lease:—*Held*: the agreement must be construed as applying entirely to a legal termination of R.'s tenancy, which having taken place, he was entitled under the agreement to the return of the £1,100.—*LUCAS v. RIDEOUT* (1868), 1 L. R. 3 H. L. 153, II. 1.; *affg. S. C. sub nom. RIDEOUT v. LUCAS* (1866), 14 L. T. 738, Ex. Ch.

**6818.** — **Lessor liable on covenants—Covenant to pay "at end of term."**—*BEVAN v. CHAMBERS* (1896), 12 T. L. R. 417, C. A.

**6819.** — **Lessor entitled to sue for breach of covenant.**—A lease for fourteen years provided that the lessees should have power to determine the lease at the end of the first seven years upon giving six months' notice in writing, & that "in such case this present indenture & every clause, matter, & thing herein contained shall, upon the expiration of the said notice, cease & determine & be void, anything hereinbefore contained to the contrary notwithstanding"; the proviso, however, did not contain the usual reservation or the lessor's rights in respect of existing breaches of the lessee's covenants:—*Held*: upon the determination of the lease by the lessees under the above power, the lessor was entitled to sue them for existing breaches of their covenants notwithstanding that his right to do so was not expressly reserved.—*BLORE v. GIULINI*, [1903] 1 K. R. 356; 72 L. J. K. B. 114; 88 L. T. 235; 51 W. R. 336; 47 Sol. Jo. 258.

*Annotation*:—*Refd.* *Burch v. Farrows Bank*, [1917] 1 Ch. 606.

**6820.** **Exercise of counter-option by lessee—To call for further term.**—Where a lease for twenty-one years, expiring in 1931, contained options for the lessor or lessee to determine the lease at the end of the first seven or fourteen years, & also an option for the lessee to call for a further term from the expiration of the twenty-one years & such last option was exercised by the lessee, & the lessor thereupon gave notice to determine the lease at the end of the first fourteen years:—*Held*: upon the true construction of the lease, such notice did, in fact, duly determine the lease, notwithstanding deft.'s previous notice calling for a further term.—*STEWART v. MASSETT* (1924), 132 L. T. 301; 69 Sol. Jo. 72.

**6821.** **Loss of right to exercise—Agreement subsequent to lease—Agreement stamped but not under seal.**—Lease of lands by indenture for twenty-one years, with proviso that it should be determinable, by lessee or lessor, at the end of the first seven or fourteen years, & memorandum, indorsed six years after the execution of the lease, "of its being agreed between the parties previously to the execution, that the lessor shall not dispossess nor cause the lessee to be dispossessed of the said estate, but to have it for the term of twenty-one years from this present time;" which memorandum was signed by the parties, & stamped with a lease stamp, but not sealed:—*Held*: the lessor might, notwithstanding, determine the lease at the end of the first fourteen years; for the memorandum did not operate as a new lease & surrender of the first lease.—*GOODRIGHT d. NICHOLLS v. MARK* (1815), 4 M. & S. 30; 105 E. R. 746.

**6822.** — **Undertaking beyond date on which**

**tenancy determinable.**—*PHIPOS v. CALLEGARI*, No. 6748, *ante*.

#### SUB-SECT. 2.—BY WHOM EXERCISABLE.

**6823.** **Where provision in lease for exercise—Exercisable by either party—Their executors or administrators—Extends to devisee of lessor.**—A proviso in a lease for twenty-one years, that if either of the parties shall be desirous to determine it in seven or fourteen years, it shall be lawful for either of them, his exors. or administrators, so to do, upon twelve months' notice to the other of them, his heirs, exors., or administrators, extends, by reasonable intentment, to the devisee of the lessor who was entitled to the rent & reversion.—*ROE d. BAMFORD v. HAYLEY* (1810), 12 East, 464; 104 E. R. 181.

*Annotations*:—*Refd.* *Simpson v. Clayton* (1838), 4 Bing. N. C. 758; *Kennedy v. Liddy* (1867), 15 W. R. 431; *Williams v. Earle* (1868), L. R. 3 Q. B. 739; *Muller v. Trafford*, [1901] 1 Ch. 54.

**6824.** — **Determinable "if parties so think fit"—Assent of both parties necessary.**—A lease for twenty-one years, expressed to be determinable, nevertheless in seven or fourteen years, if the said parties hereto shall so think fit," is determinable only by consent of both the parties, although it may have been their intention to give the option to either alone.

If a lease is merely for seven, fourteen, or twenty-one years, giving an option to somebody, but not saying to whom, the option is with the lessee, & the lessee alone (*POLLOCK, C.B.*).—*FOWELL v. TRANTER* (1861), 3 H. & C. 458; 34 L. J. Ex. 6; 11 L. T. 317; 29 J. P. 8; 13 W. R. 145; 159 E. R. 610.

**6825.** — **Severance of reversion—Exercise by tenants in common.**—*LIDDY v. KENNEDY*, No. 6811, *ante*.

— **Persons entitled to serve notice.**—*See, also*, Nos. 6839–6841, *post*.

**6826.** — **Exercisable by lessee—Or his assigns—Not equitable assignee.**—*SEAWARD v. DREW*, No. 6542, *ante*.

**6827.** — **Party entitled to equitable assignment—Licence by landlord to assign no estoppel.**—(1) An underlease containing a proviso enabling the lessee to determine same cannot be determined by a person who has only an equitable right to call for an assignment. The fact that the landlord has granted licences to assign & has given him receipts for rent without knowing that the legal term was outstanding does not estop the landlord from disputing such person's right to determine the underlease.

An underlease contained the following proviso: "That if the lessee should be desirous of determining the present lease at the expiration of the first seven or fourteen years of the term hereby granted, & of such his desire shall give six calendar months' previous notice in writing to the lessors . . . & shall pay all the rent & perform & observe all the covenants . . . up to such determination then & in any such case & immediately after the expiration of the said term of seven or fourteen years, as the case may be, this present lease & everything herein contained shall cease & be void":—*Held*: (2) the payment of rent & performance of the covenants before the expiration of the seven or fourteen years respectively was a condition precedent to the determination of the lease at all.—*STAIT v. FENNER*, [1912] 2 Ch. 504; 181 L. J. Ch. 710; 107 L. T. 120; 56 Sol. Jo. 669.

*Annotation*:—*As to* (2) *Consd.* *Burch v. Farrows Bank*, [1917] 1 Ch. 606.



not make the performance of all the covenants a condition precedent to the tenant's power to put an end to the lease. The Ct. of Exch. Chamber held that the proviso did make the performance of the covenants a condition precedent. The Lords were equally divided, & so the judgment of the Exch. Chamber was affirmed.—*GREY v. FRIAR* (1854), 4 H. L. Cas. 585; 2 C. L. R. 434; 23 L. T. O. S. 334; 18 Jur. 1036; 10 E. R. 583, H. L.

*Annotations*:—*Consd.* *Finch v. Underwood* (1875), 33 L. T. 634; *Bastin v. Bidwell* (1881), 18 Ch. D. 238. *Folld.* *Stait v. Fenner*, [1912] 2 Ch. 504. *Consd.* *Burch v. Farrows Bank*, [1917] 1 Ch. 606. *Refd.* *Jorvis v. Tomkinson* (1856), 26 L. J. Ex. 41; *Newson v. Smythies* (1858), 3 H. & N. 840; *London Gas-Light Co. v. Chelsea Vestry* (1860), 8 C. B. N. S. 215; *Seaward v. Drow* (1898), 67 L. J. Q. B. 322.

**6838.** — — — — —.]—A lease for a term of years contained the usual covenant by the lessee to repair & deliver up in good & substantial repair the demised premises, with a proviso that if the lessee should desire to determine the lease at the expiration of the third, seventh, & fourteenth year of the term & should of such desire give six months' previous notice in writing to the lessor, "and shall pay all the rent & perform & observe all the covenants hereinbefore reserved & contained & on the part of the lessee to be paid, performed & observed up to such determination, then & in such case immediately after the expiration of the said term of three, seven or fourteen years as the case may be this lease & the term hereby granted shall absolutely cease & determine but without prejudice to the remedies of either of the parties hereto against the other in respect of any antecedent claim or breach of covenant." Under this proviso the lessee gave the lessor a six months' previous notice in writing to determine the lease at the expiration of the seventh year of the term & the premises being out of repair, commenced repairs shortly before & completed them a few days after the date for the determination of the lease:—*Held*: the performance of the covenant to repair was a condition precedent to the determination of the lease notwithstanding the qualifying words "without prejudice," etc., concluding the proviso; & the condition not having been fulfilled, the notice was bad & the lease had not determined.—*BURCH v. FARROWS BANK, LTD.*, [1917] 1 Ch. 606; 86 L. J. Ch. 400; 117 L. T. 8; 61 Sol. Jo. 383.

*Provisions as to giving notice.*—*See* Sub-sect. 4, *post*.

#### SUB-SECT. 4.—NOTICE TO EXERCISE.

**6839. Notice by specific persons—Limitation to such persons.**—(1) Demise from A. to B. for twenty-one years, if both should so long live; but if either should die before the end of the said term, then the heirs, exors., etc., of the person so dying should give twelve months' notice to quit, etc.:—*Held*: the lease could only be determined by twelve months' notice given by the representatives of the party dying before the end of the term, & consequently such notice given by the lessor to the representatives of the lessee, who died during the term, did not determine it.

(2) Where power is given to a party to determine a lease on giving a notice in writing, he can-

not determine it by giving a parol notice.—*LEGG d. SCOT v. BENION* (1738), Willes, 43; 125 E. R. 1047.

**6840.** — *Notice by all of such persons—Executors.*—Where a lease for twenty-one years contained a proviso that in case either landlord or tenant, or their respective heirs & exors., wished to determine it at the end of the first fourteen years, & should give six months' notice in writing under his or their respective hands, the term should cease:—*Held*: a notice to quit, signed by two only of three exors. of the original lessor, to whom he had bequeathed the freehold as joint tenants, expressing the notice to be given on behalf of themselves & the third exor., was not good under the proviso, which required it to be given under the hands of all three; neither could such notice be sustained under the general rule of law, that one joint tenant may bind his companions by an act done for his benefit; for *non constat* the determination of the lease was for the benefit of the co-joint tenant; which it was incumbent on the party who wished to avail himself of it to prove. The notice to quit being such as the tenant was to act upon at the time, no subsequent recognition of the third exor. will make it good by relation: nor was his joining in the ejectment evidence of his original assent to bind the tenant by the notice.—*RIGHT d. FISHER v. CUTHELL* (1804), 5 East, 491; 2 Smith, K. B. 83; 102 E. R. 1158.

*Annotations*:—*Distd.* *Doe d. Elliott v. Hulme* (1828), 6 L. J. O. S. K. B. 315; *Doe d. Aslin v. Summersett* (1830), 1 B. & Ad. 135. *Consd.* *Re Bobington's Tenancy*, *Bobington v. Wildman*, [1921] 1 Ch. 559. *Refd.* *Goodtitle d. King v. Woodward* (1820), 3 B. & Ad. 689; *Doe d. Mann v. Walters* (1830), 10 B. & C. 626; *Dodd v. Acklom* (1813), 6 Man. & G. 672; *Re Viola's Indenture of Lease*, *Humphrey v. Stenbury*, [1909] 1 Ch. 244. *Mentd.* *Charlinton v. Johnson* (1845), 4 L. T. O. S. 398.

**6841.** — — — *Joint lessees.*—Where a lease contains a proviso enabling the "lessees" to determine the lease by notice, a notice given by one of two lessees will not, in the absence of evidence of authority from the other lessee to give it or of circumstances from which the ct. can infer such authority, be effectual to determine the lease.—*Re VIOLA'S INDENTURE OF LEASE*, *HUMPHREY v. STENBURY*, [1909] 1 Ch. 244; 78 L. J. Ch. 128; 100 L. T. 33.

**6842.** — *By beneficial owners—With consent of legal owners.*—*Re KNIGHT & HUBBARD'S UNDERLEASE*, *HUBBARD v. HIGHTON*, No. 6829, *ante*.

**6843. Notice to specific persons—All must be served.**—*QUARTERMAINE v. SELBY* (1889), 5 T. L. R. 223, C. A.

**6844. Notice to servant of lessee—At house of lessee.**—*LIDDY v. KENNEDY*, No. 6811, *ante*.

**6845. Form of notice—Writing—Parol notice insufficient.**—*LEGG d. SCOT v. BENION*, No. 6839, *ante*.

**6846. Time for notice.**—Lease for twenty-one years from Michaelmas, 1823, with covenant that if the tenant should desire to determine the demise at the end of the first fourteen years, & should leave or give six calendar months' notice immediately preceding the expiration of the first fourteen years, the lease should determine. The tenant, six months before June preceding the expiration of the first fourteen years, gave notice that he should quit on June 24, 1837, agreeably to

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**6846 l. Time for notice.**—*FRABER'S TRUSTEES v. MAULE & SON* (1904), 6 F. (Ct. of Sess.) 819; 41 Sc. L. R. 623; 12 S. L. T. 157.—*SCOT*.

*k. On sale of premises—Whether sufficient without notice that purchaser requires possession.*—*Re WESTERN TRUST CO. & FEINSTEIN* (Sask.), [1922] 2 W. W. R. 900; 67 D. L. R.

#### 321.—CAN.

*l. Proof that notice has been given—Oral admissions of landlord.*—*MARTIN v. DOHERTY* (1880), 6 L. R. Ir. 194.—*IR*.

**Sect. 5.—Option to determine: Sub-sect. 4. Sects. 6, 7, 8, 9 & 10: Sub-sects. 1, 2 & 3, A.]**

the covenants of the lease:—*Held*: this notice did not satisfy the covenant; & the jury could not be asked whether, from the landlord's conduct, as shown in evidence, they believed that he understood the notice to refer to Michaelmas, 1837.—*CADBY v. MARTINEZ* (1840), 11 Ad. & El. 720; 3 Per. & Dav. 386; 9 L. J. Q. B. 281; 4 J. P. 105; 113 E. R. 587.

*Annotations*:—*Refd.* *Giddins v. Dodd* (1856), 20 J. P. 580. *Mentd.* *Doe d. Armstrong v. Wilkinson* (1840), 12 Ad. & El. 743.

**6847. — Day of notice excluded.]—QUARTERMAINE v. SELBY** (1889), 5 T. L. R. 223, C. A.

#### SECT. 6.—ON BANKRUPTCY.

**Right of re-entry.]—See** BANKRUPTCY, Vol. IV., p. 193, No. 1781; Vol. V., pp. 657 *et seq.*, Nos. 5860–5861, 5875, 5895, 5904, 5913, 5919, 5920, 5947–5956.

— **Bankruptcy of lessor's executor.]—See** EXECUTORS, Vol. XXIII., p. 307, No. 3718.

— **Technical flaw in declaration of bankruptcy.]—See** No. 6091, *ante*.

— **Disclaimer.]—See, generally,** BANKRUPTCY, Vol. V., pp. 938–953, Nos. 7666–7814.

— **Right to disclaim.]—See** BANKRUPTCY, Vol. V., pp. 938, 940, Nos. 7666–7667, 7684–7687, 7689.

— **Leave to disclaim.]—See** BANKRUPTCY, Vol. V., pp. 941–944, Nos. 7694–7727.

— **Trustee compelled to elect.]—See** BANKRUPTCY, Vol. V., pp. 944–945, Nos. 7728–7745.

— **Effect of disclaimer.]—See** BANKRUPTCY, Vol. V., pp. 945–951, Nos. 7746–7794.

— **Right to vesting order.]—See** BANKRUPTCY, Vol. V., p. 954, Nos. 7818–7829.

— **Exclusion of party refusing to accept vesting order.]—See** BANKRUPTCY, Vol. V., p. 955, Nos. 7830–7836.

— **Proof by landlord after disclaimer—Difference between agreed & obtainable rent.]—See** BANKRUPTCY, Vol. IV., pp. 258, 433, Nos. 2451–2452, 3909.

— **Set-off of arrears of rent—Against value of improvements.]—See** BANKRUPTCY, Vol. IV., p. 400, No. 3646.

#### SECT. 7.—ON DISSOLUTION OF CORPORATION.

*See, now,* Law of Property Act, 1925 (c. 20), ss. 180, 181; & *generally,* CORPORATIONS, Vol. XIII., pp. 436–437, Nos. 1596–1604.

**6848. Lease determined—Acceleration of reversion.]—A** lease to a corp. for a term of years determines if the corp. is dissolved without having assigned the lease. On dissolution of the corp. the lease does not vest in the Crown as *bona vacantia*, but the reversion is accelerated, & the land reverts to the lessor. Therefore, where a lease was made to a limited co. & payment of the rent during the term was guaranteed by sureties, on dissolution of the co. under ss. 142 & 143 of Cos. Act, 1862 (c. 89):—*Held*: the lease, not having been assigned, had determined, & with it the liability of the sureties.—*HASTINGS CORPN. v. LETTON*, [1908] 1 K. B. 378; 77 L. J. K. B. 149; 97 L. T. 582; 23 T. L. R. 456; 15 Mans. 58, D. C.

*Annotation*:—*Refd.* *Re Woking Urban Council* (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300.

**Winding up of company.]—See** sect. 8, *post*.

#### SECT. 8.—ON WINDING UP.

**Winding up by court—Dissolution of company.]—See** COMPANIES, Vol. X., p. 986, No. 6827.

— **Landlord's right of distress.]—See** COMPANIES, Vol. X., pp. 968–969, Nos. 6650–6667.

— **Claim for future rent.]—See** COMPANIES, Vol. X., p. 935, Nos. 6410–6415.

— **Landlord's right of re-entry.]—See** COMPANIES, Vol. X., p. 863, No. 5824.

— **Rights of third parties.]—See** COMPANIES, Vol. X., p. 863, No. 5826.

— **Voluntary winding up—Right of distress.]—See** COMPANIES, Vol. X., pp. 1014–1015, Nos. 7040–7044.

— **Effect.]—See** COMPANIES, Vol. X., p. 1033, Nos. 7163–7164, 7168–7169.

— **Right of re-entry.]—See** COMPANIES, Vol. X., pp. 995–996, 1031, Nos. 6905–6906, 7144, 7145.

#### SECT. 9.—ON EXECUTION.

*See, generally,* EXECUTION, Vol. XXI., pp. 490, 491, 560, Nos. 684–696, 1366–1370.

— **Right of re-entry.]—See** EXECUTION, Vol. XXI., pp. 490, 560, Nos. 687–688, 1366.

#### SECT. 10.—ACTION FOR DOUBLE RENT OR DOUBLE VALUE.

##### SUB-SECT. 1.—IN GENERAL.

**6849. Landlord & Tenant Act, 1730 (c. 28), s. 1—Distress for Rent Act, 1737 (c. 19), s. 18—In pari materia—Same construction.]—Parol** notice to quit, by a tenant on a parol lease, is within Distress for Rent Act, 1737 (c. 19).

Statutes *in pari materia* are to be all taken as one system to suppress the mischief. . . . The two laws, [Landlord & Tenant Act, 1730 (c. 28), & Distress for Rent Act, 1737 (c. 19)], are only parts of the same provision (LORD MANSFIELD, C.J.).

There is no power of distress in that Act, [Landlord & Tenant Act, 1730 (c. 28)], because no certainty of the value (WILMOT, J.).—*TIMMINS v. ROWLISON* (1765), 1 Wm. Bl. 533; 3 Burr. 1603; 96 E. R. 309.

*Annotation*:—*Distd.* *Johnstone v. Hudlestone* (1825), 4 B. & C. 922.

**6850. — — — — —.]—Notice to quit** under 4 Geo. 2 (c. 28), may be previous to the expiration of the lease.

Notice or requisition to the tenant to quit at the end of his term, implies that it must be previous. It would be absurd, because impossible to be complied with, to require after the expiration of the term that the tenant shall quit at the expiration. 4 Geo. 2 (c. 28), & 11 Geo. 2 (c. 19), being *in pari materia* ought to have the same construction; & when, by the latter, the tenant is to be bound by his own notice to quit, that must be clearly previous. As to the second point, I doubt, that though the rent is demandable at sunset, yet it is not due, nor does the lease expire till midnight. If so the notice is a little premature. But this is only the fraction of a second; the ct. will not grant a new trial on such a frivolous objection (BLACKSTONE, J.).—*CUTTING v. DERBY* (1776), 2 Wm. Bl. 1075; 96 E. R. 633.

*Annotations*:—*Refd.* *Wilkinson v. Hall* (1835), 1 Bing. N. C. 713. *Mentd.* *Whitley v. Roberts* (1825), 1 McCle. & Yo. 107.

## SUB-SECT. 2.—DOUBLE RENT.

See Distress for Rent Act, 1737 (c. 19), s. 18.

**6851. Who may maintain action—Assignee of reversioner—Assignment after expiry of notice.]**—Where a tenant holds over after giving notice to quit & the landlord assigns the reversion after the expiry of such notice without having taken any proceeding against such tenant, his assignee is a "landlord" within the meaning of Distress for Rent Act, 1737 (c. 19), s. 18, & may maintain an action for double rent.—*NORTCOTT v. ROCHE* (1921), 37 T. L. R. 364, D. C.

**6852. Notice to quit—Sufficiency—Parol notice—On parol lease.]**—*TIMMINS v. ROWLISON*, No. 6849, ante.

**6853. — On contingency—Failure to quit on contingency—Tenant not liable.]**—If tenant from year to year give his landlord notice that he will quit upon a contingency, & does not quit when the contingency happens, he is not liable to an action on Distress for Rent Act, 1737 (c. 19), for double rent.—*FARRANCE v. ELKINGTON* (1811), 2 Camp. 591, N. P.

**6854. — Tenant must be empowered to determine tenancy by—Valid notice.]**—*JOHNSTONE v. HUDLESTONE*, No. 6716, ante.

**6855. — Necessity for fresh notice—Tenant holding over after first notice.]**—*BOOTH v. MACFARLANE*, No. 6857, post.

See, generally, Part XXIII., ante.

**6856. Extent of liability—Period of continuing in possession—Whether jury entitled to award less than double rent.]**—*ANON.* (1773), Loft, 275; 98 E. R. 648.

**6857. — No liability after quitting premises.]**—A tenant who, after having given notice to quit, holds over for a year, paying double rent according to Distress for Rent Act, 1737 (c. 19), s. 18, may quit at the end of such year without fresh notice.

Here the double rent has been paid during all the time the tenant has continued in possession & he is not bound to pay it after he has quitted (*LORD TENTERDEN, C.J.*).—*BOOTH v. MACFARLANE* (1831), 1 B. & Ad. 904; 9 L. J. O. S. K. B. 161; 109 E. R. 1022.

See, also, Sub-sect. 3, F., post.

**6858. Joinder of claim for use & occupation—For same period of occupation.]**—A count in debt on Distress for Rent Act, 1737 (c. 19), s. 18, for double rent of premises held over by a tenant after giving notice to quit, may be joined with a count for use & occupation of the same premises, during the same period.—*THOROTON v. WHITEHEAD* (1836), 1 M. & W. 14; 4 Dowl. 747; 1 Gale, 359; Tyr. & Gr. 313; 5 L. J. Ex. 113; 150 E. R. 326.

Annotation:—*Mentd.* *Jenkins v. Treloar* (1836), Tyr. & Gr. 316.

**6859. Pleading—Must show terms of tenancy & of notice to quit.]**—In a cognizance by debt, as bailiff, for double rent under Distress for Rent Act, 1737 (c. 19), s. 18, the terms of the tenancy, and of the notice to quit, should be so shown, that the tenants power to determine the tenancy by notice to his landlord for that purpose, & the sufficiency in law, of the notice actually given, may appear. It is not sufficient to allege that the tenant "having power" to determine by such a notice as hereinafter mentioned," gave a notice to quit on a given day past.—*HUMBERTSTONE v. DUBOIS* (1842), 10 M. & W. 765; 2 Dowl. N. S. 506; 12 L. J. Ex. 98; 152 E. R. 681.

**6860. Effect of Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 1—Distress for Rent Act, 1737 (c. 19), s. 18 not repealed.]**—The provision of Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 1, whereby in the case of a dwelling house to which the Act applies any increase in the rent beyond the standard rent as defined by the Act is irrecoverable, does not prevent a landlord from recovering a penal sum amounting to double rent under Distress for Rent Act, 1737 (c. 19), where a tenant holds over after giving notice to quit.—*FLANNAGAN v. SHAW*, [1920] 3 K. B. 96; 89 L. J. K. B. 168; 122 L. T. 177; 84 J. P. 45; 36 T. L. R. 34; 64 Sol. Jo. 51; 18 L. G. R. 29, C. A.; *reversg.* (1919), 35 T. L. R. 467, D. C.

Annotations:—*Consd.* *Nortcott v. Roche* (1921), 37 T. L. R. 364. *Refd.* *Hunt v. Bliss* (1919), 89 L. J. K. B. 174; *Davies v. Bristow, Penrhos College v. Butler*, [1920] 3 K. B. 428; *Barton v. Fincham*, [1921] 2 K. B. 291. *Mentd.* *The Danube II.*, [1921] P. 183; *Wallwork v. Fielding*, [1922] 2 K. B. 66.

See, further, Part XXVII., post.

**Landlord's power of distress.]**—See DISTRESS, Vol. XVIII., pp. 321, 322, Nos. 557, 558.

**Goods fraudulently removed.]**—See DISTRESS, Vol. XVIII., pp. 360-366, Nos. 978-1403.

## SUB-SECT. 3.—DOUBLE VALUE.

## A. To What Tenancies Applicable.

See Landlord & Tenant Act, 1730 (c. 28), s. 1.

**6861. Yearly tenancy.]**—A landlord declared in debt. (a) for the double value, (b) for use & occupation: the tenant pleaded *nil debet* to (a), & a tender of the single rent before action brought to (b), & paid the money into ct.: which plff. took out before trial & still proceeded:—*Held*: this was no cause of nonsuit, as upon the ground of such acceptance of the single rent being a waiver of plff.'s right to proceed for the double value; but that the case ought to have gone to the jury; & plff.'s going on with the action after taking the single rent out of ct. was evidence to show that he did not mean to waive his claim for the double value, but to take it *pro tanto*. It seems that though the single rent were paid into ct. on the second count, yet if plff. had not accepted it, but had recovered on the first count, debt. would have been entitled to have the money so paid in deducted out of the larger sum recovered.

If the tender of the single rent had been accepted before the action brought, it would have been a question for the jury to have determined, whether it were not a waiver of the landlord's claim to double value (*ELLENBOROUGH, C.J.*).—*RYAL v. RICH* (1808), 10 East, 48; 103 E. R. 693. Annotations:—*Apld.* *Collins v. Kingsbury* (1848) 13 Jur. 98. *Refd.* *Re Wickham, etc.*, *Exors. v. Lee* (1848), 12 Jur. 628.

**6862. Weekly tenancy.]**—Debt for double value on Landlord & Tenant Act, 1730 (c. 28), does not lie against a weekly tenant.—*LLOYD v. ROSBEE* (1810), 2 Camp, 453, N. P.

Annotation:—*Apld.* *Sullivan v. Bishop* (1826), 2 C. & P. 359.

**6863. Quarterly tenancy.]**—*Qu.*: whether a quarterly tenant who wilfully held over after his tenancy was expired was liable to pay double value to his landlord under Landlord & Tenant Act, 1730 (c. 28).—*WILKINSON v. HALL* (1837),

## PART XXIV. SECT. 10, SUB-SECT. 3.—A.

*m. Tenancy for term certain.]*—*DUNDAS v. OSMONT* (N. W. T.) (1905), 1 W. L. R. 363.—CAN.

**Sect. 10.—Action for double rent or double value:**  
**Sub-sect. 3, A., B., C., D. & E.]**

3 Bing. N. C. 508; 3 Hodg. 56; 4 Scott, 301; 6 L. J. C. P. 82; 132 E. R. 506.

**Annotations:—***Refd.* Alderman v. Neate (1839), 4 M. & W. 704; Gibson v. Kirk (1841), 1 Q. B. 850; Chapman v. Beecham (1842), 3 Gal. & Dav. 71; Duxbury v. Sandford (1898), 80 L. T. 552. **Mentd.** Doe d. Lyster v. Goldwin (1841), 2 Q. B. 143; Doe d. Roylance v. Lightfoot (1841), 8 M. & W. 553; Doe d. Parsley v. Day (1842), 2 Q. B. 147; Manders v. Williams (1849), 4 Exch. 339.

**B. Who may bring Action.**

See Landlord & Tenant Act, 1730 (c. 28), s. 1.

**6864. General rule—Person entitled in reversion.]**  
**—BLATCHFORD v. COLE, No. 6869, post.**

**6865. Tenants in common—Right of one tenant—in respect of moiety.]—**One tenant in common may bring action for the double value of his moiety, under Landlord & Tenant Act, 1730 (c. 28).—**CUTTING v. DERBY** (1776), 2 Wm. Bl. 1077; 96 E. R. 634.

**Annotations:—***Foll.* Whitley v. Roberts (1825), M'Cle. & Yo. 107. **Consd.** Wilkinson v. Hall (1835), 1 Bing. C. N. 713.

**6866. — May not sue jointly—Unless joint demise proved.]—**Tenants in common cannot jointly maintain an action for double value where the premises have been held over after the expiration of a tenancy from year to year without proof of a joint demise.—**WILKINSON v. HALL** (1835), 1 Bing. N. C. 713; 1 Scott, 675; 1 Hodg. 170; 4 L. J. C. P. 204; 131 E. R. 1292.

**Annotation:—***Refd.* Foley v. Addenbrooke (1843), 4 Q. B. 197.

**6867. Administratrix of landlord's executor—Before administration de bonis non—Not entitled—Notwithstanding attornment by tenant.]—**The administratrix of an exor. cannot sue for the double value of lands held over after notice to quit under a demise from the testator, contrary to Landlord & Tenant Act, 1730 (c. 28), without taking out administration *de bonis non*; even though the tenant has attorned to her.—**TINGREY v. BROWN** (1798), 1 Bos. & P. 310; 126 E. R. 921.

**6868. Husband seised in right of wife—Tenancy created by husband only—Action by husband & wife jointly.]—**In debt for double value under Landlord & Tenant Act, 1730 (c. 28), the declaration stated that plffs. were seised in their demesne as of freehold in right of pltf., Mrs. H., during her life, of a messuage held by deft. as tenant to said plffs. for a year, terminable on Oct. 11, 1844, the reversion thereof belonging to plffs. in right of the said Mrs. H. That plffs. on Sept. 1, gave notice in writing & demanded of deft. to deliver up possession of the said premises to plffs. on Oct. 11, which deft. refused to do. *Plea, nil debet*, by statute. Deft. became tenant to Mr. H., one of plffs., for one year, from Oct. 11, 1843, to Oct. 11, 1844, of a house, farm, etc., at a certain rent, & occupied the same as tenant to him for that year. The contract for this tenancy was by parol, & was made by deft. expressly with Mr. H. alone in his own right, & Mrs. H. was no party thereto. A demand & notice in writing for delivery up of the possession by deft. was made by the agent of plffs. Deft. retained possession of the premises:—**Held:** the two plffs. were not entitled to recover in this joint form of action, deft. not being the tenant of two plffs., & the reversion not being in the two plffs., but in the husband alone, & neither the averment of the tenancy, nor the words "to said plffs." in the allegation of the tenancy, could be rejected.—**HARCOURT v. WYMAN** (1849), 3 Exch. 817; 18

L. J. Ex. 453; 13 L. T. O. S. 213; 154 E. R. 1075.

**6869. Lessee under future lease—To commence from determination of former term—Interest termini only.]—**It is only the lessor or the person who stands in the situation of landlord, & not any one who derives title from the lessor, who can, under Landlord & Tenant Act, 1730 (c. 28), s. 1, sue a tenant for double value when there has been a holding over after the determination of the tenancy. Where, therefore, A., who had let certain premises to deft. under a letting which expired on Mar. 25, 1858, & had required deft., by notice in writing, to deliver up possession on that day, afterwards, but before the end of such tenancy, demised the premises to pltf. from such Mar. 25, 1858, & deft. held over without paying rent to or otherwise recognising pltf. as landlord:—**Held:** pltf. was not the proper person to sue deft. for double value under Landlord & Tenant Act, 1730 (c. 28), s. 1.—**BLATCHFORD v. COLE** (1858), 5 C. B. N. S. 514; 28 L. J. C. P. 140; 32 L. T. O. S. 316; 23 J. P. 166; 5 Jur. N. S. 412; 141 E. R. 208.

**C. When and in What Court Maintainable.**

**6870. When maintainable—After recovery in ejectment.]—**Where a tenant has held over possession after the expiration of his term, & the landlord recovers the possession by ejectment, he cannot afterwards maintain an action of debt under Landlord & Tenant Act, 1730 (c. 28), for the double value.

The true construction of the Act appears to be, that where there is a clear contumacy in the tenant, he shall be within the penalty of the Act; for if there is any doubt, if he had any fair ground of defence, & that defence was *bona fide* taken, it would be a hard construction to subject him to a penalty (**LORD MACDONALD, C.B.**).—**WRIGHT v. SMITH** (1805), 5 Esp. 203, N. P.

**Annotations:—***Expld.* Soulsby v. Neving (1808), 9 East, 310. **Appld.** Swinfen v. Bacon (1861), 6 H. & N. 846. **Refd.** Crook v. Whitbread (1919), 88 L. J. K. B. 959. **Mentd.** Melreles v. Banning (1831), 2 B. & Ad. 909.

**6871. — — —.]—**After a landlord has recovered in ejectment against his tenant, he may maintain debt upon Landlord & Tenant Act, 1730 (c. 28), for double the yearly value of the premises, during the time the tenant held over after the expiration of the landlord's notice to quit.

Landlord & Tenant Act, 1730 (c. 28), only meant to apply to the case of a wilful & contumacious holding over by the tenant after notice to quit & not to a *bona fide* holding over by mistake (**ELLENBOROUGH, C.J.**).—**SOULSBY v. NEVING** (1808), 9 East, 310; 103 E. R. 592.

**Annotations:—***Appld.* Swinfen v. Bacon (1860), 6 H. & N. 184. **Refd.** Crook v. Whitbread (1919), 88 L. J. K. B. 959; Northcott v. Roche (1921), 37 T. L. R. 364. **Mentd.** Barton v. Cordy (1825), M'Cle. & Yo. 278.

**6872. In what court maintainable—County court—Action for rent & double value—Whether dividing cause of action.]—**Under 9 & 10 Vict. c. 95, for recovery of small debts, it is not a dividing of the cause of action, within sect. 63, to levy one plaint for rent of premises, & another, under Landlord & Tenant Act, 1730 (c. 28), s. 1, to recover double value for holding the same premises after the expiration of a notice to quit. An action for double value lies in the cts. established under 9 & 10 Vict. c. 95. A party sued in such ct. for rent & double value, as above, cannot avail himself of 9 & 10 Vict. c. 95, s. 58, to oust the ct. of jurisdiction, by alleging title to

the premises in himself, if it be proved that he has admitted himself to have been tenant to pltf. at the times when the rent accrued, & from which the holding over commenced.—**WICKHAM v. LEE** (1848), 12 Q. B. 521; *Cox, M. & H.* 119; 18 L. J. Q. B. 21; 11 L. T. O. S. 240; 12 Jur. 628; 12 J. P. Jo. 391; 116 E. R. 963.

*Annotations*:—**Refd.** *Kerkin v. Kerkin* (1854), 18 Jur. 813; *Richards v. Marten* (1874), 23 W. L. R. 93.

**6873.** ——— **Ouster of court's jurisdiction.**—**WICKHAM v. LEE**, No. 6872, *ante*.

*See, generally, COUNTY COURTS, Vol. XIII, pp. 448 et seq.*

#### *D. Wilful Holding Over.*

*See Landlord & Tenant Act, 1730 (c. 28), s. 1.*

**6874. General rule—Must be contumacious—Not liable when fair defence.**—**WRIGHT v. SMITH**, No. 6870, *ante*.

**6875.** ——— **Not liable for bona fide mistake.**—**SOULSBY v. NEVING**, No. 6871, *ante*.

**6876.** ——— **—B., who held a farm as tenant from year to year under S., after the death of S. took the same with other lands at an increased rent from the devisee of S. The heir-at-law disputed the will. The devisee gave to B. notice to quit. B. acting under a bona fide belief that the heir-at-law was entitled, refused to give up possession of the land to the devisee:—Held: B. was not liable to pay double rent under Landlord & Tenant Act, 1730 (c. 28), which applied only when the tenant holds over though conscious he has no right to retain possession.**—**SWINFEN v. BACON** (1861), 6 H. & N. 846; 30 L. J. Ex. 308; 25 J. P. 788; 7 Jur. N. S. 897; 9 W. R. 740; 158 E. R. 349, Exch.; *sub nom.* **SWINFEN v. BACON**, **SWINFEN v. LEWIS**, 5 L. T. 83, Ex. Ch.

*Annotation*:—**Refd.** *Crook v. Whitbread* (1919), 88 L. J. K. B. 959.

**6877.** ——— **—A tenant holding over after notice to quit given by the landlord, is not liable to a distress, without some evidence of a renewal of the tenancy.**

The tenants have not waived the notice to quit by holding over. The landlords may recover the double value during the period of holding over or they may bring action for use & occupation & recover such sum as a jury may think proper to award. But they cannot distrain unless they can show an agreement between the parties to hold on at the old rent (**PARKE, J.**).—**JENNET v. CLEGG** (1832), 1 Mood. & R. 213, N. P.

*Annotations*:—**Distd.** *Williams v. Stiven* (1816), 9 Q. B. 14. **Refd.** *Hurley v. Hanrahan* (1867), 15 W. L. R. 990.

**6878.** ——— **—In an action by a landlord against his tenant for double value under Landlord & Tenant Act, 1730 (c. 28), s. 1, pltf. must show a wilful holding over by deft.; & it is not enough to show that the premises were held over by a sub-tenant of deft., without his assent or authority.**—**RANDS v. CLARK** (1870), 19 W. R. 48.

**6879. Evidence of wilful holding over—Statement by joint tenant—Not in occupation—Not admissible.**—(1) A notice to quit lands on a given day "or at such time as your holding shall

expire next after the expiration of half a year from the receipt of this notice" is a sufficient demand of possession within Landlord & Tenant Act, 1730 (c. 28), s. 1, to render the tenant liable for holding over after the determination of the notice.

(2) Where on the receipt of a notice to quit to two joint tenants, one of whom only actually occupied the land, the other said "that he had nothing to do with the land":—**Held**: this statement was not admissible to show that a holding over after the expiration of the notice, was not wilful on the part of the latter. **Qu.**: whether a joint tenant is necessarily liable for the wilful holding over of his co-tenant?—**HIRST v. HORN** (1840), 6 M. & W. 393; 151 E. R. 464.

*Annotations*:—*As to* (1) **Consd.** *Philpotts v. Rogers*, [1925] 1 K. B. 14. *As to* (2) **Refd.** *Tancred v. Christy* (1843), 2 L. T. O. S. 190; *Crook v. Whitbread* (1919), 88 L. J. K. B. 959.

**6880. Co-tenant wilfully holding over—Whether joint tenant liable.**—**HIRST v. HORN**, No. 6879, *ante*.

**6881. What amounts to wilful holding over—Where mere demand for rent.**—In an action against a tenant to recover double the value of the premises, for holding over after the expiration of a notice to quit, it is not necessary, in order that deft. may avail himself of a waiver on the part of the landlord, that such waiver should be specially pleaded.

It would not be a contumacious holding over where there was a mere demand for rent, but it must be a holding over in spite of everything (**MELLOR, J.**).—**RAWLINSON v. MARRIOTT** (1867), 16 L. T. 207, N. P.

**6882.** ——— **Holding over by sub-tenant—Without assent of tenant.**—**RANDS v. CLARK**, No. 6878, *ante*.

#### *E. Notice to Quit.*

*See Landlord & Tenant Act, 1730 (c. 28), s. 1.*

**Notice to quit generally.**—*See Part XX., ante.*

**6883. Who may give—Receiver—Appointed by court.**—**WILKINSON v. COLLEY** (1771), 5 Burr. 2694; 98 E. R. 414.

*Annotations*:—**Fold.** *Poole v. Warren* (1838), 3 Nev. & P. K. B. 693. **Refd.** *Lake v. Smith* (1895), 1 Bos. & P. N. R. 174; *Page v. More* (1850), 15 Q. B. 684; *Swinfen v. Bacon* (1860), 30 L. J. Ex. 33; *Jones v. Philpotts* (1868), L. R. 3 Q. B. 567.

**6884.** ——— **Appointed by mortgagor & mortgagee.**—A joint authority given by mtgor. & mtgee. of premises to a person to be the receiver, agent, & attorney of the mtgors., to receive the rents, until satisfaction of the mtge., to bring actions in case of non-payment of rent, to give notices to quit, to bring ejectment in case of non-compliance, etc., as fully as the mtgors. might have done, is a sufficient authority to him to demand possession of tenants, under 4 Geo. 2 (c. 28), s. 1, so as to make them liable in double value for holding over.—**POOLE v. WARREN** (1838), 8 Ad. & El. 582; 3 Nev. & P. K. B. 693; 1 Will. Woll. & H. 518; 3 Jur. 23; 112 E. R. 959.

*Annotation*:—**Mentd.** *Edwards v. Camerons Ry.* (1850), 16 L. T. O. S. 197.

#### **PART XXIV. SECT. 10, SUB-SECT. 3.—D.**

**6874 i. General rule—Must be contumacious—Not liable when fair defence.**—**NANKIN v. STARLAND, LTD.** (Alta.) (1910), 15 W. L. R. 520.—**CAN.**

**6874 ii.** ——— **Not liable for bona fide mistake.**—*As deft. was not conscious that he had no right to retain*

possession:—**Held**: double value should not be awarded against him.—**DICKSON CO. v. GRAHAM** (1913), 23 O. W. R. 749; 4 O. W. N. 670; 9 D. L. R. 813.—**CAN.**

**6877 i.** ——— **—DUNDAS v. OSMONT** (1906), 4 W. L. R. 116; *on appeal* (1907), 6 W. L. R. 86.—**CAN.**

*n. Agreement to refer to arbitration claim for improvements—Whether good defence.*—It is no answer to an

action for the recovery of double the yearly value of premises held over after notice to quit, that subsequent to the notice, & while the tenant remained in possession, an agreement was made between him & the landlord to refer to arb'n. a claim made by the tenant for improvements on the premises during the tenancy.—**HATHWAY v. McMAHON** (1843), 2 Kerr, 209.—**CAN.**

*Sect. 10.—Action for double rent or double value: Sub-sect. 3, E., F., G., H. & I. Part XXV. Sects. 1 & 2.]*

**6885. Time for—Before expiration of term.]—**CUTTING v. DERBY, No. 6850, *ante*.

**6886. ———.]—**If a landlord give notice to his tenant to quit at the expiration of the lease, & the tenant hold over, the landlord is entitled to double rent.

The landlord, before the time expired, told the tenant, "you know you are to quit"; the meaning of that is, "If you do not quit, I will insist on my double rent," & he gave him a second notice afterwards, wherein he said in so many express words what was before to be collected by indentment (LORD MANSFIELD, C.J.).—MESSENGER v. ARMSTRONG (1785), 1 Term Rep. 53; 99 E. R. 968. *Annotation:—Expld.* Johnston v. Huddleston (1825), 7 Dow. & Ry. K. B. 411.

**6887. ———.]—**JOHNSTONE v. HUDDLESTONE, No. 6716, *ante*.

**6888. ——— After expiration of term.]—**COBB v. STOKES, No. 6897, *post*.

**6889. Time of expiration of notice—Not before expiration of term—Effect of notice for noon on last day.]—**An action for double value under 4 Geo. 2 (c. 28), s. 1, for holding over after notice to quit, is not supported by a notice that the landlord requires the tenant to give up possession at twelve at noon on, etc., the day when the tenancy was determinable, at which time the landlord will attend to receive the keys & rent, & that, in the event of the tenant not so surrendering, the landlord will demand 7s. daily rent, a rate more than double the original rate of rent, till he can obtain legal possession. For the requisition to deliver up the premises at noon is premature, & insufficient as a notice to determine the tenancy. Although a notice to quit, when regular, operates also as a demand of possession under 4 Geo. 2 (c. 28), without a more specific demand:—*Semble*: a notice having the above defect is not equivalent to a demand.—PAGE v. MORE (1850), 15 Q. B. 684; 117 E. R. 618.

*Annotations:—Refd.* Sidebotham v. Holland, [1895] 1 Q. B. 378. *Mentd.* Brakspear v. Barton, [1924] 2 K. B. 88.

#### F. Demand for Possession.

*See* Landlord & Tenant Act, 1730 (c. 28), s. 1.

**6890. Notice to quit sufficient.]—**WILKINSON v. COLLEY (1771), 5 Burr. 2694; 98 E. R. 414.

*Annotations:—Apld.* Lake v. Smith (1805), 1 Bos. & P. N. R. 174. *Expld.* Page v. More (1850), 15 Q. B. 684. *Refd.* Poole v. Warren (1838), 3 Nov. & P. K. B. 693; Swinfen v. Bacon (1860), 30 L. J. Ex. 33; Jones v. Phipps (1868), L. R. 3 Q. B. 567.

**6891. ———.]—**MESSENGER v. ARMSTRONG, No. 6886, *ante*.

**6892. ———.]—**HIRST v. HORN, No. 6879, *ante*.

**6893. ——— If notice regular—No demand by bad notice.]—**PAGE v. MORE, No. 6889, *ante*.

**6894. Who may make—Receiver.]—**POOLE v. WARREN, No. 6881, *ante*.

*See, also*, No. 6883, *ante*.

**6895. Time for—After expiration of term—If tenancy not acknowledged meanwhile.]—**COBB v. STOKES, No. 6897, *post*.

*See, also*, Nos. 6850, 6886, *ante*.

#### G. Ascertainment of Double Value.

*See* Landlord & Tenant Act, 1730 (c. 28), s. 1.

**6896. General rule.]—**The penalty given by the

statute [Distress for Rent Act, 1730 (c. 28)] is not double rent but double the yearly value which is more favourable to landlords, for the double rent would be no penalty on the expiration of some leases (LORD MANSFIELD, C.J.).—DOE d. MATTHEWS v. JACKSON (1779), 1 Doug. K. B. 175; 99 E. R. 115.

*Annotations:—Apld.* Doe d. Lyster v. Goldwin (1841), 2 Q. B. 143. *Refd.* Ahearn v. Bellman, Sedgwick v. Ahearn (1879), 4 Ex. D. 201; Bury v. Thompson, [1895] 1 Q. B. 696.

**6897. From what date reckoned—Date of demand—Demand after expiration of term—Single rent for interim period not recoverable.]—**Where a demise is for a certain time, no notice to quit is necessary at or before the end of the term to put an end to the tenancy; but a demand of possession & notice in writing, etc., are necessary to entitle the landlord to double rent or value; & such demand may be made for that purpose above six weeks afterwards, if the landlord have done no act in the mean time to acknowledge the continuation of the tenancy; & he will thereupon be entitled to double value as from the time of such demand, if the tenant hold over; but if the rent were before reserved quarterly, & such demand be made in the middle of a quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter.—COBB v. STOKES (1807), 8 East, 358; 103 E. R. 380.

**6898. ——— Expiration of notice—Landlord recovering in ejectment.]—**SOULSBY v. NEVING, No. 6871, *ante*.

**6899. How estimated—Lease of mill & power therefor—Value of power not included.]—**Where pltf., being the owner of a woollen mill & steam-engine, let to deft. a room in the mill together with a supply of power from the steam-engine by means of a revolving shaft, in the room:—*Held*: in an action for double value, under Landlord & Tenant Act, 1730 (c. 28), against the tenant for holding over after the expiration of a notice to quit, in estimating such double value, the value of the power supplied could not be included.—ROBINSON v. LEAROYD (1840), 7 M. & W. 48; 10 L. J. Ex. 166; 151 E. R. 673.

*Annotations:—Expld.* Marshall v. Schofield (1882), 52 L. J. Q. B. 58. *Refd.* Selby v. Greaves (1868), L. R. 3 C. P. 594.

#### H. Waiver.

*See* Landlord & Tenant Act, 1730 (c. 28), s. 1.

**6900. Tender of single rent—Accepted before action—Whether waiver—Question of fact.]—**RYAL v. RICH, No. 6861, *ante*.

**6901. Availability as defence—Need not be specially pleaded.]—**RAWLINSON v. MARRIOTT, No. 6881, *ante*.

#### I. Other Cases.

*See* Landlord & Tenant Act, 1730 (c. 28), s. 1.

**6902. Not recoverable by distress—No certainty of value.]—**TIMMINS v. ROWLISON, No. 6849, *ante*.

**6903. Joinder of claim for use & occupation—Same period of occupation—Recovery on both claims.]—**A declaration contained a count for double value, & a count for use & occupation. The particulars of demand stated, that pltf. sought to recover, under the second count £75 being the single rent of the premises mentioned in the first count. Deft. paid £75 into ct. upon the second count, which pltf. took out of ct. The holding

over in the first count & the occupation in the second, were during the same period:—*Held*: plff. might still recover upon the first count.—*COLLINS v. KINGSBURY* (1848), 13 Jur. 98.

—*Compare* No. 6858, *ante*.

**6904. Effect of Rent & Mortgage Interest Act, 1915 (c. 97).—**Tenant of premises subject to Act—**Not liable.**—Terms of tenancy continued.]—Where a tenant of premises to which above Act applies, holds over after the determination of the term &

a notice to give up the premises, he is not liable for double the yearly value under Landlord & Tenant Act, 1730 (c. 28), s. 1, or for use & occupation after the expiration of the notice, but he remains a tenant on the terms of his former tenancy.—*CROOK v. WHITBREAD* (1919), 88 L. J. K. B. 959; 121 L. T. 278; 35 T. L. R. 522; 17 L. G. R. 504, D. C.

*Annotation*:—*Reid*. *Glossop v. Ashley*, [1921] 2 K. B. 451.

—*Compare* No. 6860, *ante*.

## Part XXV.—Delivery and Recovery of Possession.

### SECT. 1.—RE-ENTRY.

**6905. Right to re-enter—**Where tenant quits—**Whether ejectment necessary.**—If a tenant quit without any intention of returning, the landlord may enter without bringing ejectment.—*LACEY v. LEAR* (1802), Peake, Add. Cas. 210, N. P.

**6906. ——— Right to break in.**—If a tenancy of a house be determined, & the tenant has promised to leave on a particular day, but afterwards refuses to do so, the landlord is not justified in putting the tenant's wife by force out of the house, & putting the tenant's furniture into the street; but if the tenancy be determined, & the tenant & his family be gone away & the house locked up, no one being in possession, the landlord would be justified in breaking into the house & obtaining possession.—*HILLARY v. GAY* (1833), 6 C. & P. 284, N. P.

*Annotations*:—*Apld*. *Newton v. Harland* (1840), 1 Man. & G. 644. *Reid*. *Beddall v. Maitland* (1881), 29 W. R. 484; *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K. B. 720.

—**Where tenant refuses to give possession.**—*See* Sect. 3, *post*.

**6907. ——— Term granted shorter than term agreed—Restraint by injunction.**—Perpetual injunction granted against persons claiming a reversion upon the expiration of a lease made for a term of years shorter than was contracted for by the parties to the lease.—*WILDE v. ASHLEY* (1838), 2 Jur. 679.

**6908. Sufficiency of entry—Entry on part.**—An entry into part of lands is good for the whole.—*COTTON'S CASE* (1590), Cro. Eliz. 189; 78 E. R. 445.

**6909. Effect of re-entry—On landlord's rights against third parties.**—A lessor having entered at the expiration of the term might sue in trespass persons claiming under the late tenant as well as the late tenant himself.—*HEY v. MOORHOUSE* (1839), 6 Bing. N. C. 52; 8 Scott, 156; 9 L. J. C. P. 113; 133 E. R. 20.

*Annotation*:—*Reid*. *Newton v. Harland* (1840), 1 Man. & G. 644.

**Re-entry on forfeiture.**—*See* Part XXIV., Sect. 1, sub-sect. 2, *ante*.

### PART XXV. SECT. 2.

**6910. General rule.**—The lease under which deft. held having expired:—*Held*: he could not set up a lease from plff. to a third party, to commence at the expiration of his lease, & contend that the lessee under that lease was entitled to possession, but that he must give up possession, in accordance with the terms of his lease, to his landlord.—*FOX v. MACAULAY* (1862), 12 C. P. 298.—*CAN.*

*o. As against sub-lessees.*—*TORONTO HOSPITAL TRUSTEES v. DENHAM* (1880), 31 C. P. 203.—*CAN.*

*p. At expiration of lease for one year.*—Upon an originating summons by plffs. to obtain possession of premises held by them as lessees of

the owners, & sublet by plffs. to defts.:—*Held*: defts. were in possession under a lease for one year, which terminated on Feb. 1, 1911, & were, after that date tenants at will only; & plffs. were, therefore, entitled to possession.—*STANDARD CLOTHING CO. v. SASKATCHEWAN VALLEY LAND CO. (ALTA.)* (1911), 17 W. L. R. 544.—*CAN.*

*q. Tenant overholding under colour of right—Without proof of right.*—*Re CANADIAN PACIFIC RY. CO. & LECHTZIER* (1904), 23 C. L. T. 339.—*CAN.*

*r. Tenant repudiating landlord's title.*—The weight of authority of the decisions of the High Ct. is in favour of the view that when a tenant directly repudiates the relation of landlord &

### SECT. 2.—LESSOR'S RIGHT TO POSSESSION.

**6910. General rule.**—*HARDING v. CRETHORN*, No. 6932, *post*.

**6911. Where no provision in lease—Contract implied.**—*HENDERSON v. SQUIRE*, No. 6925, *post*.

**6912. On parol demise.**—*HENDERSON v. SQUIRE*, No. 6925, *post*.

**6913. As against sub-lessees—**Though tortiously evicted by mesne lessor.]—If my lessee covenants, at the end of his term, to deliver possession to me, & in order to do so forcibly evicts one to whom he had sub-let for a longer term, & I take possession without notice, surely I can keep it; at least at the common law I could (*BRAMWELL, B.*).—*HOOPER v. LANE* (1857), 6 H. L. Cas. 443; 27 L. J. Q. B. 75; 30 L. T. O. S. 33; 3 Jur. N. S. 1026; 6 W. R. 146; 10 E. R. 1368, H. L.

*Annotations*:—*Mentd.* *Bateman v. Preston* (1861), 3 E. & E. 578; *Ex p. Preston* (1861), 3 De G. F. & J. 612; *Ockford v. Preston, Chapman v. Same* (1861), 6 H. & N. 466; *Tyne Improvement Comrs. v. General Steam Navigation Co.* (1866), 8 B. & S. 66; *Re London Celluloid Co.* (1888), 39 Ch. D. 190.

—*See, also*, No. 6919, *post*.

**6914. Demand of possession—Whether necessary.**—In declaring on a covenant by lessee to deliver up possession to lessor, at the end of the term, it is needless to allege a request. Deft. may plead that he was ready to deliver, & that no body was there to receive.—*NORRIS v. ELSWORTH* (1678), *Freem.* K. B. 462; 89 E. R. 345.

**6915. Attendance to receive possession—Whether necessary.**—*NORRIS v. ELSWORTH*, No. 6914, *ante*.

**6916. Grounds for interference by court—Outstanding questions between parties.**—Equity cannot compel a resort to comrs. appointed under an Act of Parliament to settle disputes between parties arising from a navigation; a lease for years having expired, & the landlord proceeding to recover possession.—*STANHOPE v. PILKINGTON* (1815), Coop. G. 193; 35 E. R. 528.

**6917. Covenant by tenant to yield up—Tenant dispossessed by title paramount—Covenant discharged.**—*ANDREWS v. NEEDHAM* (1598), Noy, 75; Cro. Eliz. 656; 74 E. R. 1042.

tenant & sets up an adverse title in himself the landlord is entitled to take possession irrespective of the period during which the tenant may have been in possession.—*SHUMSHER ALI v. DOYA BIBI* (1881), 8 C. L. R. 150.—*IND.*

*t. Covenant for renewal on request—No request made—Landlord's right to possession without demand.*—Deft. held under lease for five years, containing a covenant by the lessor to grant him a renewal for five years at a rent named, if requested. The first term having expired, & no request made:—*Held*: the lessor might eject without any demand.—*DAWSON v. ST. CLAIR* (1856), 14 U. C. R. 97.—*CAN.*

### SECT. 3.—FAILURE OF LESSEE TO GIVE POSSESSION.

#### SUB-SECT. 1.—WHAT AMOUNTS TO.

**6918. Partial occupation—Beer left in cellar.]—**Leaving beer in a cellar is keeping the possession.—*SAVAGE v. DENT* (1736), 2 Stra. 1064; 93 E. R. 1034.

**6919. — By underlessee.]—**If upon notice to quit given to a tenant he gives notice to his undertenants to quit at the same time, & upon the expiration of the notice he quits so much as is occupied by himself but his undertenants refuse to quit, an ejectment may still be maintained against him for so much as his undertenants have not given up.—*ROE v. WIGGS* (1806), 2 Bos. & P. N. R. 330; 127 E. R. 654.

**6920. — Whether tenant accepted as sub-tenant by incoming tenant.]—***BEAUCLERC (LADY) v. CLIFT* (1851), 17 L. T. O. S. 62.

**6921. — —.]—***HENDERSON v. SQUIRE*, No. 6925, *post*.

**6922. Possession retained by sub-lessee—Against will of lessee.]—***IBBS v. RICHARDSON*, No. 6934, *post*.

**6923. Possession retained by lessee's caretaker—Against will of lessee.]—**A caretaker, engaged by a tenant, held over, notwithstanding the willingness of the tenant that the landlord should have possession of the premises at the expiration of the tenancy:—*Held*: the landlord was entitled to maintain an action against the tenant & to recover damages for the trouble & expense occasioned by the turning out of the caretaker, & for loss of mesne profits.—*HENDERSON v. VAN COOTEN* (1922), 67 Sol. Jo. 228.

**6924. Accidental retention of key.]—**Where a tenancy from year to year has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant, who has quitted the premises & removed his goods, for two days beyond the expiration of the term, does not amount to any evidence of use & occupation, so as to render him liable for another quarter.—*GRAY v. BOMPAS* (1802), 11 C. B. N. S. 520; 5 L. T. 841; 142 E. R. 899.

*Annotation:—Mentd. Schroder v. Ward* (1863), 13 C. B. N. S. 410.

#### SUB-SECT. 2.—REMEDIES OF LESSOR.

##### A. Action for Damages.

**6925. Liability of tenant—Holding over by sub-tenant.]—**(1) A tenant, under a parol agreement, without any stipulation that he shall deliver up possession of the premises at the end of the term, is nevertheless bound at law to deliver up complete possession.

(2) Where, therefore, a tenant, under such an agreement, has underlet a part of the premises, & at the determination of both tenancies the undertenant holds over against the will of the tenant, the landlord can recover against the tenant as damages the value of the whole premises for the time he is kept out of possession, & the costs of ejecting the undertenant.

The landlord is entitled to recover all the loss he has sustained by not being put in possession of the entire premises at the end of the term; he

is entitled to a sum equivalent to the rent which he has lost & to the expenses he has been put to in taking legal proceedings to oust the sub-tenant from a wrongful possession (*COCKBURN, C.J.*).

(3) The declaration contained a special count, alleging that deft. was tenant upon the terms that he should at the determination of the tenancy give up possession to pltf.; that the tenancy was duly determined, yet that deft. did not give up possession, whereby, etc. Deft. pleaded to this count, payment of 40s. into ct. The ct., being of opinion that, under the circumstances of the case, deft. could not have intended to admit that pltf. was entitled to recover more than the sum of 40s., intimated that it would, if necessary, allow such an amendment as would leave deft. at liberty to deny that there had been a breach of the contract alleged in the count.

(4) The question is where there is a tenancy & nothing is expressed as to delivering up possession at its determination whether there is an implied contract that the tenant shall not only go out of possession, but restore the possession to the landlord. . . . I think that there is such an implied contract (*BLACKBURN, J.*).—*HENDERSON v. SQUIRE* (1869), L. R. 4 Q. B. 170; 10 B. & S. 183; 38 L. J. Q. B. 73; 19 L. T. 601; 33 J. P. 532 17 W. R. 519.

*Annotations:—As to* (2) *Distd. Reynolds v. Bannerman*, [1922] 1 K. B. 719. *Appld. Henderson v. Van Cooten* (1922), 67 Sol. Jo. 228. *As to* (4) *Appld. Henderson v. Van Cooten* (1922), 67 Sol. Jo. 228. *Generally, Refd. Itands v. Clark* (1870), 19 W. R. 48.

**6926. — Tenant's caretaker refusing to quit—Against will of tenant.]—***HENDERSON v. VAN COOTEN*, No. 6923, *ante*.

**6927. Liability of undertenants.]—***HEY v. MOORHOUSE*, No. 6909, *ante*.

**6928. Measure of damages—Actual damage sustained—Covenant to deliver up fixtures.]—**By a covenant in a lease the tenant covenanted to deliver up certain fixtures on the premises at the expiration of the term. The term expired on Apr. 1; on Apr. 10 the landlord demanded possession; on Apr. 13 the tenant received notice of his title from a mtgee. of the demised premises, & a requisition to pay the rent to him; & on the same day he purchased the interest on the mtgc. Subsequently the landlord brought an action for the breach of covenant in not delivering up the fixtures:—*Held*: the tenant was not in such action estopped from denying the title of the landlord, & pltf. was not entitled to recover the full value of the fixtures, but only the actual damage he had sustained by being deprived of the possession of them for the period of time between the expiration of the tenancy & the giving of the notice by the mtgee.—*WATSON v. LANE* (1856), 11 Exch. 769; 25 L. J. Ex. 101; 26 L. T. O. S. 260; 2 Jur. N. S. 119; 4 W. R. 293; 156 E. R. 1042.

*Annotations:—Expld. Delaney v. Fox* (1857), 2 C. B. N. S. 768. *Refd. Hodgson v. McCreagh* (1923), 93 L. J. Ch. 339.

**6929. — Damages recovered by prospective tenant—& costs of action.]—**If a landlord, after giving a yearly tenant notice to quit at the end of his year, afterwards agrees to let the premises to A. from the end of the year, & informs the tenant that he has done so, but the tenant nevertheless holds the premises over for another quarter, &

#### PART XXV. SECT. 3, SUB-SECT. 2.—A.

**a. Measure of damages—Damages recovered by prospective tenant—& rent.]—**A lessor having become liable to a second lessee in damages for not

being able to give possession of the premises in consequence of the first lessee wilfully holding over until ejectment:—*Held*: the lessor was entitled to recover such damages from the first lessee, besides an amount equal to the rent for the period of

such wrongful occupation.—*NICHOLSON v. MYBURGH* (1897), 14 S. C. 384.—S. AF.

**b. Where deed of surrender executed.]—***D'ARCY v. CASTLEMAINE (LORD) & CAMERON*, [1909] 2 I. R. 474.—IR.

after being ejected, pays the landlord a quarter's rent for the extra quarter, the landlord is not prevented by the receipt of the rent from bringing an action against the tenant for the damages occasioned by his holding over, & in that action the landlord may recover as damages the amount of the ordinary damages which he has had to pay in an action brought against him by A. for not giving him possession at the time agreed on, & also the costs of such action.—**BRAMLEY v. CHESTERTON** (1857), 2 C. B. N. S. 592; 27 L. J. C. P. 23; 29 L. T. O. S. 227; 21 J. P. 807; 3 Jur. N. S. 1104; 5 W. R. 690; 140 E. R. 548.

*Annotation*:—**Reid**. Portman v. Middleton (1858), 27 L. J. C. P. 231.

**6930. — Value of whole premises—Though possession of part only retained—Costs of ejecting sub-tenant.**—**HENDERSON v. SQUIRE**, No. 6925, *ante*.

**6931. Effect of payment into court—As admission.**—**HENDERSON v. SQUIRE**, No. 6925, *ante*.

*See, generally, PRACTICE.*

### B. Claim for Rent.

**6932. General rule.**—(1) When a lease is expired, the tenant continues liable to the rent unless he delivers up complete possession of the premises, or the landlord accepts another in his room.

The lessor is entitled to receive the absolute possession at the end of the term (**LORD KENYON**).

—**HARDING v. CRETHORN** (1793), 1 Esp. 56, N. P. *Annotations*:—*As to* (1) **Apld.** Christy v. Tancered (1840), 7 M. & W. 127. **Consd.** Christy v. Tancered (1842), 9 M. & W. 438. **Apld.** Henderson v. Squire (1869), L. R. 4 Q. B. 170. **Refd.** Hurley v. Hanrahan (1867), 15 W. R. 990. *As to* (2) **Consd.** Henderson v. Squire (1869), L. R. 4 Q. B. 170. **Distd.** Reynolds v. Bannerman, [1922] 1 K. B. 719.

**6933. —**—**HENDERSON v. SQUIRE**, No. 6925, *ante*.

**6934. Premises underlet—Holding over by sub-tenant—Measure of tenant's liability.**—Lessee for a term ending on Oct. 11, underlet to C. from year to year, subject to the determination of his own interest. Upon the expiration of the term, C. refused to quit, & held over against the will of the lessee. On Oct. 16 the lessee distrained on him for rent due before Oct. 11. On Dec. 14 C. quitted; & the lessee then tendered possession to the original landlord, who refused to accept it:—**Held**: the lessee was liable, in an action for use & occupation, to pay rent to his landlord for the period between Oct. 11 & Dec. 14, but not for any longer period.—**IRBS v. RICHARDSON** (1839), 9 Ad. & El. 849; 1 Per. & Dav. 618; 8 L. J. Q. B. 126; 3 Jur. 102; 112 E. R. 1436.

*Annotations*:—**Consd.** Levy v. Lewis (1861), 9 C. B. N. S. 872. **Distd.** Reynolds v. Bannerman, [1922] 1 K. B. 719. **Refd.** Tancered v. Christy (1843), 12 M. & W. 316; Hurley v. Hanrahan (1867), 15 W. R. 990; Henderson v. Squire (1869), 10 B. & S. 183.

**6935. —**—**HENDERSON v. SQUIRE**, No. 6925, *ante*.

**6936. One of two joint tenants holding over.**—Where there is a demise to A. & B. for a term, & B. holds over after the expiration of the term, without A.'s assent, A. is not liable for rent becoming due during such holding over.—**DRAPER v. CROFTS** (1846), 15 M. & W. 166; 15 L. J. Ex. 92; 153 E. R. 807.

**Right of landlord to recover for use & occupation—On tenant holding over.**—*See* Part XV., Sect. 10, sub-sect. 3, C. (c), *ante*.

**Claim for double rent or double value.**—*See* Part XXIV., Sect. 10, *ante*.

### C. Re-Entry.

**6937. Right of landlord.**—**TAYLOR v. BEAUMONT** (prior to 1823), cited 7 Moore, C. P. at p. 578. *Annotation*:—**Consd.** Turner v. Meymott (1823), 7 Moore, C. P. 574.

**6938. —**—A tenant holding over after the expiration of his term cannot distrain the landlord's cattle which were put upon the premises by way of taking possession.—**TAUNTON v. COSTAR** (1797), 7 Term Rep. 431; 101 E. R. 1060.

*Annotations*:—**Apld.** Davis v. Connop (1814), 1 Price, 53; Turner v. Meymott (1823), 1 Bing. 158; Butcher v. Butcher (1827), 7 B. & C. 399. **Consd.** Newton v. Harland (1840), 1 Man. & G. 644. **Refd.** Doe d. Stevens v. Lord (1838), 6 Dowl. 256; Wright v. Burroughes (1846), 3 C. B. 685; Davison v. Wilson (1848), 11 Q. B. 890; Jones v. Chapman (1849), 2 Exch. 803; Hemmings v. Stoke Poges Golf Club, [1920] 1 K. B. 720.

—*See, generally, Sect. 1, ante*.

**6939. — Forcible entry.**—No action of trespass *vi et armis* will lie for a tenant at will against his landlord, for the lord's entering or distraining for rent, etc. (**HOLT, C.J.**).—**ANON.** (1709), 11 Mod. Rep. 209; 88 E. R. 994.

**6940. —**—A tenant having omitted to deliver up possession when his term had expired after a regular notice to quit, the landlord, in his absence, broke open the door, & resumed possession; though some articles of furniture remained. The tenant having obtained a verdict against the landlord in trespass for this entry, the ct. granted a new trial, holding that the landlord might so enter in such a case.—**TURNER v. MEYMOTT** (1823), 1 Bing. 158; 7 Moore, C. P. 574; 1 L. J. O. S. C. P. 13; 130 E. R. 64.

*Annotations*:—**Consd.** Hillary v. Gay (1833), 6 C. & P. 284; Newton v. Harland (1840), 1 Man. & G. 644. **Refd.** Doe d. Willson v. Phillips (1824), 2 Bing. 13; Doe d. Stevens v. Lord (1838), 6 Dowl. 256; Davison v. Wilson (1848), 11 Q. B. 890; Hemmings v. Stoke Poges Golf Club, [1920] 1 K. B. 720.

**6941. —**—**HILLARY v. GAY**, No. 6906, *ante*.

**6942. —**—Where a tenant remains in possession after the expiration of his term, a landlord is not justified in expelling him by force, in order to regain possession. *Semble*: possession so acquired is not sufficient to vest the possession in the landlord with relation to the termination of the term.—**NEWTON v. HARLAND** (1840), 1 Man. & G. 644; 1 Scott, N. R. 474; 2 Jur. 350; 133 E. R. 490.

*Annotations*:—**Consd.** Beddall v. Maitland (1881), 17 Ch. D. 174; Jones v. Foley (1891), 60 L. J. Q. B. 464. **Overd.** Hemmings v. Stoke Poges Golf Club, [1920] 1 K. B. 720. **Refd.** Harvey v. Bridges (1845), 3 Dowl. & L. 55; Wright v. Burroughes (1846), 3 C. B. 685; Davis v. Burrell (1851), 10 C. B. 821; Delancy v. Fox (1856), 1 C. B. N. S. 166; Pollon v. Brewer (1859), 1 L. T. 9; Accidental Death Inco. v. Mackenzie (1861), 5 L. T. 20; Blades v. Higgs (1861), 10 C. B. N. S. 713; Telford v. Laws (1874), 31 L. T. 90; Edridge v. Hawker (1881), 50 L. J. Ch. 577. **Mentd.** Carter v. Hughes (1858), 2 H. & N. 714.

**6943. —**—Pending a negotiation for an assignment of a lease, A. was, as the jury found, let into possession of the premises as tenant of some kind. The negotiation going off, B., the landlord, demanded the key, & wrote to A., telling him that he never intended to let him into possession at all, & A., refusing to go out, B. entered & forcibly expelled him & his family, in the doing of which pltf. & his wife were assaulted:—**Held**: although pltf. was entitled to recover damages for the assaults, he was not entitled to damages for the expulsion, his tenancy being at the most a tenancy at will, & that having been properly determined.—**POLLEN v. BREWER** (1859),

### PART XXV. SECT. 3, SUB-SECT. 2.—C.

**6939 1. Right of landlord—Forcible entry.**—**MARGUSON v. GRANT** (1921), 57 D. L. R. 710.—**CAN.**

**Sect. 3.—Failure of lessee to give possession: Sub-sect. 2, C. & D. Sect. 4: Sub-sect. 1, A. & B.; sub-sect. 2, A. (a), (b), (c), (d) & (e).]**

7 C. B. N. S. 371; 1 L. T. 9; 6 Jur. N. S. 509; 141 E. R. 860.

**Annotation:—***Refd.* *Beddall v. Maitland* (1881), 17 Ch. D. 174.

**6944.** ———.]—The owner is justified in entering on his own premises by force.—*WILLIAMS v. TAPERELL* (1892), 8 T. L. R. 241, D. C.

**6945.** ———.]—5 Ric. 2, stat. 1, c. 7, provides that none make any entry into any lands & tenements, but in case where entry is given by the law; & in such case not with strong hand, nor with multitude of people, but only in peaceable & easy manner; & that if any man do to the contrary, & thereof be duly convicted, he shall be punished by imprisonment of his body, & thereof ransomed at the King's will.

Pltfs., a man & his wife, lived in a cottage belonging to defts., the man being in their service & being required by them to live in the cottage as part of his service & for the performance of his duties. He left their service, but refused to give up the cottage after notice to quit duly given. Thereupon by command of defts. several persons entered the cottage & removed pltfs. & their furniture, using no more force than was necessary for that purpose. In an action by pltfs. for assault, battery & trespass:—*Held*: defts. were not liable, their right of entry being a defence to civil proceedings for the acts complained of.—*HEMMINGS v. STOKES POGES GOLF CLUB*, [1920] 1 K. B. 720; 89 L. J. K. B. 744; 122 L. T. 479; 36 T. L. R. 77; 64 Sol. Jo. 131, C. A.

——— **Liability to criminal proceedings.]—***See, generally*, CRIMINAL LAW, Vol. XV., pp. 650 *et seq.*

**6946.** ——— **What amounts to.]—**Pltf. occupied a cottage belonging to deft. F. under a tenancy determinable upon three months' notice. On Mar. 24, 1890, notice to quit the premises at Midsummer was given by F., but pltf. refused to give up possession on the termination of the tenancy, though informed that the owner had entered into a contract with B., a co-deft., to pull down & rebuild pltf.'s cottage, & also one adjoining. On Sept. 3, F., being still unable to get possession of the cottage occupied by pltf., applied for & obtained from justices an order requiring possession to be given up within twenty-one days under Small Tenements Recovery Act, 1838 (c. 74). The same day that the order was obtained some tiles were removed by one of defts. from the roof of pltf.'s cottage & fell into a bedroom, thereby injuring some of his furniture; & before the twenty-one days had expired the foundations of the new cottages were dug in the garden, & some garden produce destroyed. There was also, within the time specified by the justices' order, some further interference with the roof & consequent damage to the furniture:—*Held*: an action for trespass & damage to pltf.'s goods was not maintainable, inasmuch as there was no evidence of any cause of action, & defts. were justified in acting as they did, notwithstanding the justices' order.—*JONES v. FOLEY*, [1891] 1 Q. B. 730; 60 L. J. Q. B. 464; 64 L. T. 538; 55 J. P. 521; 39 W. R. 510; 7 T. L. R. 440, D. C.

**Annotation:—***Refd.* *Hemmings v. Stokes Poges Golf Club* (1919), 89 L. J. K. B. 744.

**6947.** ——— **Pleading.]—**A declaration in trespass alleged that deft. with force & arms broke & entered pltf.'s dwelling-house. Plea: A., being seised in fee of the dwelling-house, demised it to B. for twenty-one years; B. demised to

deft. for all the residue of his term, wanting one day; & pltf., claiming title under colour of a charter of demise, pretended to have been thereof made to him by A., for life, before the making of the demise by A. to B., whereas nothing ever passed by virtue of that charter, during the continuation of the several terms, entered into the dwelling-house, & was thereof possessed; whereupon deft. entered, etc. Replication: before the making of the demise from B. to deft., & whilst B. was possessed of the term, B. demised the premises to D. for three years; & D. assigned his term to pltf., who thereupon became possessed, & remained so until the committing of the trespasses. Rejoinder: the demise to D. was subject to a condition; the condition was broken, & deft. entered for the breach:—*Held*: (1) deft. being an assignee of the reversion within the 32 Hen. 8, c. 34, could avail himself of the breach of condition; & (2) the allegation that the trespass had been committed with force & arms, did not import a forcible entry.—*WRIGHT v. BURROUGHS* (1846), 3 C. B. 685; 4 Dow. & L. 438; 16 L. J. C. P. 6; 8 L. T. O. S. 119; 10 Jur. 968; 136 E. R. 274.

**Annotations:—***As to* (1) *Refd.* *Taitte v. Gosling* (1879), 11 Ch. D. 273; *Horn v. Beard*, [1912] 3 K. B. 181. *Generally*, *Refd.* *Liddy v. Kennedy* (1871), L. R. 5 H. L. 134.

**6948.** ——— **Whether lost by proceedings under Small Tenements Recovery Act, 1838 (c. 74).]**—*DELANEY v. FOX*, No. 6968, *post*.

**6949.** ———.]—*JONES v. FOLEY*, No. 6946, *ante*.

——— **On forfeiture for breach of covenant.]—***See* Part XXIV., Sect. 1, sub-sect. 2, A. (c), *ante*.

**6950. Unlawful entry—Remedy of tenant.]—***TAYLOR v. BEAUMONT* (prior to 1823), cited 7 Moore, C. P. at p. 578.

**Annotation:—***Refd.* *Turner v. Meymott* (1823), 7 Moore, C. P. 574.

#### *D. Action for Recovery.*

*See* Sect. 4, *post*.

### SECT. 4.—LEGAL PROCEEDINGS.

#### SUB-SECT. 1.—ACTION FOR RECOVERY OF POSSESSION.

##### *A. In High Court.*

*See* REAL PROPERTY.

##### *B. In County Court.*

*See* County Courts Act, 1888 (c. 43), s. 138.

**Jurisdiction—Ejectment.]—***See* COUNTY COURTS, Vol. XIII., pp. 469, 470.

**Recovery of possession.]—***See* COUNTY COURTS, Vol. XIII., pp. 470, 471.

**Where title to land in question.]—***See* COUNTY COURTS, Vol. XIII., pp. 476 *et seq.*

**Whether judgment bar to subsequent action.]—***See* COUNTY COURTS, Vol. XIII., pp. 505, 506.

#### SUB-SECT. 2.—PROCEDURE BEFORE MAGISTRATES.

##### *A. Under Small Tenements Recovery Act, 1838.*

##### *(a) In General.*

**6951. Whether justices bound to entertain application—Where claim by mortgagee.]—**(1) The first question for the decision of justices when a complaint is duly preferred before them under sect. 1 of above Act is, whether the relation of landlord & tenant subsists between complainant & the occupier. When, therefore, magistrates

dismissed a complaint, on the suggestion of a third party that complainant had mortgaged his interest in the premises in question, & that an action of ejectment was pending, & refused to hear the witnesses in support of the complaint, this ct. issued a *mandamus* to them to hear & adjudicate.

To entitle a complainant to a *mandamus* to issue a warrant for giving possession under sect. 1 of above Act, the fact that the relation of landlord & tenant subsists between the parties, must be distinctly shown on affidavit. *Semble*: a *mandamus* to issue a warrant for giving possession under sect. 1 of above Act will lie, when due complaint has been made, & the proof required by sect. 1 has been given.

(2) Granting a warrant under above is a judicial not a ministerial act.—*R. v. NEWENT JJ.* (1845), 4 L. T. O. S. 289; 9 J. P. 211.

**6952. Jurisdiction of justices—Relation of landlord & tenant must subsist.**—*R. v. NEWENT JJ.*, No. 6951, *ante*.

**6953.** — **No rent paid.**—*Ex p. FRISBY* (1851), 17 L. T. O. S. 84.

**6954.** — **Landlord paying taxes & repairing.**—*W.* had occupied a house for twenty-five years, having taken it as yearly tenant from *F.*, but no rent had ever been paid by *W.*, nor was anything said about rent when *W.* entered, yet *F.* had paid all the taxes & done the repairs. *F.* having proceeded under above Act for ejectment:—*Held*: on such evidence the justices were wrong in making a warrant to eject.—*WEBB v. FORDRED* (1868), 32 J. P. 804.

**6955.** — **Hospital tenement—Tenant in without nomination.**—*B.* had intruded, as alleged, into possession of a hospital tenement without the leave of the vicar & churchwardens, whose nomination was usual:—*Held*: as the relation of landlord & tenant did not exist between them, the vicar, etc., could not recover possession under above Act.—*BROWN v. NEWMARCH* (1875), 40 J. P. 212.

Relationship of landlord & tenant generally, see Part I., *ante*.

**6956.** — **Where title in dispute—Tenant setting up title of third party.**—Upon an application, under above Act, by a landlord to justices in petty sessions, to recover possession of premises held over by his tenant after the expiration of the term, the tenancy having been proved to the satisfaction of the justices, & its legal determination, & the tenant's refusal to quit:—*Held*: the jurisdiction of the justices to give the landlord possession, was not ousted by the tenant's setting up the title of third person.—*REES v. DAVIES* (1858), 4 C. B. N. S. 56; 140 E. R. 1001.

**6957.** — **Tenancy of part of house—Tenant paying rates & taxes only.**—*Re AN ORDER OF RICHMOND, SURREY, JJ., UNDER SMALL TENEMENTS ACT (1893)*, 10 T. L. R. 68, D. C.

#### (b) Notice to Tenant.

**6958. What notice must show.**—*DELANEY v. FOX*, No. 6968, *post*.

#### (c) The Warrant.

**6959. Grant of warrant—Judicial, not ministerial act.**—*R. v. NEWENT JJ.*, No. 6951, *ante*.

**6960.** — **When mandamus lies.**—*R. v. NEWENT JJ.*, No. 6951, *ante*.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 280 *et seq.*

**6961. Effect of warrant—Common law right of re-entry not suspended.**—*JONES v. FOLEY*, No. 6946, *ante*.

**6962. Execution of warrant—Time for—Jurisdiction of magistrate to postpone on terms.**—*R. v. HOPKINS*, No. 6965, *post*.

**6963.** — **Statutory protection of constable—Whether persons acting in aid of constables included.**—Trespass for breaking & entering *pltf.'s* house. Plea, a justification by *deft.*, as acting in aid of a constable to whom a warrant had been issued to give possession to *pltf.'s* landlord, *P.*, under Small Tenements Recovery Act, 1838 (c. 74). The plea stated the holding of *pltf.* under *P.* & the terms, that the reversion in fee was in *P.*, notice to quit, *P.'s* right to possession, *pltf.'s* refusal to quit, notice by *P.* of his intention to proceed under the act, *P.'s* appln. to the justices, his complaint, *pltf.'s* non-appearance, *P.'s* proof to the justices of the matters of his notice & complaint, & of his right to possession; & the issuing of the warrant by the justices. Replication, *de injuria*:—*Held*: good, on special demurrer; for all the above facts necessary to constitute the jurisdiction might be traversed in that form, even assuming that Small Tenements Recovery Act, 1838 (c. 74), s. 5, does not protect persons other than peace officers & not named in the warrant, acting in aid of the constables, & would, therefore, not limit the effect of the traverse.—*EDMUNDS v. PINNIGER* (1845), 7 Q. B. 558; 14 L. J. Q. B. 273; 9 Jur. 658; 9 J. P. Jo. 357; 115 E. R. 599; *sub nom.* *EDWARDS v. PINNIGER*, 5 L. T. O. S. 195.

**6964.** — **Under Constables Act, 1750 (c. 44)—Constable of same district only.**—By the terms of above Act, no officer can be justified in executing the warrant, except the constable of the district, division, or place, within which the premises are situated. The question does not turn upon above Act, for it is not shown that the party executing the warrant was a constable of the district. *Defts.* must make out that they were entitled to take possession under Small Tenements Recovery Act, 1838 (c. 74), & they have failed to do so (*PARKE, B.*).—*JONES v. CHAPMAN* (1845), 14 M. & W. 124; 2 Dow. & L. 907; 14 L. J. Ex. 313; 5 L. T. O. S. 97; 10 J. P. 153; 153 E. R. 416.

#### (d) Appeals.

**6965. Whether appeal lies—From finding of fact by magistrate.**—On an application for a warrant under Small Tenements Recovery Act, 1838 (c. 74), the magistrates found as a fact that the person who applied for a warrant was the duly authorised agent of the landlord, & made an order that unless the tenant went out in ten days a warrant would issue. On an application for a *mandamus* to the magistrate to state a case:—*Held*: the finding of the magistrate could not be questioned, but as to the issue of the warrant the practice was wrong, & the warrant could not be enforced before twenty-one days after its issue, & its issue could not be postponed for ten days on condition that the tenant gave up the premises, but since in this case no warrant had been issued & the tenant had left the premises, the *mandamus* would not be granted.—*R. v. HOPKINS* (1900), 64 J. P. 454, D. C.

#### (e) Remedies of Tenant unlawfully Dispossessed.

**6966. Action for trespass.**—Trespass is the proper form of action against a party who obtains a warrant from magistrates under Small Tenements Recovery Act, 1838 (c. 74), to recover possession of a tenement, if at the time he has no right to the possession.—*DARLINGTON v. PRITCHARD* (1842), 4 Man. & G. 783; 2 Dowl. N. S. 664; 5 Scott,

**Sect. 4.—Legal proceedings: Sub-sect. 2, A. (e), B. (a), (b) & (c) i. & ii., C. & D.]**

N. R. 610; 12 L. J. C. P. 34; 7 J. P. 52; 7 Jur. 677; 134 E. R. 322.

*Annotation*.—*Mentd. Cammell v. Sewell* (1860), 5 H. & N. 728.

**6967.** —.]—Where parties have broken & entered a house under the authority of a warrant issued by justices, in pursuance of Small Tenements Recovery Act, 1838 (c. 74), s. 1, trespass, & not case, is the proper remedy.—*HUMPHREYS v. MARSH* (1846), 7 L. T. O. S. 109.

*See, generally, TRESPASS.*

**6968. Action for damages—For irregularity in proceedings—Proof of special damage.]**—A landlord is not liable in trespass for ejecting a tenant where the tenancy has expired, although he may have taken proceedings against him under Small Tenements Recovery Act, 1838 (c. 74).

In an action against a landlord for irregularity in the mode of proceeding to obtain possession of premises under Small Tenements Recovery Act, 1838 (c. 74), where the landlord, at the time of applying for the justices' warrant under that Act, was entitled to the possession of the premises, there must be special damage arising from the irregularity complained of.

A declaration, setting out an informal notice of the landlord's intention to apply to the justices for a warrant to obtain possession under the Act, & alleging the issuing & execution of such warrant, & that under the authority of such proceedings *pltf.* was forcibly expelled from the dwelling-house of which he was tenant, does not sufficiently show special damage arising from the informality of the notice. *Semble*: the notice required by the Small Tenements Recovery Act, 1838 (c. 74), to be served on the person neglecting to give up possession must state that the person giving such notice is "the owner" or the agent for "the owner," & must also state the place at which the application to the justices is to be made.

The party aggrieved may, however, according to Small Tenements Recovery Act, 1838 (c. 74), s. 6, bring an action on the case for the irregularity, in which the damage alleged to be sustained is to be specially laid (*CRESSWELL, J.*).—*DELANEY v. FOX* (1856), 1 C. B. N. S. 160; 26 L. J. C. P. 5; 21 J. P. 197; 2 Jur. N. S. 1233; 5 W. R. 148; 140 E. R. 70; *subsequent proceedings* (1857), 2 C. B. N. S. 768.

*See, generally, DAMAGES, Vol. XVII., pp. 84 et seq., 154 et seq.*

## B. Deserted Premises.

### (a) Jurisdiction.

*See Distress for Rent Act, 1737 (c. 19), s. 16.*

**6969. Jurisdiction—Whether right of re-entry condition precedent—Tenant's whereabouts unknown—Servant on premises.]**—Where a tenant ceased to reside on the premises for several months, & left them without any furniture, or sufficient other property to answer the year's rent:—*Held*: (1) the landlord might properly proceed under Distress for Rent Act, 1837 (c. 19), s. 16, to recover the possession, although he knew where the tenant then was, & although the justices found a servant of the tenant on the premises when they first went to view the same; & (2) it is not necessary to state, in the record of the magistrate's proceedings, that the landlord had a right of re-entry, although such a right must exist in order to entitle the party to proceed under this stat.—*Ex p. PILTON* (1818), 1 B. & Ald. 369; 106 E. R. 136.

*Annotation*.—*As to* (1) *Reid. Edwards v. Hodges* (1864), 24 L. T. O. S. 114.

**6970.** —.]—*EDWARDS v. HODGES*, No. 6971, *post*.

**6971.** — Of lord mayor & aldermen of city of London—*Sitting as justices.*—The power to view & give possession to the landlord of deserted premises created by Distress for Rent Act, 1737 (c. 19), s. 16, extended by the 57 G. 3, c. 52, & varied as to its mode of execution by Metropolitan Police Courts Act, 1840 (c. 84), s. 13, is not by any of the provisions of the last mentioned stat. or by Summary Jurisdiction Act, 1848 (c. 43), s. 34, vested in the Lord Mayor or one Alderman sitting in the justice rooms at the Mansion House or Guildhall so as to enable them to exercise the power in the same manner as a "police magistrate" sitting in one of the metropolitan police cts. may, under Metropolitan Police Courts Act, 1840 (c. 84), s. 13, exercise it. *Qu.*: whether a right of re-entry is necessary to give jurisdiction under Distress for Rent Act, 1737 (c. 19), s. 16.—*EDWARDS v. HODGES* (1855), 15 C. B. 477; 3 C. L. R. 472; 24 L. J. M. C. 81; 24 L. T. O. S. 237; 19 J. P. 102; 1 Jur. N. S. 91; 3 W. R. 167; 139 E. R. 510.

**6972.** — Premises must be deserted—*Tenant seen on premises.*—Two magistrates having, at the request of a landlord under Distress for Rent Act, 1737 (c. 19), s. 16, proceeded to view a dwelling-house, deserted & unoccupied, & at the second view having perceived the tenant looking out of the widow, when, however, he did not pay the rent in arrear, the justices refused to put the landlord into possession:—*Held*: a *mandamus* would not lie to the justices to compel them to deliver possession.—*FIELDER v. WINCHESTER JJ.* (1840), 4 Jur. 507.

**6973.** — Whether lost—*Judgment recovered for same rent—Judgment unsatisfied.*—Where a landlord has recovered judgment for half a year's rent which remains unsatisfied, if the tenant desert the house leaving no sufficient distress in it, it is still open to the landlord to put the justices in motion under Distress for Rent Act, 1737 (c. 19), & to recover possession of the house.

Where justices are called on to act under Distress for Rent Act, 1737 (c. 19), in the case of a house, the doors & windows of which are locked & closed, they need not enter by breaking open the doors; but they may proceed though they only look into one room through the shutters, & find that empty; it being open to the tenant on appeal to the justices of the assize to rebut the inference from that fact, by showing that there was sufficient distress in other parts of the house.—*Re EMMETT* (1850), 4 New Mag. Cas. 164; 16 L. T. O. S. 131; 14 J. P. 530.

**6974. What amounts to desertion—Question for justices.]**—What is a desertion of premises under Distress for Rent Act, 1737 (c. 19); the justices are the proper judges of the fact of desertion or non-desertion.—*Ex p. ROBERTS* (1839), 3 J. P. 290.

**6975.** — Servant of tenant on premises.]—*Ex p. PILTON*, No. 6969, *ante*.

### (b) Practice.

**6976. Information—Whether on oath.]**—Distress for Rent Act, 1737 (c. 19), s. 16, does not require that the magistrates, giving possession of deserted premises should act on information given to them on oath. If the record of their proceedings states sufficient circumstances to show, that they followed all the requisites of the Act, then it is evidence of itself, & is an answer to any action that may be brought against them.

In trespass against two magistrates for turning a

tenant out of possession under Distress for Rent Act, 1737 (c. 19), a record of the proceedings, drawn up conformably to the statute, was given in evidence:—*Held*: it was a complete defence to the action, though they did not appear to have acted on the oath of the landlord.—*BASTEN v. CAREW* (1825), 3 B. & C. 649; 5 Dow. & Ry. K. B. 558; 2 Dow. & Ry. M. C. 563; 3 L. J. O. S. K. B. 111; 107 E. R. 874.

*Annotations*:—*Mentd.* *Hutchinson v. Lowndes* (1832), 1 Nev. & M. K. B. 674; *Baylis v. Strickland* (1840), 1 Man. & G. 591; *Chaney v. Payne* (1841), 1 Q. B. 712; *Taylor v. Clemson* (1844), 11 Cl. & Fin. 610; *Ex p. Kinning* (1847), 4 C. B. 507; *R. v. Millard* (1853), 6 Cox, C. C. 160; *Kemp v. Neville* (1861), 10 C. B. N. S. 523.

**6977. Affidavit of rent in arrear—Who may make—Receiver.**—In ejectment on a vacant possession, the affidavit that six months' rent are in arrear may be made by a receiver.—*ANON.* (1833), 3 Moo. & S. 751.

**6978. Service of notice—By affixing on premises—Doubt whether property available for distress.**—The ct. refused to allow the sticking up a declaration & notice on the premises, the tenant whereof had absconded, & it was unknown whether or not there was property thereon upon which a distress might be made, to be deemed good service.—*DOE d. BRACEBRIDGE v. ROE* (1839), 7 Scott, 689.

**6979. View by justices—Not bound to view every room.**—*Re EMMETT*, No. 6973, *ante*.

**6980. — Time between first & second views.**—On an appeal to the judges of assize against the decision of justices giving possession of premises under Distress for Rent Act, 1737 (c. 19), ss. 16, 17, requiring that the notice, after the first view by justices, should state what day, at the distance of fourteen clear days at the least, they should return to take a second view:—*Held*: fourteen clear days must elapse between the first & second views; & that period had not elapsed, the proceedings were set aside as irregular, & restitution ordered.—*CREAK v. BRIGHTON JJ.* (1858), 1 F. & F. 110.

**6981. Refusal by magistrates to give possession—Jurisdiction doubtful—Whether mandamus lies.**—Where magistrates, from a doubt of their jurisdiction, decline giving possession of premises to a landlord pursuant to Distress for Rent Act, 1737 (c. 19), s. 16, the ct. will not compel them, by *mandamus* to do so.—*Ex p. FULDER* (1840), 8 Dowl. 535.

#### (c) *Remedy of Tenant.*

##### i. *By Action.*

See Distress for Rent Act, 1737 (c. 19), s. 17.

**6982. Remedy against justices—Statutory procedure as defence.**—*BASTEN v. CAREW*, No. 6976, *ante*.

**6983. — — — Two magistrates having, at a landlord's request, given possession of a dwelling-house as deserted & unoccupied pursuant to Distress for Rent Act, 1737 (c. 19), s. 16, the judges of assize of the county, on appeal, made an order for the restitution of the farm to the tenant, with costs. The latter brought an action of trespass for the eviction, against the magistrates, the**

constable, & the landlord:—*Held*: the record of the proceeding before the magistrates was an answer to the action on behalf of all defts. *Semble*: under such circumstances, the tenant may maintain an action on the case against the landlord, for causing the justices to take the proceedings.—*ASHCROFT v. BOURNE* (1832), 3 B. & Ad. 684; 1 L. J. K. B. 209; 110 E. R. 250.

*Annotation*:—*Mentd.* *Foster v. Dodd* (1867), L. R. 3 Q. B. 67.

**6984. Remedy against landlord—Action for trespass—Statutory procedure a complete defence.**]

—*ASHCROFT v. BOURNE*, No. 6983, *ante*.

**6985. — Action for damages.**—*ASHCROFT v. BOURNE*, No. 6983, *ante*.

**6986. — Where application to justices improperly made.**—*WILSON v. SEWELL* (1843), 1 L. T. O. S. 168.

##### ii. *Appeal.*

**6987. To judge of assize—Order for restitution.**]

—*ASHCROFT v. BOURNE*, No. 6983, *ante*.

**6988. — — — Whether mandamus lies to justices.**—The judges of assize, on appeal, under Distress for Rent Act, 1737 (c. 19), s. 17, against an order of two magistrates giving possession to a landlord under sect. 16, made an order for restitution of the premises to the tenant. The order of the judges was not directed to any person:—*Held*: *mandamus* could not issue commanding the two justices to make restitution.—*R. v. TRAILL* (1840), 12 Ad. & El. 761; Arn. & H. 78; 4 Per. & Dav. 325; 10 L. J. M. C. 57; 4 J. P. 778; 113 E. R. 1002.

**6989. — — — Necessity for proof of proceedings before justices.**—(1) Proceedings of magistrates for restitution of premises under Distress for Rent Act, 1737 (c. 19), s. 16, are, by sect. 17, to be revised, in England, by the judges, on circuit, etc., acting as individual justices:—*Held*: therefore, the allegation in an indictment, that an order was made by A. & B. the justices of assize for Surrey was not supported by a certificate of such an order signed by the deputy clerk of assize in the same way as an order of ct. *Semble*: it is not necessary, on such indictment, to prove the proceedings before the magistrates, preliminary to the restitution; & it is sufficient to put in the record made up by them, in which, after reciting the complaint & other proceedings, they declare that they put complainant into possession.

(2) *Semble*: orders under Distress for Rent Act, 1737 (c. 19), s. 17, should be signed by the judges who make them.—*R. v. SEWELL* (1845), 8 Q. B. 161; 15 L. J. Q. B. 49; 6 L. T. O. S. 191; 9 J. P. 803; 10 Jur. 48; 1 Cox, C. C. 255; 115 E. R. 836.

**6990. — — — Whether signature of judge necessary.**—*R. v. SEWELL*, No. 6989, *ante*.

#### C. *Under Poor Relief Act, 1818.*

See POOR LAW.

#### D. *Under Colonial Statutes.*

See Cases, *infra*.

#### PART XXV. SECT. 4, SUB-SECT. 2.—D.

c. *Summary proceedings for ejectment—Payment for use & occupation—Power to order.*—*WALLACE v. DAY* (Alta) (1912), 22 W. L. R. 22; 6 D. L. R. 281; 2 W. W. R. 846.—*CAN.*

d. *"Landlord & tenant"—Definition for purposes of action.*—*Re MITCHELL & FRASER* (1917), 40 O. L. R. 389; 38 D. L. R. 597.—*CAN.*

e. *Notice of hearing—Necessity for service of affidavit.*—On an application under Overholding Tenants Act by a landlord for possession, a copy of the affidavit filed on the application was not served on the tenant. The application was adjourned to enable a copy of the affidavit to be served. After service the application was proceeded with, & counsel for the tenant examined & cross-examined witnesses & argued the case, when an

order for possession was made:—*Held*: the failure to serve a copy of the affidavit was an irregularity which could be & had been waived; & prohibition against the enforcement of the order for possession was refused.—*Re DEWAR & DUMAS* (1904), 24 C. L. T. 360; 8 O. L. R. 141; 4 O. W. R. 110.—*CAN.*

f. *Writ of possession—Removal of proceedings to High Court.*—*Held*:

### SECT. 5.—ACTION FOR MESNE PROFITS.

**6991. Conditions precedent to action—By disseisee—Re-entry—Lease granted by disseisor.]**—If a disseisor grants a lease for years, & then the disseisee re-enters, the disseisee can after re-entry sue the lessee for mesne profits, but cannot sue before re-entry.—*HOLCOMB v. RAWLYNS* (1598), Cro. Eliz. 540; *Moore*, K. B. 461; 78 E. R. 786.

**6992. — Lessor entitled to immediate possession.]**—*BEAUCLERC (LADY) v. CLIFT* (1851), 17 L. T. O. S. 62.

*See, also*, No 7009, *post*.

**6993. Right of lessor—Lessor allowing lessee to hold over.]**—A lessor suffers the lessee to hold the lands after the lease is determined; equity will not compel the tenant to account for the mesne profits, unless the lessor was hindered from entering by fraud or some extraordinary accident.—*BOLTON (DUKE) v. DEANE* (1719), Prec. Ch. 516; 2 Eq. Cas. Abr. 588; 24 E. R. 231, L. C.

*Annotations:—*Consd. *Dormer v. Fortescue* (1744), 3 Atk. 124; *A. G. v. Plymouth Corp.* (1754), Wight. 134. *Mentd.* *Curtis v. Curtis*, Day v. Leman (1789), 2 Bro. C. C. 620; *Hicks v. Sallitt* (1854), 3 De G. M. & G. 782.

**6994. — After order for possession under County Courts Act, 1856 (c. 108)—Whether equivalent to ejectment.]**—In an action of trespass for mesne profits by a landlord against a sub-tenant, after a judgment of a county ct. on a plaint between the same parties, ordering possession of tenements to be delivered up on a certain day, & which order was duly complied with by deft., pleaded "not guilty" only:—*Held*: (1) the judgment of a county ct., ordering possession of tenements to be given up, under above Act, sect. 50, on a plaint by the landlord against a sub-tenant, is not analogous to an action of ejectment, & therefore is not conclusive by way of estoppel in a subsequent action of trespass for the mesne profits by same pltf. against same deft.; & on a plea of "not guilty" in such action, pltf.'s title is not admitted, & in order to recover he is

bound, on the issue raised thereby, to prove the trespass; & when a deft. has, both in letter & in spirit, obeyed the order of a county ct. to deliver possession, retaining possession so long only as the order warranted, he cannot be treated as a trespasser; & (2) under above Act, sect. 51, a landlord proceeding against his own tenant under sect. 50, is entitled to add a claim either for rent or mesne profits or both, but he has no right to insert a claim for mesne profits when he is proceeding under the above sect. not against his own tenant, but against a stranger or the person in possession under the tenant.—*CAMPBELL v. LOADER* (1865), 3 H. & C. 520; 5 New Rep. 285; 34 L. J. Ex. 50; 11 L. T. 608; 29 J. P. 103; 11 Jur. N. S. 286; 13 W. R. 348; 159 E. R. 634.

*Annotation:—*As to (1) *Refd.* *Hodson v. Walker* (1872), L. R. 7 Exch. 55.

*See, now*, County Courts Act, 1888 (c. 43), s. 138. **Claim by mortgagor.]—***See* MORTGAGE.

**6995. Against whom awarded—Tenant—Holding over on sufferance.]**—*BOLTON (DUKE) v. DEANE*, No. 6993, *ante*.

**6996. — Where undertenant holds over.]**—A termor, who lets to an undertenant, cannot, after his term expired, enforce the continuance of the undertenancy by distress, if the undertenant refuses to acknowledge him as landlord, or pays him under threat of distress; although the undertenant still retains the possession. *Semble*: a tenant, whose undertenant retains the possession after the term, is not liable for mesne profits.—*BURNE v. RICHARDSON* (1813), 4 Taunt. 720; 128 E. R. 513.

*Annotations:—**Refd.* *Doe v. Harlow* (1838), 12 Ad. & El. 40; *Levi v. Lewis* (1859), 6 C. B. N. S. 766.

**6997. — In occupation by undertenant—During period of claim.]**—In trespass for mesne profits, a verdict may be found against deft., though he never actually occupied during the time of the trespass, if it be proved that, before the trespass, deft., who then held lawfully, underlet

proceedings under Overholding Tenants Act can be removed into the High Ct. only when sect. 6 of that Act applies, & that sect. does not apply until a writ of possession has been issued; & therefore that the appt. was not entitled to relief.—*Re WARBRICK & RUTHERFORD* (1903), 23 C. L. T. 326; 6 O. L. R. 430; 2 O. W. R. 609, 961.—**CAN.**

**g. Demand for possession—Tenant overholding—Demand bad for uncertainty.]**—*Re MYERS & MURRANS*, 24 C. L. T. 186.—**CAN.**

**h. Costs.]**—The costs of a summary proceeding under the Landlord & Tenant Act, 1902 (c. 93), to eject a tenant, are the costs of an action in the King's Bench & taxable on the same scale.—*WEST WINNIPEG DEVELOPMENT Co. v. SMITH* (1910), 20 Man. L. R. 274.—**CAN.**

**k. Forfeiture for breach of covenant—Summary proceedings to evict.]**—*RYAN v. TURNER* (1904), 14 Man. L. R. 624.—**CAN.**

**l. Court of Petty Sessions—Jurisdiction of.]**—An application by a landlord to recover from an overholding tenant possession of premises under Landlord & Tenant Act, 1915, s. 92, is not a "complaint under this Act" within Justices Act, 1915, s. 81, & consequently the jurisdiction of a Ct. of Petty Sessions to deal with the application is not ousted by the raising of a *bona fide* question of title.—*DODGE v. McNAUGHTON*, [1920] V. L. R. 115.—**AUS.**

**m. Date of tenancy must be proved.]**—In a proceeding to recover possession of a tenement under Land-

lord & Tenant Act, 1899, s. 23, the informant must prove the date of the creation of the tenancy.—*CLARKE v. GIBNEY* (1904), 4 S. R. N. S. W. 670; 21 N. S. W. W. N. 237.—**AUS.**

**n. Assignee of original lessor—Right to recover—Jurisdiction of justices.]**—Where a landlord, seeking to recover possession summarily from deft., his tenant, was not the person who leased to deft., but claimed by virtue of a transfer from the original lessor:—*Held*: the justices had no jurisdiction to make an order under Tenements Act.—*SLOANE v. HAYES* (1884), 5 N. S. W. L. R. 377; 1 N. S. W. W. N. 86.—**AUS.**

**o. Sub-tenant holding over—Lessor's right to recover.]**—Where premises were let by the owners to a tenant & afterwards sub-let for a term less than the tenant's, & the sub-tenant held over after the expiration of the tenant's lease:—*Held*: the sub-tenant could not be said to claim under the tenant within Tenements Recovery Act, s. 2, & the owners could not recover possession of the premises under that Act.—*Ex p. FERGUSSON* (1890), 11 N. S. W. L. R. 43; 6 N. S. W. W. N. 125.—**AUS.**

**p. Tenants holding over—Jurisdiction of justices.]**—The justices have jurisdiction, under Tenements Recovery Act, in all cases of holding over by tenants, whatever the value of the property.—*Ex p. MCGOWAN* (1869), 8 N. S. W. S. C. R. (L.) 115.—**AUS.**

**q. Summary order for recovery—Whether appeal.]**—An appeal will not lie to Quarter Sessions from a summary order under Landlord & Tenant

Act, 1899, Pt. IV.—*Ex p. DWYER* (1908), 8 S. R. N. S. W. 329; 25 N. S. W. W. N. 101.—**AUS.**

**r. Lease void for want of due execution—Tenant holding for seven years.]**—Where a tenant has occupied during the whole of a term of seven years which was void as being executed by an agent not authorised in writing the procedure for summary ejectment by warrant of justices is applicable at the expiration of such period.—*HOLMES v. NORTH* (1876), 2 V. L. R. L. 84.—**AUS.**

**t. Action by joint owners—Whether by one—Summary Jurisdiction Act, 1851, s. 15.]**—*MILLS v. HOEY* (1913), 47 L. L. T. 246.—**IR.**

### PART XXV. SECT. 5.

**a. Conditions precedent to action—Recovery in ejectment.]**—*DOE v. ESTERBROOKS* (1840), 1 Kerr, 119.—**CAN.**

**b. —.]**—An action of trespass for mesne profits is consequential to recovery in ejectment.—*LECRAIN v. HOSTERMAN* (1878), Cass. Dig. 2nd ed. 827.—**CAN.**

**c. —.]**—*Re FULLER & CUTHBERT (Y. T.)* (1907), 6 W. L. R. 717.—**CAN.**

**d. —.]**—A judgment in ejectment is not now necessary before a claim for mesne profits can be enforced.—*KIRKPATRICK & BARCLAY v. HUTCHISON* (1904), 23 N. Z. L. R. 665.—**N.Z.**

**e. Right of lessor—Forfeiture for breach of covenant.]**—After a forfeiture for breach of covenant in a lease mesne profits may be recovered in an

to H.; that deft.'s & H.'s interest became determined, & right of possession vested in pltf.; that H. held on; & that deft. afterwards continued to receive rent of him, & declared him to be his tenant when pltf. demanded possession; deft. & H. both alleging title in the party under whom deft. formerly held.—*DOE v. HARLOW* (1838), 12 Ad. & El. 40; 113 E. R. 724.

*Annotations*.—*Consd.* *Powell v. Aiken* (1858), 4 K. & J. 343; *Elias v. Griffith* (1878), 8 Ch. D. 521. *Refd.* *Doe v. Challis* (1851), 17 Q. B. 166; *Levi v. Lewis* (1859), 6 C. B. N. S. 766.

— *Of charity lands.*—*See* CHARITIES, Vol. VIII., p. 362, No. 1615.

**6998.** — *Subtenant*—*After judgment in ejectment against tenant.*—The lessor of pltf. recovered judgment in an action of ejectment against one P. Before execution, deft. came into possession of the premises under P., & occupied for a year, paying rent.—*Held*: the judgment in the ejectment was evidence against deft. in trespass for the mesne profits.—*DOE v. WHITCOMB* (1831), 8 Bing. 46; 1 Moo. & S. 107; 1 L. J. C. P. 9; 131 E. R. 317.

**6999.** — — — *Trespass for mesne profits does not lie against a person who occupies the premises during the interval between a recovery of a judgment in ejectment against another person & the execution of a writ of possession under that judgment, unless it is shown that deft. occupied under the person against whom the judgment was obtained.*—*DOE v. HARVEY* (1832), 8 Bing. 239; 1 Moo. & S. 374; 1 L. J. C. P. 9; 131 E. R. 393.

**7000.** — — — *Remaining in possession from determination of term—Until possession given up under County Courts Act.*—*CAMPBELL v. LOADER*, No. 6994, *ante*.

**7001.** — *Lessee in possession—Proof of possession.*—In an action of trespass for mesne profits, proof that deft. had had a lease of the premises at a certain yearly rent, & that he had suffered judgment by default in a previous action of ejectment for the same premises:—*Held*: sufficient to show that he was in possession at the date of the writ of ejectment.

Under a claim for "great expenses in recovering possession" of the premises, pltf. in an action for mesne profits may recover the costs of the prior action of ejectment.—*PEARSE v. COAKER* (1869), L. R. 4 Exch. 92; 38 L. J. Ex. 82; 20 L. T. 82.

*Annotations*.—*Consd.* *Elliott v. Boynton*, [1924] 1 Ch. 236. *Refd.* *Harris v. Mulkern* (1875), 1 Ex. D. 31.

**7002.** *For what period awarded—Limited to defendant's occupation.*—*STANNYNGH v. COSINS* (1746), Barnes, 456; 94 E. R. 1002.

**7003.** — *Commencement of period—Where landlord re-enters for breach of covenant.*—Where in an action brought by a landlord against his tenant to enforce a right of re-entry for breach of covenant, an order is made that the landlord do

recover possession of the demised premises & mesne profits, the mesne profits are assessable from the date of the writ in the action & not from the date of the breach of covenant giving rise to the landlord's right to re-enter.—*ELLIOTT v. BOYNTON*, [1924] 1 Ch. 236; 93 L. J. Ch. 122; 130 L. T. 497; 40 T. L. R. 180; 68 Sol. Jo. 236, C. A.

*Annotation*.—*Refd.* *Abrahams v. MacFishes*, [1925] 2 K. B. 18.

— *On termination of term.*—*See* Common Law Procedure Act, 1852 (c. 76), s. 214.

**7004.** — *Up to giving of possession—Specially indorsed writ.*—Pltfs. issued a specially indorsed writ under R. S. C., Ord. 3, r. 6, claiming possession of certain lands held over by the deft., who had been tenant to pltfs., after the termination of his tenancy, & £80 for mesne profits. On an application under R. S. C., Ord. 14, r. 1, for leave to sign final judgment for £80 & for possession, the accompanying affidavit stated that the £80 was claimed as double value for six months in consequence of deft. having refused to deliver up possession:—*Held*: notwithstanding the terms of the affidavit, the writ was specially indorsed so as to bring it within R. S. C., Ord. 14, & the judge had jurisdiction to make the order giving mesne profits up to the time of possession being obtained.—*SOUTHPORT TRAMWAYS CO. v. GANDY*, [1897] 2 Q. B. 66; 66 L. J. Q. B. 532; 76 L. T. 815; 45 W. R. 684, C. A.

**7005.** *The writ—Whether mesne profits must be specially claimed—In action of ejectment.*—In ejectment by landlord against tenant under Common Law Procedure Act, 1852 (c. 76), s. 214, mesne profits may be recovered although not specially claimed in the writ or issue.—*SMITH v. TETT* (1854), 9 Exch. 307; 2 C. L. R. 509; 23 L. J. Ex. 93; 22 L. T. O. S. 227; 2 W. R. 159; 156 E. R. 131.

**7006.** — *Special indorsement—Sufficiency.*—*SOUTHPORT TRAMWAYS CO. v. GANDY*, No. 7004, *ante*.

**7007.** *Joinder of parties—Party to whom rent already paid.*—An action for mesne profits had been brought against one who had been tenant of pltf.'s land during pltf.'s incarceration in an asylum & had already been ejected as a trespasser. The defence was that the rent has been paid to L. who had applied the money towards pltf.'s expenses in the asylum. An application to join L. as a deft. was refused, deft. having an independent remedy against her for money had & received.—*LOVELL v. HOLLAND* (1876), Bitt. Prac. Cas. 117; 2 Char. Cham. Cas. 26.

**7008.** *Deductions allowed—Ground rent paid—Though for period longer than occupation.*—In an action for mesne profits, where the deft. has taken possession before the end of a quarter, he is entitled to deduct from the damages a payment for ground rent for the whole of that quarter.

action of ejectment.—*HUME v. DODGSHUM* (1883), 9 V. L. R. 83.—*AUS.*

**1.** *For what period awarded.*—There is no objection to the award of mesne profits or interest during the whole period for which a suit is pending however long that period may be.—*KAKAJI BIN RANOJI v. BAPUJI BIN MADHAVRAY* (1870), 8 Bom. A. C. 205.—*IND.*

**g.** *Against whom awarded—Ex-ecutor.*—An action for mesne profits may be maintained against an extrix. under 7 Wm. 4, c. 3.—*GREEN v. HAMILTON* (1839), 2 Ont. Dig. 2769.—*CAN.*

**h.** — *Overholding tenant.*—A landlord proceeding against an over-

holding tenant under 4 Will. 4, c. 1, s. 53, cannot, under 14 & 15 Vict. c. 114, s. 12, recover mesne profits, the latter Act applying only to actions of ejectment.—*ALLAN v. ROGERS* (1856), 13 U. C. R. 166.—*CAN.*

**k.** *Amount recoverable—Set-off—Value of improvements.*—*LINDBAY v. McFARLING* (1829), Dra. 6.—*CAN.*

**l.** — — — — — *PATTERSON v. REARDON* (1850), 7 U. C. R. 326.—*CAN.*

**m.** — — — — — *MONTREUIL v. ONTARIO ASPHALT CO. & CALDWELL SAND & GRAVEL CO.* (1922), 69 D. L. R. 313; 63 S. C. R. 401; *varying*, 52 D. L. R. 563; 47 O. L. R. 227.—*CAN.*

**n.** — *Costs.*—As a general rule,

pltf., after judgment against casual ejector, is entitled to recover the costs thereof as part of the damages in an action for mesne profits.—*DOE v. DOBSON* (1852), 2 All. 446.—*CAN.*

**o.** — — — — — *NEALE v. WINTER* (1860), 10 C. P. 199.—*CAN.*

**p.** *Whether interest recoverable.*—In a suit for mesne profits not being a suit for land & its mesne profits, interest on mesne profits cannot be recovered.—*CHAKU MODAN IRANA v. DULABH DWARKA* (1872), 9 Bom. 7.—*IND.*

**q.** — — — — — *There being no rule of law obliging the ct. to allow interest on mesne profits, it is a matter for the discretion of the ct., upon consideration*

**Sect. 5.—Action for mesne profits. Parts XXVI. & XXVII. Sect. 1: Sub-sect. 1.]**

—DOE v. HARE (1833), 2 Cr. & M. 145; 2 Dowl. 245; 4 Tyr. 29; 3 L. J. Ex. 17; 149 E. R. 709. *Annotations*.—*Consd.* Peruvian Guano Co. v. Dreyfus (1887), [1892] A. C. 170, n. *Reid*. Doe v. Filbiter (1844), 13 M. & W. 47; Barber v. Brown (1856), 1 C. B. N. S. 121.

**7009. What must be proved—Lessor's right to immediate possession—Though lessee does not**

**appear.]—Where in an action of ejectment by the landlord against his tenant for the recovery of the possession of premises, it is sought to recover damages for mesne profits since the determination of the tenant's interest under the Common Law Procedure Act, 1852 (c. 76), s. 214, it is necessary for pltf., although deft. does not appear, to prove his right to recover possession before he can give evidence of the mesne profits.—HOWARD v. WILLIAMS (1853), 21 L. T. O. S. 264, N. P.**

## Part XXVI.—Encroachments and Accretions.

**7010. Encroachment on other land of landlord—Adjoining demised premises—Presumption of inclusion in tenancy—Subsequent payment of rent.]—HUTCHINSON v. SCOTT (1837), 1 Jur. 609.**

**7011. ——— Adjoining land in occupation of third party.]—A tenant taking in land adjacent to his own, by encroachment, must, as between himself & the landlord, be deemed, *prima facie*, to take it as part of the demised land: but that presumption will not prevail for the landlord's benefit against third persons. The landlord of A. & B., adjacent closes, mortgaged them, & afterwards demised A. The tenant of A. built upon B. without leave of the landlord, who, on permission being asked, refused it, saying he had granted rights over B to occupier of other adjoining lands. The tenant held both A. & B. for twenty years, paying rent to the landlord under the demise of A., but not expressly in respect of B.:—*Held*: on this evidence, he might insist, as against the landlord, on a twenty years' occupation of B. within Real Property Limitation Act, 1853 (c. 27), ss. 2 & 3.—DOE d. BADDELEY v. MASSEY (1851), 17 Q. B. 373; 20 L. J. Q. B. 434; 17 L. T. O. S. 221; 15 Jur. 1031; 117 E. R. 1322.**

*Annotations*.—*Mentd.* Hemming v. Blanton (1873), 42 L. J. C. P. 158; Thornton v. France, [1897] 2 Q. B. 143.

**7012. ——— Liability under covenant to repair.]—Under a lease of a farm, the tenant was bound to keep in repair the buildings to be erected thereon. During the term the tenant, with the permission of the landlord, who was lord of the manor, built a house on the waste adjoining the farm, & he enjoyed it with the farm:—*Held*: the tenant was also under an obligation to keep his house in repair.—WHITE v. WAKLEY (No. 1) (1858), 26 Beav. 17; 22 J. P. 705; 4 Jur. N. S. 988; 53 E. R. 802; *sub nom.* *Re* NEWBURY, WHITE v. WAKLEY, 28 L. J. Ch. 77; 32 L. T. O. S. 24; 6 W. R. 791.**

**7013. ——— For remainder of term.]—The tenant under a lease for years encroached upon & occupied a piece of land belonging to his landlord & adjoining the demised premises for a period of more than twelve years. The landlord during the term brought an action for an injunction & damages for trespass:—*Held*: the action would not lie. The tenant must be deemed to have occupied the piece of ground as part of the holding, & he was entitled so to occupy it during the remainder of his lease.—TABOR v. GODFREY (1895), 64 L. J. Q. B. 245.**

*Annotations*.—*Consd.* Hastings v. Saddler (1898), 79 L. T. 355. *Reid*. A. G. v. Cory, Kennard v. Cory (1918), 34 T. L. R. 621.

**7014. ——— Not adjoining demised premises—No presumption of inclusion in tenancy.]—H. demised an island to E. Subsequently E. occupied two other plots of H.'s land. These plots were situate on the mainland, & were something between half a mile & a mile from the island demised by E. They were inclosed land. There was no evidence that they were occupied by E. as an addition to his holding under H. & no rent was paid in respect of them. After more than twelve years had elapsed, when E.'s tenancy of the island had determined H. brought an action against E.'s successor in title to obtain possession of the two plots. The county ct. judge held that there was a presumption that E. had occupied them as H.'s tenant, & in the absence of evidence to rebut this presumption H. was entitled to recover possession:—*Held*: there was no such presumption. *Semble*: the presumption that a tenant who occupies more land than is demised to him, occupies it for the benefit of his landlord is confined to encroachment on waste.—HASTINGS (LORD) v. SADDLER (1898), 79 L. T. 355; 15 T. L. R. 24, D. C.**

**7015. For whose benefit encroachment operates—Encroachment on waste—Waste occupied before tenancy.]—The presumption of law that a tenant of a close occupying waste lands contiguous to his close does so for the benefit of his landlord, does not apply where the tenant is in occupation of the waste land before entering upon his tenancy.—DIXON v. BATY (1866), L. R. 1 Exch. 259; 12 Jur. N. S. 1024; 14 W. R. 830.**

*Sec. generally*, COMMONS, Vol. XI., pp. 55 *et seq.*

**7016. ——— Encroachment on land not waste.]—HASTINGS (LORD) v. SADDLER, No. 7014, *ante*.**

**7017. ———.]—Two adjoining pieces of land, herein referred to as the foundry & the stable, were in 1819 & 1831 respectively demised by the same lessor to the same lessee for ninety-nine years or three lives. The leases contained a covenant by the lessor to renew in certain events. In 1846 both pieces & certain other lands of the lessee were assigned by him to trustees to hold in trust for the lessee for life, & thereafter as to the foundry upon one set of trusts, & as to the residue upon another set of trusts. From some date prior to 1843, & down to the death of the lessee in 1858, two portions of the stable property were occupied by the lessee as part of & in connection with the business carried on by him on the foundry property. After his death these two portions continued to be so occupied by the *cestuis que trust* of the foundry, & defts., their successors, without any acknowledgment, down to the date of this action. In**

of the facts, whether to allow interest or not.—ABDUL GHAFUR v. RAJA RAM (1900), 1 L. R. 23 All. 262.—IND.

r. ———.]—*Held*: the term "mesne profits" includes interest on such mesne profits, & the interest accrues from the date upon which each

instalment of the mesne profits may become due.—NARPAT SINGH v. HAR GYAN (1903), 1 L. R. 25 All. 275.—IND.

Mar. 1856, the foundry lease, & in Aug. 1856, the stable lease, were renewed, new leases on the same terms for ninety-nine years or three lives being granted to the trustees of the settlement. In July, 1890, a new lease of the foundry was granted to the then *cestui que trust* occupying the foundry & the two portions of the stable property. This lease was subsequently sold to defts. In 1894 a new lease of the stable was granted to the trustees, which was again renewed in 1898. This renewed lease was in 1901 sold to plffs., who on July 18, 1901, commenced this action, claiming to recover from defts. the two portions of the stable property which had been occupied as part of the foundry property:—*Held*: (1) plff.'s claim was not barred; at the date of the stable lease of Aug. 1856, the possession in law of the disputed portions was in the trustees so as to enable them to surrender them to the lessor & to obtain a regrant from him, & Stat. Limitations did not begin to run against the lessor in 1856, but only in 1894, on the determination of the stable lease of Aug. 1856; the occupiers of the disputed portions were persons claiming through a trustee within Stat. Limitations, 1833 (c. 27), s. 25, & the statute, therefore, did not run in their favour; (2) assuming that the statute began to run in 1856 against the lessor, the disputed portions became an accretion to the property comprised in the foundry lease, & on the determination & surrender of that lease in July, 1890, i.e., within twelve years of the commencement of the action, the lessor acquired a new right of possession, there being nothing to rebut the presumption that the encroachment enured for the benefit of the lessor.—*EAST STONEHOUSE URBAN COUNCIL v. WILLOUGHBY BROTHERS, LTD.*, [1902] 2 K. B. 318; 71 L. J. K. B. 873; 87 L. T. 366; 50 W. R. 698.

**Encroachment by neighbouring owner—On land subject to lease—Right of lessor to bring action.]—***See BOUNDARIES*, Vol. VII., pp. 301, 302.

**7018. Accretion—By reclamation under statutory powers—For whose benefit operating.]—**A. entered into articles of agreement for leases of ninety-nine years from Lady Day, 1768, of certain building land abutting on the Thames with the trustees of D., who were tenants in fee. Soon afterwards by a local Act, A. & others were empowered to embank the Thames, & win part of the bed of it; & sect. 2 of the local Act enacted that the ground & soil of the river to be enclosed & embanked in the front of each house should vest in the owner of the house according to his respective estate, trust, or interest. A certain portion of the bed of the river, fronting the land on which he had built houses under his leases, was reclaimed by A. pursuant to the statute, & he occupied it more than twenty years before Lady Day, 1867. No lease of the reclaimed land was ever executed either by the trustees of by A. The leases, if they had been granted, would have expired at Lady Day, 1867. No rent was ever paid by A. in respect of the reclaimed land:—*Held*: by sect. 2 of the local Act the fee simple of the reclaimed land was vested in the trustees; & their representatives were not barred by Real Property Limitation Act, 1833 (c. 27), & were entitled to the reclaimed land at Lady Day, 1867.—*DRUMMOND v. SANT* (1871), L. R. 6 Q. B. 763; 41 L. J. Q. B. 21; 25 L. T. 419; 20 W. R. 18.

*Annotations*:—*Consd. Warren v. Murray*, [1894] 2 Q. B. 648. *Reid. Beighton v. Beighton* (1895), 64 L. J. Ch. 796. *Mentd. Sands v. Thompson* (1883), 22 Ch. D. 614.

—*See, generally, WATERS & WATER-COURSES.*

## Part XXVII.—Rent and Mortgage Restriction Acts.

**NOTE.**—*The Acts now in force in England are Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), Rent Restrictions (Notices of Increase) Act, 1923 (c. 13), Rent & Mortgage Interest Restrictions Act, 1923 (c. 32), Prevention of Eviction Act, 1924 (c. 18), & Rent & Mortgage Interest (Restrictions Continuation) Act, 1925 (c. 32), referred to in this Part as the 1920, 1923 (Notices of Increase), 1923, 1924 & 1925 Acts respectively. In considering the cases regard must be had to their date, the Act under which they were decided, & the effect of the subsequent Acts.*

### SECT. 1.—SCOPE OF THE ACTS.

#### SUB-SECT. 1.—IN GENERAL.

**7019. Construction—Not to be needlessly extended.]—***WILCOCK v. BOOTH*, No. 7322, *post*.

**7020. Application to rent—Not to particular tenancies.]—**On Aug. 8, 1914, the rent of certain premises let by the respondent to a weekly tenant was 10s. In Nov. 1917, the property was let to a new tenant at 20s. a week, with permission to sub-let apartments. The increased rent fell into arrear, & on an application by the landlord the county ct. judge granted leave to distrain, holding that Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), did not apply, as a new tenant had come in, & the property was not

now let as a dwelling-house, but as a lodging-house:—*Held*: the Act was not limited to particular tenancies, but referred to the rent of the house generally, & the contention that an increase of rent to a new tenant was not an increase to which the Act applied could not be supported; the Act applied to houses, not to persons, operating *in rem* not *in personam*, & stereotyped the rent, so that where, as in the present case, the rent had been increased above the standard rent the increase was irrecoverable.—*KING v. YORK* (1919), 88 L. J. K. B. 839; 35 T. L. R. 256, D. C.

*Annotations*:—*Reid. Roberts v. Poplar Metropolitan Borough Assmt. Com.*, [1922] 1 K. B. 25; *Schmit v. Christy*, [1922] 2 K. B. 60; *Prout v. Hunter*, [1924] 2 K. B. 736.

**7021. Application to premises—Not to persons.]—***KING v. YORK*, No. 7020, *ante*.

**7022. — Letting not necessary.]—***WOODFIELD v. BOND* (No. 1), No. 7045, *post*.

**7023. — Fixtures demised with premises.]—***ELLEN v. GOLDSTEIN*, No. 7055, *post*.

**7024. Intention of Acts—Restrictions on increase of rent.]—***GOODWIN v. RHODES*, No. 7299, *post*.

**7025. — Restrictions on recovery of possession.]—***GOODWIN v. RHODES*, No. 7299, *post*.

**7026. — Encouragement of building.]—***STOCKHAM v. EASTON*, No. 7193, *post*.

### PART XXVII. SECT. 1, SUB-SECT. 1.

*t. Intention of Acts—Ejection at common law not prohibited.]—**PURVES v. GRAHAM*, [1924] S. C. 477.—*SCOT.*

*Sect. 1.—Scope of the Acts: Sub-sects. 1, 2 & 3, A. (a).]*

**7027.** — *Protection of tenants.*—*GLOSSOP v. ASHLEY*, No. 7125, *post*.

**7028.** — *Fixity of tenure.*—*DUFTY v. PALMER*, No. 7139, *post*.

#### SUB-SECT. 2.—TO WHAT TENANCIES APPLICABLE.

*See, also, Sect. 2, sub-sect. 2, post.*

**7029. Tenancy at sufferance—After expiry of notice to quit.**—A dwelling-house was let at a rental of £50 a year for three years from Mar. 25, 1912. At the end of the term the tenant continued on a yearly tenancy at the same rent; but this tenancy was determined by a notice to quit given by the landlord, which expired on Mar. 25, 1919. Negotiations were proceeded with for a new tenancy at £60 a year, the tenant still continuing in possession. These negotiations had not resulted in any arrangement when, on Apr. 2, 1919, the Increase of Rent & Mortgage (Restrictions) Act, 1919 (c. 7) was passed & came into operation. The tenant then claimed that he was within the protection of the new Act. The landlord issued a writ to recover possession:—*Held*: the landlord was not entitled to recover possession of the premises & the tenant was entitled to the protection of Increase of Rent & Mortgage (Restrictions) Act, 1919 (c. 7), he being a person to whom the premises had been let within sect. 4 & at the time when the writ was issued, not a trespasser, but a tenant at sufferance.—*DOBSON v. RICHARDS* (1919), 63 Sol. Jo. 663, N. P.

*Annotation*:—*Apprvd.* *Remon v. City of London Real Property Co.*, [1921] 1 K. B. 49.

**7030 Tenancy at will.**—*ECCLESIASTICAL COMRS. v. HILDER*, No. 7099, *post*.

**7031. Furnished business premises—Effect of 1920 Act, ss. 12, (2) & 13.**—The effect of above sects. is that where business premises are let at a rent which includes the use of furniture the Act does not apply to such premises, save as otherwise expressly provided.—*NECCHI v. CRANCHI* (1921), 37 T. L. R. 934, C. A.

**7032. Tenant holding over as statutory tenant—Premises not within earlier Acts.**—Two rooms to which the provisions of 1920 Act applied were let to pltf. on a quarterly tenancy to be surrendered four clear days before the quarter day for which any notice to quit might be given. Pltf. received notice to quit "on June 24 next or at the expiration of the year of your tenancy which shall expire next after the end of a half year from the delivery of this notice." Pltf. did not yield up the premises but remained in possession against the will of the landlords until the passing of the 1920 Act. Then the landlords entered the premises & retook possession:—*Held*: although the agreement of tenancy had come to an end by the notice to quit, the rooms were "let" within 1920 Act, s. 12 (2), & pltf. was a tenant who by virtue of the provisions of the Act retained possession within s. 15 (1), & the landlords could not lawfully disturb him in his possession.—*REMON v. CITY OF LONDON REAL PROPERTY CO.*, [1921] 1 K. B. 49; 89 L. J. K. B. 1105; 123 L. T. 617; 36

T. L. R. 869; 18 L. G. R. 691; 84 J. P. Jo. 349, C. A.

*Annotations*:—*Consd.* *Cruise v. Terrell*, [1922] 1 K. B. 664. *Reid. Barton v. Fincham*, [1921] 2 K. B. 201; *Glossop v. Ashley*, (1921) 90 L. J. K. B. 1237; *Reeves v. Davies*, [1921] 2 K. B. 486; *Shuter v. Hersh*, [1922] 1 K. B. 438; *Parkinson v. Noel*, [1923] 1 K. B. 117; *Keeves v. Dean*, *Nunn v. Pellegrini*, [1924] 1 K. B. 685. *Mentd.* *Duffy v. Palmer*, [1924] 2 K. B. 35.

—*Compare* No. 7268, *post*.

**7033. Tenancy for fixed term—Determinable without notice.**—*CRUISE v. TERRELL*, No. 7268, *post*.

**7034.** — *Effect of apportionment of rent.*—*FUMASOLI v. COMYN & FISH*, No. 7245, *post*.

**7035. Where rent less than two-thirds of ratable value—Particular tenancy excluded from operation of Acts—Though house still subject to Acts.**—*WALLER v. THOMAS*, No. 7092, *post*.

*Compare* No. 7112, *post*.

**7036.** — *Attornment of mortgagee by sub-demise.*—Pltf. in 1920 acquired the lease of a dwelling-house, which had an unexpired term of thirty-one years. In 1921 she mortgaged her leasehold interest in the house by a sub-demise which contained an attornment clause & attorned tenant to the mtgee. at a nominal rent of a peppercorn. The mtgee. did not enter into possession under the mtge. Pltf. resided in the house & let a portion of it. In Dec. 1923, after the passing of 1923 Act, pltf. let a room in the house to deft. Subsequently pltf. gave deft. notice to quit, & claimed to recover possession of the room, alleging that the Rent Restrictions Acts had ceased to apply to the house by virtue of 1923 Act, s. 2 (1). Deft. contended that as pltf. had attorned tenant to the mtgee. she had ceased to be a landlord & had become a tenant of the house, & that consequently the Rent Restrictions Acts still applied to the house by virtue of the proviso to 1923 Act, s. 2 (1):—*Held*: (1) as the rent reserved under the attornment clause in the mtge., namely, a peppercorn, was less than two-thirds of the ratable value of the house, the tenancy created by the attornment must under 1920 Act, s. 12 (7) be regarded for the purpose of the Rent Restrictions Acts as if it had never existed, & therefore under 1923 Act, s. 2 (1) the Rent Restrictions Acts ceased to apply to the house; (2) the holder of a long lease of which a substantial portion remains unexpired is for the purpose of 1923 Act, s. 2 (1), in the position of a landlord & not of a tenant.—*JENKINSON v. WRIGHT*, [1924] 2 K. B. 645; 94 L. J. K. B. 17; 132 L. T. 157; 40 T. L. R. 858; 60 Sol. Jo. 74, D. C.

*Annotation*:—*As to (2) Apprvd. & Fold.* *Finney v. Gougoltz*, [1926] 2 K. B. 322.

**7037.** — *Part of premises sub-let after 1923 Act.*—Deft. was the holder of a lease for ninety-nine years, expiring in 1940, of a dwelling-house at a ground rent of £10 a year. In Jan. 1925, she was in possession of the whole house, the standard rent of which was £60; & in Feb., 1925, she let an unfurnished room therein, together with part use of the scullery, to pltf. at a weekly rent of 16s. Deft. having levied a distress on pltf.'s goods for unpaid rent at this rate, pltf. brought an action for damages, alleging that on an apportionment the rent of 16s. was more than he was liable to pay under the Rent Restriction Acts:—*Held*: (1) deft. was the "landlord" of the house within 1923 Act, s. 2 (1); (2) 1920 Act

#### PART XXVII. SECT. 1, SUB-SECT. 2.

*a. Occupation by servant of landlord—Part remuneration for services.*—Where a servant has had possession

of a dwelling-house belonging to his employer as part of the remuneration for his services, he is not entitled, on the termination of his contract of service, to the benefit of the restrictions

on a landlord's right to recover possession or to eject a tenant, imposed by 1920 Act.—*BUTE v. PRENDERLEITH*, [1921] S. C. 281.—*SCOT*.

ceased to apply to the room let to pltf.; & the distress for rent at 16s. a week was therefore lawful.—*FINEY v. GOUGOLTZ*, [1926] 2 K. B. 322; 95 L. J. K. B. 770; 42 T. L. R. 501; 70 Sol. Jo. 758, D. C.

**7038. Two flats let at one entire rent—Rent exceeding statutory limit—Letting not divisible.]—**Where there is one letting of two flats at one entire rent, the letting is not divisible so as to bring each of the flats within the limit of rent below which dwelling-houses are brought within the Increase of Rent & Mortgage Interest (War Restrictions) Acts.—*RIDER v. ROLLIT* (1920), 36 T. L. R. 687; 84 J. P. Jo. 267.

*Compare* No. 7194, *post*.

**7039. Continuation of application of Acts—Continued existence of dwelling-house.]—***PHILLIPS v. BARNETT*, No. 7132, *post*.

**7040. — Sub-letting furnished of unfurnished house—Destruction of identity.]—**(1) The word "let" in par. (1) of the proviso to 1920 Act, s. 12 (2) means "let to the occupying tenant," & therefore where a landlord let a house unfurnished to a tenant who let it to a sub-tenant furnished, the former could not on an application by the landlord for possession claim the protection of the statute.

(2) The furnishing & letting furnished of a dwelling-house which had previously been let unfurnished is a sufficient destruction of its identity, within the principle of *Phillips v. Barnett*, No. 7132, *post*, to exclude the application of 1920 Act, s. 12 (6).—*PROUT v. HUNTER*, [1924] 2 K. B. 736; 93 L. J. K. B. 993; 132 L. T. 193; 40 T. L. R. 868; 69 Sol. Jo. 49; 22 L. G. R. 746, C. A.

*Annotations:—As to* (1) *Consd.* *Glidden v. Mills*, [1925] 2 K. B. 713. *As to* (2) *Refd.* *Abrahart v. Webster*, [1925] 1 K. B. 563; *Phillips v. Hallahan*, [1925] 1 K. B. 756.

**7041. — Part of flat sub-let by statutory tenant.]—**An entire house within the protection of the Rent Restriction Acts was let to a tenant, who on the expiration of his lease remained in possession as a statutory tenant. On two occasions he sub-let the entire house furnished, but himself resumed possession after each sub-letting. On a later occasion he sub-let two rooms furnished, & while these rooms remained so sub-let, the landlords brought an action claiming possession of the entire house, on the grounds that (1) the earlier sub-lettings furnished of the entire house & (2) the later sub-letting furnished of the two rooms both put the house outside the protection of the Rent Restrictions Acts:—*Held*: the landlords were not entitled to succeed as (1) in the case of the earlier sub-lettings, the period during which the house was sub-let furnished had expired, & the statutory tenant had resumed possession before the action was brought; & (2) in the case of the later sub-letting, part only of the house was sub-let furnished & the landlords had claimed possession of the whole.—*LESLIE & Co. v. CUMMINGS*, [1926] 2 K. B. 417; 135 L. T. 443; 42 T. L. R. 504; 70 Sol. Jo. 738, D. C.

**Breach of terms of tenancy—As ground for recovering of possession—Meaning of tenancy.]—***See* No. 7304, *post*.

**Sub-tenancy.]—***See* No. 7306, *post*.

**On death of tenant.]—***See* Nos. 7097, 7105, 7263, *post*.

### SUB-SECT. 3.—TO WHAT PREMISES APPLICABLE.

#### A. Dwelling-House.

##### (a) In General.

*See* 1920 Act, s. 12 (2).

**7042. Question of fact—Main purpose of building.]—**Deft. took a garage with living rooms above, putting his motor cars in the garage, & allowing his chauffeur & family to live in the rooms above, but not as a tenant. The agreement contained certain terms appropriate to a dwelling-house. The county ct. judge held that the premises were let for a double purpose, that of a garage & that of a dwelling-house, & that deft. occupied the latter by his chauffeur, & that he was therefore entitled to the protection of the Increase of Rent, etc. (Restrictions) Acts, as the premises were let as a "separate dwelling," & as there was no evidence of alternative occupation refused to make an order for possession:—*Held*: the question was one of fact, & there was evidence to support the judge's finding.—*CALLAGHAN v. BRISTOWE* (1920), 89 L. J. K. B. 817; 123 L. T. 622; 84 J. P. 250; 36 T. L. R. 841; 18 L. G. R. 442, D. C.

*Annotation:—Refd.* *Glidden v. Mills*, [1925] 2 K. B. 713.

**7043. — — —.]—**1920 Act applies if premises are used as a dwelling-house, notwithstanding the fact that part of them is used for the purposes of a shop. What has to be determined, as a question of fact, is what was the real, main, & substantial purpose of the premises.—*GREIG v. FRANCIS & CAMPION, LTD.* (1922), 38 T. L. R. 519, D. C.

**7044. Whether let as "separate dwelling"—Premises used partly as garage.]—***CALLAGHAN v. BRISTOWE*, No. 7042, *ante*.

**7045. — Part of a house—Effect of 1920 Act.]—**Letting is not a necessary condition for premises to be protected by above Act.

The words "let as a separate dwelling" in above Act, s. 12 (2), only qualify the words "part of a house" & do not qualify the word "house" where the Act is made to apply to "a house or part of a house let as a separate dwelling."

Although, *prima facie*, similar words in Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97) were not applicable only to part of a dwelling-house yet the above Act is an amending as well as a consolidating Act & those ambiguous words in the earlier Act were removed. Moreover the title of the Act shows that it was intended to protect mtgors. as well as tenants.—*WOODFIELD v. BOND* (No. 1) (1921), 127 L. T. 204; 66 Sol. Jo. (W. R.) 14.

*Annotation:—Refd.* *Greig v. Francis & Campion* (1922), 38 T. L. R. 519.

**7046. — First letting—Necessity for substantial structural alteration.]—***MARCHBANK v. CAMPBELL*, No. 7192, *post*.

**7047. Parts of house let as separate dwellings.]—**If different parts of a building are let separately as dwelling-houses, each of those parts, if the rent is within the statutory limits, is "a dwelling-house to which the principal Act applies" within 1923 Act, s. 2 (1), & therefore, if the landlord comes into possession of any one of them, that part becomes decontrolled by virtue of the said sub-sect.—*DUNBAR v. SMITH*, [1926] 1 K. B. 360; 95 L. J. K. B. 242; 134 L. T. 380; 42 T. L. R. 196; 70 Sol. Jo. 367, D. C.

**7048. May contain more than one dwelling-house.]—***ABRAHART v. WEBSTER*, No. 7194, *post*.

*Compare* No. 7038, *ante*.

### PART XXVII. SECT. 1, SUB-SECT. 3.— A. (a).

**70451. Whether let as "separate dwell-**

**ling"—Part of a house—Effect of 1920 Act.]—**To come within the Act, the premises of which possession is sought must be a house, or part of a house let

as a separate dwelling.—*MARTIN ESTATES CO., LTD. v. WATT & HUNTER*, [1925] N. 79.—*IR.*

*Sect. 1.—Scope of the Acts: Sub-sect. 3, A. (a) & (b), & B.]*

**Separate & self-contained flats.]—See Sect. 2 (6), *post*.**

**7049. Dwelling house in "actual possession" of landlord—Distinguished from notional possession.]—**The provision of 1923 Act, s. 2 (3), which requires "actual possession" on the part of the landlord to take a dwelling-house out of the scope of the Rent Acts, is directed against a "notional" coming into possession by the landlord during the interval between the end of an old tenancy & the commencement of a new one. What amounts to "actual possession" is a question of fact for the county ct. judge.—*HALL v. ROGERS* (1925), 133 L. T. 44; 41 T. L. R. 341; 69 Sol. Jo. 397; 23 L. G. R. 550, D. C.

**7050. — Whether question of law or fact.]—***HALL v. ROGERS*, No. 7049, *ante*.

**7051. — —.]—**(1) Whether a landlord has taken "actual possession" of a dwelling-house within the Rent Restriction Acts so as to take it, by virtue of 1923 Act, s. 2 (1), out of the protection previously enjoyed, may in some circumstances amount to a question of law & not a mere question of fact.

(2) Where an outgoing tenant has vacated & locked up the premises that he occupied, & has handed the key to the landlords, who have retained it for a considerable time before letting the premises to a fresh tenant, there has been "actual possession" by the landlords within 1923 Act, s. 2 (1). (3).—*JEWISH MATERNITY HOME (TRUSTEES) v. GARFINKLE* (1926), 95 L. J. K. B. 766; 42 T. L. R. 589, D. C.

**7052. Premises ceasing to be used as dwelling-house—What amounts to.]—**Where premises have been let as a dwelling-house & are protected by the Rent Acts a subsequent partial user as business premises will not take them out of the protection of the Acts. If a tenant can by mere user take premises out of the protection of the Acts such user must be unequivocal & complete.

*Semble*: where there is a complete change of user, so that the user of the premises as a dwelling-house is abandoned & the whole premises used for business purposes, the premises will lose the protection of the Acts.—*HYMAN v. STEWARD*, [1925] 2 K. B. 702; 94 L. J. K. B. 715; 133 L. T. 315; 41 T. L. R. 501; 69 Sol. Jo. 677; 23 L. G. R. 556, D. C.

**7053. — Whether premises taken out of scope of Acts.]—***HYMAN v. STEWARD*, No. 7052, *ante*.

(b) *Premises Used Partly for Other Purposes.*

*See* 1920 Act, s. 12 (2).

**7054. General rule.]—***EPSOM GRAND STAND ASSOCN., LTD. v. CLARKE*, No. 7296, *post*.

**7055. Shop.]—**By an agreement dated Sept. 11, 1916, certain premises, which consisted of a shop & bakehouse, with ovens & other fixtures on the ground floor, & two floors of residential rooms above, were let for three years from Aug. 25, 1916, at an annual rent of £52 payable weekly, the tenant agreeing to keep in repair the interior of the premises with the ovens & fixtures, & to yield up the premises with the fixtures at the expiration of the tenancy, & to use the shop as a baker's & confectioner's shop only, the lessor agreeing to repair the outside & to pay the rates & taxes.

By a supplemental document of even date the tenant agreed, in consideration of the tenancy agreement & of the goodwill of the baker's business & of the use of the landlord's fixtures, to pay during the term a further sum of £1 weekly to be recoverable as rent in arrear. On the expiration of the tenancy the tenant remained in possession, claiming the benefit of Increase of Rent & Mortgage Interest (Restrictions) Acts, 1915 & 1919. The lessor threatened to take possession of & remove the fixtures, claiming that the Acts did not apply to the shop, bakehouse & fixtures, & that the rent was in excess of the limit contained in the Acts. The tenant applied for an injunction to restrain him:—*Held*: (1) the supplemental agreement did not constitute a demise of the business premises & the fixtures at an additional yearly rent of £52, so as to make the total yearly rent £104 & take the premises outside the limit of £70, to which the Increase of Rent & Mortgage Interest (Restrictions Amendment) Act, 1919 (c. 7) applied; (2) the dwelling-house & the business premises together fell within the provisions of the Acts.

(3) Where a dwelling-house & business premises had been demised together there was no machinery which enabled the ct. to give the lessor possession of the business premises & to apportion the rent:—*Held*: the fixtures formed part of the business premises & came within the provisions of the Acts.—*ELLEN v. GOLDSTEIN* (1920), 89 L. J. Ch. 586; 123 L. T. 644.

**7056. —.]—***GREIG v. FRANCIS & CAMPION, LTD.*, No. 7043, *ante*.

**7057. —.]—**By a tenancy agreement for three years ptlf. let to deft. premises consisting of a shop, bakehouse, excepting the oven & other rooms, & by an agreement of even date for the same period he also let to deft. a quantity of tools, utensils, fixtures & fittings, including the oven, for use on the premises by deft. in his business of a baker. Deft., with his wife & family, occupied the premises under the agreements, he carrying on thereon his business. The standard rent of the premises was £40. In an action by ptlf., after expiration of the agreements, for recovery of possession, it was contended on his behalf that the premises were used for "business or trade purposes" within 1920 Act, s. 13 (1) & as that sect. had expired before the termination of the tenancy ptlf. was entitled to recover:—*Held*: the premises were a dwelling-house within 1920 Act, s. 12 (2) & consequently that deft. was entitled to the protection given by the statute.—*COHEN v. BENJAMIN* (1922), 39 T. L. R. 10; 67 Sol. Jo. 147.

**7058. Sleeping accommodation for hotel staff.]—**Certain premises had been let on lease for a term of years to deft. D. During the currency of that lease, a portion of the premises was let on agreement by D.'s assignee to deft. hotel co. for three years. One of the terms of that agreement was that the tenants were not to carry on any business on the premises "or permit the same to be occupied or used in any other way than as sleeping apartments for their staff." Proceedings for the recovery of possession of the premises comprised in the original lease having been instituted by ptlfs. on the ground of the forfeiture of that lease by reason of a breach of covenant to keep in repair, the hotel co. claimed that they were entitled to

**PART XXVII. SECT. 1, SUB-SECT. 3.—**  
A. (b).

b. *Temperance hotel.*—Premises were let to deft. to carry on the busi-

ness of a temperance hotel; deft., as proprietress of the hotel, resided there:—*Held*: the premises came within 1920 Act, s. 12, on the ground that the hotel trading was a business

of such a nature that the premises in which it was conducted never lost the character of a dwelling-house.—*BURNS v. RADCLIFFE*, [1923] 2 I. R. 158.—**IR.**

the protection of the Act, & in the alternative they counterclaimed for relief against forfeiture. The official referee held that the Act had at the date of the trial ceased to apply to the premises occupied by the hotel co. inasmuch as they were using them as business premises, & ordered them to pay their own costs. The hotel co. appealed:—*Held*: the premises occupied by the hotel co. being used by them as sleeping apartments for their staff constituted a dwelling-house to which the Act applied, & the official referee was therefore wrong in law in depriving them of their costs.—*RICHMOND (DUKE) v. DEWAR & CADOGAN HOTEL CO., LTD.* (1921), 38 T. L. R. 151, D. C.

*Annotation*:—*Reid. Cohen v. Benjamin* (1922), 39 T. L. R. 10.

**7059. Public-house.**—*WALLER v. THOMAS*, No. 7092, *post*.

**7060. Boarding-house.**—A flat, the standard rent of which was £42, was let by pltf. to deft. in 1919 at a rent of £109 4s. Deft. used the flat partly for taking in boarders, but she reserved & used certain rooms for her own residence. Subsequently deft. refused to pay rent at the rate of £109 4s., & on being sued she alleged that she was not liable for rent at that rate, which was in excess of the standard rent, & she counterclaimed the excess she had paid:—*Held*: (1) the premises came within 1920 Act, s. 12 (2) (ii); (2) deft. was not liable to pay rent in excess of the standard rent; (3) she was entitled to recover the excess she had actually paid over the standard rent.—*COLLS v. PARNHAM*, [1922] 1 K. B. 325; 91 L. J. K. B. 335; 126 L. T. 480; 20 L. G. R. 97, D. C.

*Annotation*:—*As to* (1) *Reid. Cohen v. Benjamin* (1922), 39 T. L. R. 10.

**7061. Subsequent letting in 1919 solely as business premises—Whether within 1920 Act.**—Premises which were occupied from 1914 till 1919 partly as business premises & partly as a dwelling-house, were in 1919 let to deft. solely as business premises:—*Held*: the premises were not within the protection of 1920 Act.—*WILLIAMS v. PERRY*, [1924] 1 K. B. 936; 93 L. J. K. B. 521; 131 L. T. 471; 40 T. L. R. 539; 68 Sol. Jo. 617; 22 L. G. R. 471, D. C.

*Annotations*:—*Apld. Phillips v. Hallahan*, [1925] 1 K. B. 756. *Reid. Barrett v. Hardy* (Allnwick), [1925] 2 K. B. 220; *Hyman v. Steward*, [1925] 2 K. B. 702.

**7062. Separate letting of part as business premises.**—The landlord of premises, which consisted of a shop on the ground floor with a dwelling-house above, let both portions, when they became vacant in 1923, to a tenant, but under separate lettings. As regards rent the premises came within the scope of 1920 Act:—*Held*: the shop portion of the premises while so let separately was not within the protection of the Act.—*PHILLIPS v. HALLAHAN*, [1925] 1 K. B. 756; 94 L. J. K. B. 694; 133 L. T. 236; 41 T. L. R. 407; 69 Sol. Jo. 444; 23 L. G. R. 440, D. C.

*Annotation*:—*Apprvd. & Apld. Gidden v. Mills*, [1925] 2 K. B. 713.

**7063.** —[Certain premises were leased in 1865 for a term expiring on Dec. 25, 1923, under the description of "all that piece of ground . . . with the warehouse thereon erected." Before 1913 the lessee's interest became vested in A. & R., who on Nov. 17, 1913, sublet the premises to deft. under the description of "all that piece of ground . . . with the coachhouse & stable thereof erected" for a period expiring Dec. 22, 1923. There was no evidence when the premises were converted from a warehouse into a coachhouse & stable, but before the sub-lease to deft. the premises had been used as a coachhouse & stable with living rooms for the coachman on the upper

floor. Deft. converted the premises into a garage with living rooms over, the living rooms having a separate & independent entrance, & occupied them by keeping cars in the garage & by his chauffeur using the living rooms not as tenant but as servant. On Sept. 1, 1922, deft. let the living rooms to W. as a dwelling-house, but continued in occupation of the garage. In July, 1924, after the expiration of the head lease & the sub-lease to deft. the freeholders leased the premises to pltf., who brought an action against deft. for the possession of the whole of the premises or alternatively for possession of the garage:—*Held*: (1) pltf. was not entitled to an order for possession of the living rooms, as they were in the occupation of a tenant to whom they had been validly sub-let by deft. & who was holding over & was protected by 1920 Act, s. 5 (1). The fact that deft. was not himself in actual possession of the premises as a dwelling-house did not prevent him from claiming the benefit of the Rent Restriction Acts, as the claim was for actual possession, & an order for possession would be executed against whoever was on the premises; (2) pltf. was entitled to an order for possession of the garage, as that portion of the premises had been separated from the portion of the premises let off as a separate dwelling-house, & at the time the action for possession was brought was being used solely for business purposes, & therefore not within the definition of a dwelling-house to which the Act applied.—*GIDDEN v. MILLS*, [1925] 2 K. B. 713; 134 L. T. 31, D. C.

**Land or premises let together with a house—Whether premises includes business premises.**—*See* No. 7088, *post*.

**7064. What are "business premises"—Within 1920 Act, s. 13—Letting lodgings.**—Appl. occupied a dwelling-house partly for her own residence & partly for letting rooms as lodgings:—*Held*: that the house was "used for business purposes" within the above sect.—*TOMPKINS v. ROGERS*, [1921] 2 K. B. 94; 90 L. J. K. B. 591; 124 L. T. 478; 85 J. P. 113; 37 T. L. R. 299; 19 L. G. R. 265, D. C.

*Annotations*:—*Expld. & Distd. Cohen v. Benjamin* (1922), 39 T. L. R. 10. *Consd. Colls v. Parnham*, [1922] 1 K. B. 325. *Reid. Richmond v. Dewar & Cadogan Hotel Co.* (1921), 38 T. L. R. 151.

**7065.** — *Public-house.*—*WALLER v. THOMAS*, No. 7092, *post*.

**7066.** — *Boarding-house.*—*COLLS v. PARNHAM*, No. 7060, *ante*.

**7067.** — *Shop & bakehouse.*—*COHEN v. BENJAMIN*, No. 7057, *ante*.

**NOTE.**—1920 Act, s. 13 ceased to be in force on June 24, 1921.

#### *B. Dwelling-House Let at Rent Including Attendance.*

*See* 1920 Act, s. 12 (2) (i); 1923 Act, s. 10.

**7068. "Let"—Let to occupying tenant.**—*PROUT v. HUNTER*, No. 7040, *ante*.

**7069. Whether payment for attendance included in rent—Intention of parties.**—By 1920 Act, s. 12 (2), the Act applies "to a house or part of a house let as a separate dwelling, where either the annual amount of the standard rent or the ratable value does not exceed—(a) in the Metropolitan Police District including therein the City of London £105." Proviso (i) of the sect. enacts that the "Act shall not, save as otherwise expressly provided, apply to a dwelling-house *bona fide* let at a rent which includes payments in respect of board, & attendance, or use of furniture." A tenant covenanted to pay the yearly rent of £100 for a flat in a block, "&, moreover, to pay 10s.

**Sect. 1.—Scope of the Acts: Sub-sect. 3, B., C. & D.]**

weekly throughout the tenancy for services at the times & in manner herein set out." Besides this flat there were other flats in the same block, where certain of the tenants covenanted to pay an inclusive rent for service:—*Held*: (1) under the particular agreement, the parties had not purported to make the 10s. per week rent or part of rent, & had not done so, although payments for attendance might in certain cases form part of the rent within the meaning of the Act; (2) inasmuch as the rent was not inclusive, but exclusive, of the stipulated payments for attendance, the proviso in sect. 12 (2) did not apply. The rent was therefore under the limit of £105.—*WOOD v. WALLACE* (1920), 90 L. J. K. B. 319; 124 L. T. 539; 37 T. L. R. 147; 65 Sol. Jo. 135; 84 J. P. Jo. 517.

*Annotations*:—*As to* (1) *Reid*. *Wood v. Carwardine*, [1923] 2 K. B. 185. *As to* (2) *Apprvd.* *Hocker v. Solomon* (1921), 91 L. J. Ch. 8. *Consd.* *Wilkes v. Goodwin*, [1923] 2 K. B. 86.

**7070. — Payment referred to as additional rent.**—A flat of a ratable value of less than £105 on Aug. 3, 1914, was let at a yearly rental of £170, with an additional rent of £30 to include certain attendance & the "use of certain articles of furniture, carpets, etc., as arranged & as used heretofore." The flat was not completely furnished, but the tenant had the use of certain articles of furniture. In an action for recovery of possession after notice to quit:—*Held*: the rental did not include payments in respect of attendance, nor for use of furniture; & therefore the Act applied & recovery of possession must be refused.—*HOCKER v. SOLOMON* (1921), 91 L. J. Ch. 8; 127 L. T. 144.

*Annotations*:—*Reid.* *Wilkes v. Goodwin*, [1923] 2 K. B. 86. *Wood v. Carwardine*, [1923] 2 K. B. 185.

**7071. — Payments for premises & attendance separately charged—Payable quarterly in one payment—Referred to as rent.**—Pltf. let a dwelling-house to deft. for three years at a rent of £74 4s. a year & 5s. a week for attendance. Both amounts were to be paid quarterly in one payment, & the agreement referred to the payment as "rent to include attendance." In an action to recover possession after the termination of the tenancy:—*Held*: as the rent included attendance the premises were not protected by 1920 Act, s. 12 (2) (i), as amended by 1923 Act, s. 10 (1), & pltf. was entitled to succeed.—*NADLER v. WILSON* (1924), 40 T. L. R. 639; 68 Sol. Jo. 772.

— "Standard rent."—*See* No. 7121, *post*.

**7072. What amounts to "attendance"—Carrying coals to flat—& removal of refuse.**—Pltf. let a flat to deft., with use of fixtures & of hall & common staircase at a certain rent. Pltf. covenanted (*inter alia*) to remove such refuse from the flat as could not be burnt, & to carry to the flat the lessee's coals daily, "free of charge":—*Held*: these services were part of the consideration for the rent, & constituted "attendance" within 1920 Act, s. 12 (2) (i), & consequently, the Act did not apply.—*NYE v. DAVIS*, [1922] 2 K. B. 56; 91 L. J. K. B. 545; 126 L. T. 537; 20 L. G. R. 483, D. C.

*Annotations*:—*Distd.* *King v. Millen*, [1922] 2 K. B. 647. *Follid.* *Dick v. Duncan* (1923), 92 L. J. Ch. 320. *Consd.* *Wilkes v. Goodwin*, [1923] 2 K. B. 86; *Wood v. Carwardine*, [1923] 2 K. B. 185.

**7073. —**—*Held*: the carrying of coals & the removal of refuse constituted "attendance" within the meaning of the Acts, & by the agreement of letting there was a well-recognised service which the tenant had a right to call upon

the caretaker to perform, which was not negligible, & therefore the Acts did not apply.—*DICK v. DUNCAN* (1923), 92 L. J. Ch. 320; 67 Sol. Jo. 384.

*Annotation*:—*Consd.* *Wood v. Carwardine*, [1923] 2 K. B. 185.

**7074. — Keeping common hall & stairway cleaned.**—A flat was let to a tenant "together with use of, jointly with other tenants of the premises, the main entrance door hall & staircase of the premises, . . . together with right of access to & from the basement of the premises;" & the landlord agreed (*inter alia*) "to keep the hall & staircase properly cleaned":—*Held*: the agreement to keep the hall & staircase properly cleaned did not constitute "attendance" within 1920 Act, s. 12 (2) (i), & consequently the flat was not outside the scope of the Act.—*KING v. MILLEN*, [1922] 2 K. B. 647; 92 L. J. K. B. 123; 128 L. T. 280; 67 Sol. Jo. 48; 20 L. G. R. 715, D. C.

*Annotations*:—*Consd.* *Wood v. Carwardine*, [1923] 2 K. B. 185. *Reid.* *Dick v. Duncan* (1923), 92 L. J. Ch. 320.

**7075. — Supply of hot water.**—In the case of a flat:—*Held*: the supply of hot water through a pipe does not constitute attendance within the sect., & the caretaker's reception of letters, messages, & parcels for the tenant & their delivery by the caretaker to the tenant, though they might in a sense be attendance, nevertheless must be disregarded under the rule *de minimus non curat lex*, where these matters are only a trivial part of the caretaker's duties.—*WOOD v. CARWARDINE*, [1923] 2 K. B. 185; 129 L. T. 314; 39 T. L. R. 300; 21 L. G. R. 306; *sub nom.* *CARWARDINE v. WOOD*, 92 L. J. K. B. 593.

*Annotation*:—*Reid.* *Rimmer v. Carson* (1923), 39 T. L. R. 349.

**7076. — Reception of letters by caretaker.**—*WOOD v. CARWARDINE*, No. 7075, *ante*.

**7077. — Services of porter—& use of lift for coals.**—*MICHAEL v. PHILLIPS*, No. 7155, *post*.

**C. Dwelling-House Let at Rent Including Use of Furniture.**

*See* 1920 Act, s. 12 (2) (i); 1923 Act, s. 10.

**7078. "Let"—Let to occupying tenant.**—*PROUT v. HUNTER*, No. 7040, *ante*.

**7079. Whether payment for use of furniture included in rent—Payment referred to as additional rent.**—*HOCKER v. SOLOMON*, No. 7070, *ante*.

**7080. — Rent to include use of linoleum.**—In Oct. 1920, the owner of a dwelling-house at Brighton, of which the standard rent was £55, let a portion of it as a maisonette to a tenant at a rent of £80 *per annum* "to include the use of the linoleum" with which certain of the floors were covered. It was conceded that the payment for the use of the linoleum was included in the rent *bond fide* & not with the object of evading the Act. On an application by the tenant to have the standard rent apportioned:—*Held*: unless the linoleum was so trifling in quantity or value as to be negligible, which was a question of fact for the county ct. judge, its use was sufficient to satisfy the words "use of furniture" in the proviso, & there was no jurisdiction to apportion the rent. *Qu.*: whether, where furniture is let with a house, the fact that the tenancy agreement provides for a separate payment for the use of the furniture, instead of a lump sum to include rent & furniture, negatives the house being "let at a rent which includes payment in respect of . . . use of furniture" within the meaning of the above proviso.—*WILKES v. GOODWIN*, [1923] 2 K. B.

86; 92 L. J. K. B. 580; 129 L. T. 44; 39 T. L. R. 262; 67 Sol. Jo. 437; 21 L. G. R. 239, C. A.

*Annotations*.—*Consd.* Crane v. Cox (1923), 92 L. J. K. B. 544; *Dick v. Duncan* (1923), 92 L. J. Ch. 320; *Rimmer v. Carson* (1923), 39 T. L. R. 349. *Refd.* Wood v. Carwardine, [1923] 2 K. B. 185.

**7081.** — *Proof of substantial charge required.*—In order to exclude a dwelling-house from the provisions of 1920 Act, s. 12 (2) (i), as to use of furniture the landlord must show that there was included in the letting a substantial charge for a quantity of furniture sufficiently large to exclude any reasonable application of the rule *de minimis non curat lex*.—*RIMMER v. CARSON* (1923), 39 T. L. R. 349.

**7082.** *What amounts to "furniture"—Must be substantial quantity.*—The words "use of furniture" in 1920 Act, s. 12 (2) (i), mean something substantial in the way of furniture. A piece of fitted linoleum by itself does not come within the meaning of the phrase. Where, therefore, a dwelling-house is let at a rent which includes payment for the use of such a piece of linoleum, the protection of the Act is not thereby excluded.—*CRANE v. COX* (1923), 92 L. J. K. B. 544; 128 L. T. 831; 39 T. L. R. 204; 67 Sol. Jo. 335; 21 L. G. R. 226, D. C.

*Annotations*.—*Consd.* Wilkes v. Goodwin, [1923] 2 K. B. 86; *Wood v. Carwardine*, [1923] 2 K. B. 185. *Refd.* *Rimmer v. Carson* (1923), 39 T. L. R. 349.

**7083.** — — — — —.]—*RIMMER v. CARSON*, No. 7081, *ante*.

**7084.** — — — — —.]—*WILKES v. GOODWIN*, No. 7080, *ante*.

#### D. Other Cases.

See 1920 Act, s. 12 (2) (iii).

**7085.** *Vacant plots let with cottage—Whether garden "within curtilage of dwelling-house"—Under Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 2 (2).*—Pltf. let to deft. a small cottage in a road in which, under a building scheme, a number of similar cottages were to be built, with a small piece of ground behind each cottage for a garden. On one side of the cottage occupied by deft. several of the intended cottages were not built, & there were thus a number of vacant plots forming a piece of open ground, about one-fifth of an acre in extent, adjoining the cottage, & included in the same letting, & surrounded by a continuous fence, the whole forming one garden belonging to the cottage.—*Held*: the words in above sub-sect. applied to premises domestically appurtenant to the house, & the adjoining land was therefore within the purview of those words, & the tenant was entitled to the protection of the Act.—*SCOTT v. AUSTIN* (1919), 89 L. J. K. B. 1048; 122 L. T. 235.

*Annotation*.—*Refd.* *Early v. Drummond* (1923), 39 T. L. R. 171.

**7086.** *"Site" of house let with land—Whether outbuildings, stables & garden included.*—(1) The landlord let to the tenant, deft., a dwelling-house, together with a stable, buildings, a garden, & a meadow, in one letting. Pltf., in 1919, purchased the premises freehold, & served on deft. notice to quit the premises in Dec. 1919. Deft. refused to comply with the notice, & pltf. brought an action of ejectment in the county ct. This action was heard before 1920 Act was passed &, in view of the compromise character of the letting, deft. could not claim the protection of the Increase of

Rent Restriction Acts in force, & was, therefore, unable to resist pltf.'s claim for possession. He accordingly consented to an order for possession of the premises comprised in his holding, to be given on Sept. 29, 1920. In July, 1920, 1920 Act came into force, & deft. then applied to the County Court under sect. 5 (3) of that Act, to rescind the consent order on the ground that under the new Act he had become entitled to protection, as, if the land & premises forming part of his holding had been let separately from the house, the ratable value of the land & buildings would be less than one-quarter of the ratable value of the house. The county ct. judge was not satisfied that the premises were within the protection of the Act of 1920, & refused to rescind the consent order.—*Held*: 1920 Act, s. 5 (3), did not apply to a consent order or judgment, & the county ct. judge was right in refusing to rescind the consent order in this case.

(2) *Semle*: the term "house" in proviso (iii) to 1920 Act, s. 12 (2), may include beside the actual dwelling-house, the adjoining outbuildings, stable & garden.—*WELLESLEY v. WHITE*, [1921] 2 K. B. 204; 90 L. J. K. B. 926; 125 L. T. 92; 19 L. G. R. 255, D. C.

*Annotations*.—*As to* (1) *Distd.* *Rossiter v. Langley*, [1925] 1 K. B. 741. *As to* (2) *Refd.* *Early v. Drummond* (1923), 39 T. L. R. 171.

**7087.** — *Public-house—Whether cottage & adjoining land included.*—Applt. was the tenant, under one lease, of a public-house, cottage, & 7 acres, 31 poles of land. The ratable value of the house was £14 *per annum* & of the land £10 *per annum*. Proceedings were taken against applt. to recover possession of the premises & mesne profits, & judgment was given against him. On appeal it was contended on his behalf that he was entitled to the protection of 1920 Act on the ground that though the land did not fall within proviso (iii) to sect. 12 (2), as being land which was let together with a house & which had a ratable value of less than one-quarter of the ratable value of the house, yet the land formed part of the house as being conveniently enjoyed therewith.—*Held*: the land did not form part of the house within the meaning of the proviso, & applt. was not protected by the Act.—*EARLY v. DRUMMOND* (1923), 39 T. L. R. 171; 67 Sol. Jo. 314, D. C.

**7088.** *"Land & premises"—Whether business premises included.*—Pltf. claimed to recover possession of a dwelling-house of the ratable value of £7, & of a stable-yard, coach-house, etc., of the ratable value of £48. The house & stable-yard, etc., were let together to defts. under one agreement at a monthly rent of £6 13s. 4d. The stable-yard, coach-house, etc., were occupied by defts. in their business as livery stable keepers.—*Held*: 1920 Act, s. 12 (2) (iii) deals only with the case of a single letting of a dwelling-house that is protected by the Act with land or premises that are not protected; it has no application to a single letting of a protected dwelling-house & business premises which are protected by s. 13.—*READ v. GOATER*, [1921] 1 K. B. 611; 90 L. J. K. B. 580; 125 L. T. 87; 19 L. G. R. 270, D. C.

*Annotation*.—*Refd.* *Early v. Drummond* (1923), 39 T. L. R. 171.

**7089.** *Business premises—Whether fixtures included.*—*ELLEN v. GOLDSTEIN*, No. 7055, *ante*.

**7090.** *Ascertainment of ratable value—Part of property let as dwelling-house—Dwelling-house not*

#### PART XXVII. SECT. 1, SUB-SECT. 3.—D.

c. *Land let with hotel—Exceeding one-quarter value of hotel.*—An hotel &

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two farms in its vicinity were let together in the same lease.—*Held*: as the ratable value of the farms exceeded one-quarter of the ratable value of

the hotel, the hotel was excluded from the protection provided by the Acts.—*FALCONER v. CHIMHOLM'S TRUSTEES*, [1925] S. C. 742.—*SCOT*.

**Sect. 1.—Scope of the Acts: Sub-sect. 3, D. Sect. 2: Sub-sects. 1, 2, 3, 4, 5, 6 & 7. Sect. 3: Sub-sect. 1.]**

**separately rated—Jurisdiction to apportion.]—**1920 Act, s. 12 (3), empowers a county ct. judge to apportion the ratable value of a property, although such value may exceed in amount the limit imposed by sub-sect. 2, for the purpose of ascertaining whether a part of the property which is let as a dwelling-house but is not separately rated, is within the scope of the Act.—**BARRETT v. HARDY BROTHERS (ALNWICK), LTD.**, [1925] 2 K. B. 220; 94 L. J. K. B. 665; 133 L. T. 249; 41 T. L. R. 426; 69 Sol. Jo. 492; 23 L. G. R. 427, D. C.

**Annotation:—***Reid*. Phillips v. Potter (1925), 94 L. J. K. B. 819.

**7091. Recovery of possession by mesne tenant—Whether premises decontrolled.]—**Resp. sub-let three rooms in a dwelling-house of which he was the tenant. When the sub-tenancy terminated his sub-tenancy & relinquished possession of the rooms resp. entered into possession of them & by workmen, executed certain repairs & decorations. It was not disputed that 1920 Act applied both to the whole house & also to the rooms which had been sub-let:—**Held**: 1920 Act did not cease to apply to the rooms by reason of 1923 Act, s. 2 (1), & of the fact that resp. had come into possession of them, since the proviso to the sub-sect. specifically provided that, where a tenant, as distinction from a head landlord, came into possession of part of a dwelling-house which he had sub-let, the Act of 1920 should not cease to apply to that part.—**CATTO v. CURRY**, [1926] 1 K. B. 460; 95 L. J. K. B. 414; 134 L. T. 540; 42 T. L. R. 243; 70 Sol. Jo. 368, D. C.

## SECT. 2.—INTERPRETATION OF TERMS.

### SUB-SECT. 1.—RENT.

**See Sect. 3, sub-sect. 1, post.**

**Standard rent.]—See Sect. 3, sub-sect. 2, post.**

**Net rent.]—See No. 7118, post.**

### SUB-SECT. 2.—RATABLE VALUE.

**See 1920 Act, s. 12 (1) (e).**

**7092. Whether net or gross value.]—**(1) 1920 Act, s. 12 (7) provides: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the ratable value thereof, this Act shall not apply to that rent or tenancy nor to any mtge. by the landlord from whom the tenancy is held of his interest in the dwelling-house, & this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed":—**Held**: the expression "ratable value" in this sect. means net & not gross value.

(2) The effect of the sub-sect. is to take the tenancy to which it applies entirely outside the operation of the Act, although the Act still applies to the house itself (**LUSH, J.**).

(3) On an application for possession under 1920 Act, s. 5 (1) (a), (b) or (c), no question of alternative accommodation can arise, the only point for the consideration of the ct. being whether it is reasonable to make an order or to give judgment for possession.

(4) A public-house which contains dwelling-house accommodation constitutes a "dwelling-house," & falls within the general provisions of the Act; it does not constitute business premises within s. 13.

(5) In considering whether an order for possession should be made on the ground that the tenant has been convicted of using the premises "for an immoral or illegal purpose" within 1920 Act, s. 5 (1) (b), something more than an isolated instance of illegality must be proved in order to justify the making of an order.—**WALLER v. THOMAS**, [1921] 1 K. B. 541; 90 L. J. K. B. 656; 125 L. T. 21; 37 T. L. R. 325; 19 L. G. R. 109, D. C.

**Annotations:—***As to* (2) **Consd.** Schneiders v. Abrahams, [1925] 1 K. B. 301. *Reid*. Glossop v. Ashley (1921), 90 L. J. K. B. 1237; Brakspear v. Barton, [1924] 2 K. B. 88. *Generally*, **Mentd.** Isaacs v. Keech (1925), 94 L. J. K. B. 676.

**Ratable value of house let with land—What "house" includes.]—See Nos. 7086, 7087, ante.**

**Apportionment of ratable value.]—See No. 7090, ante.**

### SUB-SECT. 3.—LANDLORD.

**See 1920 Act, s. 12 (1) (f) (g).**

**7093. Purchaser since September 30, 1917—Increase of Rent, etc. (Amendment) Act, 1918 (c. 7), s. 1.]—****VERNON INVESTMENT ASSOCN. v. WELCH**, No. 7283, *post*.

**7094. Holder of long lease—1923 Act, s. 2 (1).]**—**JENKINSON v. WRIGHT**, No. 7036, *ante*.

**7095. —.]—****FINEY v. GOUGOLTZ**, [1926] 2 K. B. 322; 95 L. J. K. B. 770; 42 T. L. R. 501; 70 Sol. Jo. 758, D. C.

**7096. Whether "landlord" converted into "tenant"—By mortgage—Sub-demise at peppercorn rent.]—****JENKINSON v. WRIGHT**, No. 7036, *ante*.

### SUB-SECT. 4.—TENANT.

**See, 1920 Act, s. 12 (1) (f) & (g).**

**See, also, Sect. 1, sub-sect. 2, ante.**

**7097. Whether statutory definition exclusive—Meaning of "include."—**(1) A single woman was the weekly tenant & sole occupier of a house which as regards rental came within the scope of 1910 Act. During her tenancy she died intestate. Some months later her sister was appointed administratrix, but she never resided in deceased's house, which had been sub-let to another person. The landlord claimed that on the death of the tenant intestate with no member of her family residing with her in the house the tenancy lapsed, & that he was entitled to recover possession of the house:—**Held**: the administratrix was a person who derived title under the original tenant within 1920 Act, s. 12 (1) (f), & her right as tenant was not affected by the provisions of 1920 Act, s. 12 (1) (g).

(2) 1920 Act, s. 12 (1) (g), must be taken as applying only to cases where there is no exor. or administrator; in other words, to cases not falling within 1920 Act, s. 12 (1) (f).—**MELLOWS v. LOW**, [1923] 1 K. B. 522; 92 L. J. K. B. 363; 128 L. T. 667; 39 T. L. R. 190; 67 Sol. Jo. 261; 21 L. G. R. 180, D. C.

**Annotations:—***As to* (1) **Reid**. Keeves v. Dean, Nunn v. Pellegrini, [1924] 1 K. B. 685. *Generally*, **Mentd.** Queen's Club Gardens Estates v. Bignell, [1924] 1 K. B. 117.

**PART XXVII. SECT. 2, SUB-SECT. 3.**  
**d. Whether "landlord" includes sub-lessor.]—**The expression "land-

lord," as interpreted by 1920 Act, s. 12 (1), is not limited to the proprietor of a dwelling-house, but includes a

tenant who has sub-let to a sub-tenant.—**LOGAN v. FAIR**, [1922] S. C. 76.—**SCOT**.

**7098. Employee—After termination of employment.]**—Deft. was employed by plffs. to take charge of a garage & while so employed he was allowed to occupy a dwelling-house belonging to plffs. adjoining their garage. His employment was terminated & he secured other employment, but remained in occupation of the dwelling-house. Plffs. served notice to quit on him & brought proceedings for ejectment against him. Deft. relied on the Increase of Rent & Mortgage Interest (War Restrictions) Acts, 1915 to 1919:—*Held*: the Acts referred to did not apply.—*NATIONAL STEAM CAR CO., LTD. v. BARHAM* (1919), 122 L. T. 315, N. P.

**7099. Caretaker.]**—(1) In May, 1919, plffs. entered into an agreement with deft. whereby deft. should act as a caretaker of a dwelling-house of which plffs. were the owners. Deft. was to have no remuneration but he was to have the use of the servants' offices & upper bedrooms rent free. It was a term of the agreement that deft. should give up possession of the house within two weeks after receiving notice to do so:—*Held*: deft. as a matter of law was never at any time a tenant of the house or part of it within the meaning of the Rent Restriction Act, & therefore was not entitled to its protection.

(2) Increase of Rent & Mortgage Interest (War Restrictions) Acts, 1915–1919, do not apply to a tenancy at will.—*ECCLESIASTICAL COMRS. v. HILDER* (1920), 36 T. L. R. 771; 84 J. P. Jo. 309, N. P.

**7100. Person not in occupation.]**—*COLLIS v. FLOWER*, No. 7105, *post*.

**7101. — Where tenant has sub-let.]**—*HICKS v. SCARSDALE BREWERY CO.*, [1924] W. N. 189, D. C.

*Annotation*:—*Consd. Gidden v. Mills*, [1925] 2 K. B. 713.

**7102. — — —.]**—*GIDDEN v. MILLS*, No. 7063, *ante*.

**7103. — — — Application of 1920 Act, s. 12 (2).]**—*PROUT v. HUNTER*, No. 7040, *ante*.

**7104. Mesne tenant.]**—*CATO v. CURRY*, No. 7091, *ante*.

**7105. Executor of tenant.]**—Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 2 (1) (d), now re-enacted by 1920 Act, s. 12 (1) (b), provides that the expression "tenant" includes "any person from time to time deriving title under the original tenant."

The tenant of a dwelling-house, which came within the scope of the Increase of Rent Restriction Acts, died. By her will she appointed deft. F. her exor., & deft. O., who had resided in the house with her, residuary legatee. After the death of the tenant O. continued to reside in the house. The landlord by notice to quit served upon F. required possession to be given up, & as possession was not given on the expiration of the notice, proceedings were commenced against both defts., who claimed the protection of the Increase of Rent Restrictions Acts:—*Held*: F., as exor., was tenant of the house within the meaning, & was entitled to the protection, of the Acts, although he was not in occupation of the house.—*COLLIS v. FLOWER*, [1921] 1 K. B. 409; 90 L. J. K. B. 282; 124 L. T. 510; 19 L. G. R. 193, D. C.

*Annotations*:—*Appld. Mellows v. Low*, [1923] 1 K. B. 522. *Reid. Parkinson v. Noel*, [1923] 1 K. B. 117; *Keeves v. Dean, Nunn v. Pellegrini*, [1924] 1 K. B. 685.

**7106. Administrator of tenant.]**—*MELLOWS v. LOW*, No. 7097, *ante*.

**7107. Husband of deceased woman tenant.]**—Where a woman statutory tenant dies intestate her husband is a "member of the tenant's family"

within 1920 Act, s. 12 (1) (g), & if residing with her at the time of her death, may become by agreement, or the decision of the county ct., the statutory tenant. As statutory tenant he has such an interest in the premises as to entitle him to maintain an action of ejectment against a sub-tenant.—*SALTER v. LASK*, *LASK v. COHEN*, [1925] 1 K. B. 584; 94 L. J. K. B. 522; 132 L. T. 830; 41 T. L. R. 201; 23 L. G. R. 327, D. C.

**Statutory tenant.]**—*See* No. 7032, *ante*, No. 7241, *post*.

**Tenant at sufferance.]**—*See* No. 7029, *ante*.

**Whether "sub-tenant" included—Under 1920 Act, s. 5 (1) & (5).]**—*See* No. 7306, *post*.

#### SUB-SECT. 5.—DWELLING-HOUSE.

*See* Sect. 1, sub-sect. 3, A. (a), *ante*.

**Whether business premises included.]**—*See* Sect. 1, sub-sect. 3, A. (b), *ante*.

**"Separate & self-contained flats."]**—*See* Sub-sect. 7, *post*.

#### SUB-SECT. 6.—ATTENDANCE AND USE OF FURNITURE.

**Attendance.]**—*See* Sect. 1, sub-sect. 3, B., *ante*.

**Use of furniture.]**—*See* Sect. 1, sub-sect. 3, C., *ante*.

#### SUB-SECT. 7.—SEPARATE AND SELF-CONTAINED FLATS.

*See* 1920 Act, s. 12 (9).

**7108. "Separate"—Whether physically separate—Or partitioned off.]**—Flats may be "separate" within 1920, s. 12 (9), even though there is no partition between them, since "separate" there means not "physically separated" but "distinct," & a flat may be "self-contained" within the provision even though there is no lavatory in it & the tenant has to use a lavatory on a landing in common with the tenant of another flat lower down.—*SMITH v. PRIME* (1923), 129 L. T. 441; 39 T. L. R. 403; 67 Sol. Jo. 557; 21 L. G. R. 368, N. P.

*Annotation*:—*Appld. & Apld. Darrall v. Whitaker* (1923), 92 L. J. K. B. 882.

**7109. "Self-contained"—Whether complete residence—Necessity for partition.]**—*DARRALL v. WHITAKER*, No. 7191, *post*.

**7110. — — — Use of common lavatory.]**—*SMITH v. PRIME*, No. 7108, *ante*.

### SECT. 3.—RENT.

#### SUB-SECT. 1.—IN GENERAL.

**7111. Means "agreed rent"—Although including rates & taxes.]**—Pltf. in 1916 let a dwelling-house to deft. at a rent of £30 a year, the landlord paying rates & taxes. The ratable value of the premises was £40 & the rates & taxes amounted to £31 18s. a year. In an action by pltf. for recovery of possession, after the tenancy had been determined by notice:—*Held*: "rent payable" meant the rent which the tenant had to pay, & not the net amount which the landlord got after paying the rates & taxes. Upon this construction, the "rent payable" not being less than two-thirds of the ratable value, the Act applied to the tenancy, & pltf. was not entitled to an order for possession.—*MACKWORTH v. HELLARD*, [1921] 2

**Sect. 3.—Rent: Sub-sects. 1 & 2, A. & B. (a), (b) & (c).]**

K. B. 755; 90 L. J. K. B. 693; 125 L. T. 451; 85 J. P. 197; 37 T. L. R. 469, C. A.

**Annotations:—***Refd.* Glossop v. Ashley (1921), 90 L. J. K. B. 1237; Roberts v. Poplar Metropolitan Borough Assmt. Com., [1922] 1 K. B. 25. *Mentd.* Brakspear v. Barton, [1924] 2 K. B. 88.

*Compare* Nos. 7119, 7120, *post*.

**7112. Must be actual rent.]—**In 1910 a newly built dwelling-house was let on a building lease for ninety-nine years at a ground rent of £8 10s. a year, which was less than two-thirds of the ratable value. There was no other letting until Jan., 1923, when the house was divided into two flats, & the upper flat let to a tenant at a rent of £2 a week. The tenant applied for an apportionment under 1920 Act, s. 12 (3), & the county ct. fixed a hypothetical rent as the standard rent for the comprising property on Aug. 3, 1914, & apportioned the standard rent for the flat at half that amount:—*Held*: having regard to 1920 Act, s. 12 (7), the lease of the comprising property in 1910 must be disregarded, & the standard rent of the flat was the actual rent of £2 a week, reserved under the tenancy of Jan. 1923, when the flat was first let separately as a "dwelling-house."—*JOY v. EPPNER*, [1925] 1 K. B. 362; 94 L. J. K. B. 157; 132 L. T. 343; 41 T. L. R. 136; 69 Sol. Jo. 841; 23 L. G. R. 52, D. C.

**Annotation:—***Expld.* Barrett v. Hardy (Alnwick), [1925] 2 K. B. 220.

**7113. Must be rent payable in money—Allowance in kind not included.]—***HORNSBY v. MAYNARD*, No. 7135, *post*.

**7114. Whether amount payable for goodwill & fixtures included—Premises used partly for business.]—***ELLEN v. GOLDSTEIN*, No. 7055, *ante*.

**Whether payments in respect of attendance included.]—***See* Sect. 1, sub-sect. 3, B., *ante*.

**Whether payments for use of furniture included.]—***See* Sect. 1, sub-sect. 3, C., *ante*.

**7115. "Net rent"—Whether same as "standard rent."—***WESTCOTT v. BOWES*, No. 7118, *post*.

*See* 1920 Act, s. 12 (1) (c).

**7116. Deduction from agricultural wages—In respect of occupation of cottage—Under Corn Production Act, 1917 (c. 46), s. 12 (1) (b).]**—*Pltf.*, an agricultural labourer, was employed in 1902 by *deft.* at 14s. a week & no cottage. In 1904 *pltf.* went into occupation of a cottage belonging to *deft.*, & from Mar. 1904, to Aug. 1917, *deft.* deducted from the wages 1s. a week in respect of *pltf.*'s occupation of the cottage. Since Aug. 1917, *deft.* had deducted 3s. a week from *pltf.*'s minimum wages as fixed by the Regulations & Orders made under above Act. In July, 1918, *pltf.*'s minimum wage was 31s. An order made by the Agricultural Wages Board (England & Wales) defined "the benefits or advantages which may be reckoned as payment of wages in lieu of payment in cash for the purpose of any minimum rate of wages" under the above Act, to include the provision by an employer for a workman employed by him of (*inter alia*) a cottage. The value of a cottage was to be taken at 3s. per week. The evidence was that the cottage in question would let at 3s. a week. *Pltf.* brought an action in the county ct. to recover the amount of these deductions, contending that the deduction of 3s.

instead of 1s. was an increase of rent which was illegal by reason of the Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97). The county ct. judge gave judgment for *deft.*, holding that the deductions were not by way of rent, but represented the benefit, etc., which *pltf.* derived from the occupation of the cottage. The Div. Ct. held, that the extra 2s. was deducted not by way of rent, but as the equivalent for the benefits or advantages which *pltf.* received from the occupation of the cottage, there had consequently been no increase of rent, & the Increase of Rent, etc., Act, 1915 (c. 97), did not apply. *Pltf.* appealed:—*Held*: the action was misconceived. The claim was for arrears of wages, & there were no arrears of wages in fact, as *pltf.* had been paid the minimum rate of wages; for he had been paid that which the Wages Board decided was the equivalent of 31s.—namely, 28s. in cash, & he had had the use of the cottage which was the equivalent of 3s.—*BAKER v. WOOD* (1919), 89 L. J. K. B. 344; 122 L. T. 664; 84 J. P. 81; 36 T. L. R. 281; 64 Sol. Jo. 256; 18 L. G. R. 175, C. A.

**Tied covenants & discounts.]—***See* No. 7134, *post*.

**SUB-SECT. 2.—"STANDARD RENT."**

**A. In General.**

*See* 1920 Act, s. 12 (1) (a).

**7117. Jurisdiction of county courts to determine—As independent question.]—**The county ct. has no jurisdiction under 1920 Act, or the Rules of 1920 made thereunder or otherwise to entertain an application to determine as a sole & independent question what is the "standard rent" of a dwelling-house within the meaning of the Act.—*BROOMHALL v. PROPERTY AGENTS & OWNERS, LTD.*, [1922] 1 K. B. 311; 91 L. J. K. B. 332; 126 L. T. 344; 38 T. L. R. 56; 66 Sol. Jo. 125, D. C.

**Annotation:—***Refd.* R. v. Marylebone County Court Judge, [1923] 1 K. B. 365.

*See, now*, 1923 Act, s. 11.

**7118. Whether same as "net rent"—Rates not paid by landlord in 1914.]—**On Aug. 3, 1914, a house was let at a rent of £85 a year, the tenant paying the rates. In Mar., 1918, a subsequent landlord let part of the house for a rent inclusive of rates, & the standard rent of that part of the house was apportioned at £2 10s. 6d. a month:—*Held*: that sum, as standard rent, was also the "net rent" within 1920 Act, s. 12 (1) (c).—*WESTCOTT v. BOWES* (1925), 94 L. J. K. B. 492; 133 L. T. 127; 41 T. L. R. 332; 69 Sol. Jo. 411, C. A.

**B. How Ascertained.**

**(a) In General.**

*See* 1920 Act, s. 12 (1) (a).

**7119. Rates payable by landlord—Whether rates can be deducted.]—**Where the lessor of a dwelling-house agrees to pay the rates, the amount of the rates cannot be deducted from the rent in computing the "standard rent" as defined in the Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 2 (1) (a), for the purposes of the Increase of Rent & Mortgage Interest (Restrictions) Act, 1919 (c. 7), s. 4.—

**PART XXVII. SECT. 3, SUB-SECT. 2.—**

**A.**

**a. Whether "not let" equivalent**

to "unoccupied."—The words "not let" in the definition of "standard rent" are not equivalent to "unoccupied."—*O'NEILL v. DUNCAN*

(1920), 55 I. L. T. 84.—*IR.*

**1. Onus of proof.]—***BOLGER v. DALY*, [1925] 2 I. R. 42.—*IR.*

A dwelling-house in the Metropolis, which on Aug. 3, 1914, was let at a rent of £85 a year, was in 1916 converted into three separate self-contained flats, which were let to different tenants & separately rated. In Oct. 1920, the tenant of one of the flats applied to the county ct. under 1920 Act, s. 12 (3), for an apportionment of the rent on Aug. 3, 1914, of the undivided dwelling-house, with a view to the determination of the standard rent of the flat :—*Held* : (1) (BANKES & ATKIN, L.J.J.) by the conversion of the house into self-contained flats the identity of the original house was destroyed, & in view of that fact the date of the conversion was immaterial ; (2) (SCRUTTON, L.J.) as at the date of the conversion the house was not within the restriction of the Increase of Rent, etc., Act then in force the landlord was equally unrestricted as to the rent which he was entitled to ask for the flats carved out of it ; (3) accordingly 1920 Act, s. 12 (3) did not apply to the case & the standard rent of the flat was the rent at which it was first

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let.—**SINCLAIR v. POWELL**, [1922] 1 K. B. 393; 91 L. J. K. B. 220; 126 L. T. 210; 38 T. L. R. 239; 66 Sol. Jo. 235; 20 L. G. R. 73, C. A.

**Annotations:—As to (1) Consd.** Sutton v. Begley, [1923] 2 K. B. 694; Stockham v. Easton, [1924] 1 K. B. 52; Barrett v. Hardy (Alnwick), [1925] 2 K. B. 220. **Refd.** Darrall v. Whitaker (1922), 92 L. J. K. B. 882. **As to (2) Consd.** Barrett v. Hardy (Alnwick), [1925] 2 K. B. 220. **Refd.** Woodhead v. Putnam, [1923] 1 K. B. 252. **As to (3) Distd.** Phillips v. Potter (1925), 94 L. J. K. B. 819. **Generally, Mentd.** Marchbank v. Campbell, [1923] 1 K. B. 245.

**7130. ——— Effect of substantial structural alterations.]—WOODHEAD v. PUTNAM**, No. 7196, *post*.

**7131. ——— Where rent of house less than two-thirds of ratable value.]—JOY v. EPPNER**, No. 7112, *ante*.

**7132. House converted into factory—Rent at first letting as factory.]—(1) When Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), was passed there were three adjoining dwelling-houses to each of which that Act applied. In 1918 the owner of the three houses converted them into one factory in such wise that the three houses ceased to exist as dwelling-houses & were replaced by the new factory. In 1920 the owner let the factory on a lease for twenty-one years at an annual rent of £700, which exceeded the aggregate rents at which the houses were let on Aug. 3, 1914. The lessee contended that the amount of the excess was irrecoverable from him by the owner & claimed under 1920 Act, s. 14, to recover so much thereof as he had paid to the owner:—**Held**: the standard rent of the factory was the rent at which it was let in 1920, when it was first let, & as this rent excluded the operation of the Rent (Restrictions) Acts, the lessee's claim failed.**

(2) It appears to me that throughout [1920 Act, s. 12 (6)] there runs the condition that there shall be a dwelling-house. . . . In my view it does not mean that, once a dwelling-house, anything on that land shall always be subject to the restrictions, whether it is a dwelling-house or not, or that the land shall be subject to those restrictions whether there is a dwelling-house on it or not (**SCRUTTON, L.J.**).—**PHILLIPS v. BARNETT**, [1922] 1 K. B. 222; 91 L. J. K. B. 198; 126 L. T. 173; 38 T. L. R. 39; 66 Sol. Jo. 124; 20 L. G. R. 1, C. A.

**Annotations:—As to (1) Distd.** Phillips v. Potter (1925), 94 L. J. K. B. 819. **Refd.** Sinclair v. Powell, [1922] 1 K. B. 393; Darrall v. Whitaker (1923), 92 L. J. K. B. 882; Prout v. Hunter, [1924] 2 K. B. 736; Abrahart v. Webster, [1925] 1 K. B. 563. **As to (2) Consd.** Prout v. Hunter, [1924] 2 K. B. 736. **Refd.** Williams v. Perry, [1924] 1 K. B. 936; Hyman v. Steward, [1925] 2 K. B. 702.

**See, further, Sect. 3, sub-sect. 4, B., post.**

**Destruction of identity—By sub-letting furnished of unfurnished house.]—See No. 7040, ante.**

**SUB-SECT. 3.—INCREASE OF RENT.**

**A. In General.**

**See 1920 Act, ss. 1, 2 (1), (2) & (3).**

**7133. What amounts to—Under Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 1 (1)—Ten per cent. authorised under Increase of Rent & Mortgage Interest (Restrictions) Act, 1919 (c. 7), s. 4.]—AZULAY v. MATTHEWS (1924), 157 L. T. Jo. 365, D. C.**

**Deduction from agricultural wages—Whether in lieu of increased rent.]—See No. 7116, ante.**

**7134. ——— Lease of tied public house—Whether tie & discounts considered.]—In 1910 deft. became tenant to pltf. of licensed premises at Henley upon a lease for three years at a yearly rent of £75. The lease contained the usual tied covenant as to the purchase of beer, wines & spirits. On the expiration of this lease deft. continued in possession, receiving a discount of 10 per cent. in respect of the tied prices. In 1914 & 1917 respectively further leases of the premises for three years each were granted to him. On Dec. 14, 1920, pltf. granted a further lease to deft., by which he was to hold the premises for seven years from Mar. 25, 1920. This lease contained the tied covenant as before, but there was no provision for a discount in favour of deft. on goods bought, & his obligations to repair were increased. Pltf. claimed rent, & payment for goods sold & delivered; deft. counterclaimed, alleging that a discount of 10 per cent. was due to him on the price of goods bought, & pleading 1920 Act:—**Held**: (1) 1920 Act, s. 1, applied, & by the lease of Dec. 14, 1920, the rent had been increased "since Mar. 25, 1920"; (2) the standard rent was £75, being the rent provided by the lease of 1910, & as no notice of increase had been served, the rent reserved by the lease of 1920 must be reduced accordingly, but in other respects that lease was valid & binding; (3) both the tied covenant in the lease & the discount for goods supplied under the tie must be disregarded for the purposes of the Rent Restriction Acts; (4) as the High Ct., by 1920 Act, s. 2 (6), had no jurisdiction to deal with the question of repairs, final judgment must be postponed until the county ct. judge had given his decision on this point.**

(5) This cessation of discount was not a "fine or premium," or other like sum for the grant, renewal or continuance of a tenancy (**MCCARDIE, J.**).—**BRAKSPEAR (W. H.) & SONS, LTD. v. BARTON**, [1924] 2 K. B. 88; 93 L. J. K. B. 801; 131 L. T. 538; 40 T. L. R. 607; 68 Sol. Jo. 719.

**7135. ——— Transfer of burden from landlord to tenant—Landlord allowed to occupy part of demised premises.]—By an agreement of tenancy made in 1917 a lady let to a tenant "all that messuage, tenement & premises situate & being No. 33 R. Road" for a term of three years at a specified yearly rent in money, & the tenant agreed (*inter alia*) "to give unto the said landlady in consideration of the rent payable the use of the drawing-room & bedroom on the same floor in the within mentioned premises for her own occupation rent free"; & on the termination of that agreement the tenant remained in occupation of the premises as a statutory tenant on the same terms:—**Held**: (1) the right given by the tenant to the landlady to use the two rooms was not "rent" within 1920 Act, that term there denoting rent in money only, & consequently, that right could not be taken into account in considering whether or not the agreed rent exceeded the standard rent by more than the permitted amount; (2) the grant of the said right by the tenant to the landlady was not within 1920 Act, s. 2 (3), equivalent to a transfer to the tenant of a burden or liability previously borne by the landlord whereby the rent should be deemed to be increased; (3) the agreement of tenancy on its true construction was not a demise of the house with an exception therefrom of the two rooms, or a demise of only the portion of the house other than the two rooms, & therefore, the tenant was not entitled to an apportionment of the rent of the house under 1920 Act, s. 12 (3).—**

**HORNSBY v. MAYNARD**, [1925] 1 K. B. 514; 94 L. J. K. B. 380; 132 L. T. 575; 41 T. L. R. 102; 69 Sol. Jo. 254; 23 L. G. R. 319, D. C.

**7136. Time of increase—“Since” March 25, 1920—Whether date from which effective—Or date of agreement for increase.**—Rent is increased within Increase of Rent & Mortgage Interest (Restrictions) Act, 1919 (c. 7), s. 4 (i), at the date when the increase becomes effective, & not at any earlier date at which an increase has been agreed upon between landlord and tenant.—**GOLDSMITH v. ORR** (1920), 89 L. J. K. B. 901; 123 L. T. 614; 85 J. P. 1; 36 T. L. R. 731; 64 Sol. Jo. 615; 18 L. G. R. 683, C. A.

*Annotations*:—**Consd.** **Ralkes v. Ogle**, [1921] 1 K. B. 576; **Brakspear v. Barton**, [1924] 2 K. B. 88; **Michael v. Phillips**, [1924] 1 K. B. 16.

**7137.** ————.]—Premises which on Aug. 4, 1914, were let at a rent of £60 a year, the landlord paying rates & taxes, were, by an agreement dated Mar. 12, 1920, let by pltf. to defts. “from Mar. 25, 1920, for the term of three years thence next ensuing & afterwards as a yearly tenancy unless six calendar months’ previous notice in writing shall be given by either party to quit at the end of the said term or on Mar. 25, in any subsequent year . . . at the yearly rent of £230 payable by four equal quarterly payments . . . the first of such payments to be made on June 24 next.” Defts. obtained the keys of the premises on Mar. 25, 1920, & actually went into possession on Mar. 26:—**Held**: by the agreement of Mar. 12 the increased rent began to accrue on Mar. 26, the rent had therefore, within 1920 Act, s. 1, been “increased since Mar. 25, 1920”; & as the increased rent exceeded the standard rent by more than the amount permitted by the statute, the excess was, notwithstanding the agreement of Mar. 12, irrecoverable from defts.—**RAIKES v. OGLE**, [1921] 1 K. B. 576; 90 L. J. K. B. 588; 125 L. T. 352; 37 T. L. R. 261, N. P.

*Annotations*:—**Consd.** **Schmitt v. Christy**, [1922] 2 K. B. 60. **Fold.** **Brakspear v. Barton**, [1924] 2 K. B. 88. **Refd.** **Michael v. Phillips**, [1924] 1 K. B. 16.

**7138.** ———— **Lease from March 25, 1920—Granted in December 1920.**—**BRASPEAR (W. H.) & SONS, LTD. v. BARTON**, No. 7134, *ante*.

## B. When Allowed.

### (a) In General.

*See* 1920 Act, ss. 1, 2 (1) & (3); 1923 Act, s. 3.

**7139. How increase calculated.**—(1) Where premises have been let at a rent lower than the standard rent, a landlord cannot, by terminating the tenancy & giving notice of increase, raise the rent to the standard rent. But increases permitted under 1920 Act, s. 2, must be based on the standard rent.

(2) I think the object of the Act [1920 Act] was to give to the tenant fixity of tenure, & that it would not be within the purview of the Act that it should be used to destroy fixity of tenure unless the tenant agreed to pay an increased rent (**HORRIDGE, J.**).—**DUFTY v. PALMER**, [1924] 2 K. B. 35; 93 L. J. K. B. 548; 131 L. T. 401; 40 T. L. R. 455; 22 L. G. R. 408, D. C.

*Annotation*:—*As to* (1) **Distd.** **Brakspear v. Barton**, [1924] 2 K. B. 88.

**7140. Where premises let at less than standard rent—Right to raise to standard rent.**—**DUFTY v. PALMER**, No. 7139, *ante*.

**7141. What is assent of tenant—Whether by tenant holding over.**—**GLOSSOP v. ASHLEY**, No. 7125, *ante*.

### (b) In respect of Repairs.

*See* 1920 Act, s. 2 (1) (d) & (5).

**7142. Where landlord has incurred expense of repairs—Under Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97).**—**WORTLEY v. MANN**, [1916] W. N. 390, D. C.

*Annotations*:—**Refd.** **Bridges v. Chambers** (1919), 88 L. J. K. B. 500; **Michael v. Phillips**, [1924] 1 K. B. 16.

**7143. Where landlord responsible for part repairs—Necessity for agreement or determination of amount.**—**BOURNE v. LITTON**, No. 7158, *post*.

**7144. Where liability of tenant increased—Jurisdiction of High Court.**—**BRASPEAR (W. H.) & SONS, LTD. v. BARTON**, No. 7134, *ante*.

### (c) In respect of Rates.

*See* 1920 Act, ss. 2 (1) (b), 12 (1) (d).

**7145. Increase caused by increase in ratable value included.**—Under Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 1 (1), a landlord who pays the rates is entitled to increase the rent by the amount of any actual increase in the rates, not merely where such increase in the rates is caused by an increase in the rate itself, but also where it is caused by an increase in the ratable value of the premises.—**STEEL v. MAHONEY** (1918), 34 T. L. R. 327; 62 Sol. Jo. 488, D. C.

**7146. Calculation of amount of increase—Pro rata with increase of rates.**—**ISAACS v. TITLEBAUM** (1920), 64 Sol. Jo. 223; 84 J. P. Jo. 52, C. A.

*Annotations*:—**Refd.** **Glossop v. Ashby** (1921), 90 L. J. K. B. 1237. **Mentd.** **Brakspear v. Barton**, [1924] 2 K. B. 88.

**7147. Amount proportional to period of rent.**—**SUTTON (W. H.) & SONS v. HOLLERTON**, [1918] W. N. 237, C. A.

*Annotation*:—**Consd.** **Cardiff Corp'n. v. Isaacs**, **Cardiff Corp'n. v. Crosta** (1920), 37 T. L. R. 649.

**7148.** ———— **Commencement & duration of increase.**—Pltfs. were the landlords of a dwelling-house held on a weekly tenancy & the rates were payable by the landlords. For the half-yearly period from Apr. 1 to Sept. 30, 1920, a new rate was allowed on May 17, which exceeded that payable for the half-yearly period including Aug. 3, 1914, by £1 18s. 11d.:—**Held**: pltfs. were entitled to increase the tenants’ weekly rent by one twenty-sixth of the amount of the increase of rates, such increase to begin on the expiry of four weeks’ notice, & to continue in force until the next half-yearly rate was demanded.—**CARDIFF CORPN. v. ISAACS** (1921), 90 L. J. K. B. 1108; 125 L. T. 571; 19 L. G. R. 396; *sub nom.* **CARDIFF CORPN. v. ISAACS**, **CARDIFF CORPN. v. CROSTA**, 37 T. L. R. 649, D. C.

**7149.** ———— **Net amount paid—Where commission receivable by owner.**—Pltf., the landlord of a dwelling-house within the Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), was a compounding landlord under Poor Rate Assessment and Collection Act, 1869 (c. 41), s. 3, which provides that in respect of certain hereditaments, if the landlord is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament for any term not less than one year from the date of the agreement, & to pay the poor rates whether the hereditament is occupied or not, the overseers may agree with the owner to receive the rates from him, & allow to him a commission not exceeding 25 per cent. on the amount. The rates on the dwelling-house were paid by pltf. under this sect.:—**Held**: the landlord was not entitled under Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915

**Sect. 3.—Rent: Sub-sect. 3, B. (c), C. (a), (b) & (c), & D.]**

(c. 97), to increase the rent to the tenant by the full amount of the increase in the poor rate charged, but only by the net amount paid.—*NICHOLSON v. JACKSON* (1921), 90 L. J. K. B. 1121; 125 L. T. 802; 85 J. P. 225; 37 T. L. R. 887; 65 Sol. Jo. 713; 19 L. G. R. 512, H. L.

*Annotation* :—*Reid. Strickland v. Palmer*, [1924] 2 K. B. 572.

**7150. — Effect of subsequent reduction.]**—The rates of a dwelling-house within 1920 Act having been increased above those paid in the period including Aug. 3, 1914, the landlord, by whom the rates were payable, served a valid notice under 1920 Act, s. 3 (2), of his intention to increase the rent by virtue of 1920 Act, s. 2 (1) (b), in respect of the increased rates; & the tenant paid the increased rent. The rates were subsequently reduced, & thenceforth the tenant deducted a proportionate amount from the increased rent. The landlord brought an action in the county ct. to recover the sum of these deductions :—*Held* : the landlord was not entitled to recover, inasmuch as the permitted increase was not the amount by which the pre-war rates had at one time been exceeded, but was the amount by which they were exceeded at the time of the claim.—*STRICKLAND v. PALMER*, [1924] 2 K. B. 572; 93 L. J. K. B. 1033; 131 L. T. 648; 40 T. L. R. 649; 68 Sol. Jo. 665; 22 L. G. R. 633, C. A.

**Necessity for notice of increase.]**—*See* No. 7152, *post*.

**Necessity for notice to quit.]**—*See* No. 7211, *post*.

**C. Notice of Increase.**

**(a) Necessity for.**

*See* 1920 Act, s. 3 (2) (3); 1923 Act (c. 32), s. 6 (1).

**7151. Under Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97).]**—*WORTLEY v. MANN*, [1916] W. N. 390, D. C.

*Annotations* :—*Foll. Bridges v. Chambers* (1919), 88 L. J. K. B. 500. *Apld. Michael v. Phillips*, [1924] 1 K. B. 16.

**7152. — In respect of rates.]**—Where the rent of a dwelling-house to which above Act applies has been increased above the standard rent before the Act came into force, on the ground that the rates, which were payable by the landlord, had been increased, the amount of the increase is not recoverable unless the landlord has given notice in writing as required by the Act of his intention to increase the rent.—*BRIDGES v. CHAMBERS* (1919), 88 L. J. K. B. 500; 63 Sol. Jo. 319, D. C.

*Annotation* :—*Consd. Michael v. Phillips*, [1924] 1 K. B. 16.

**7153. Under Increase of Rent & Mortgage Interest (Restrictions) Act, 1919 (c. 7).]**—*AZULAY v. MATTHEWS* (1924), 157 L. T. Jo. 365, D. C.

**7154. On creation of new tenancy—Agreement alone not sufficient.]**—*Deft.* had until Dec. 31, 1920, been in occupation of part of a house as sub-tenant to *pltf.*'s former tenant, S., at a weekly rental of 21s. On the determination of S.'s tenancy it was agreed that *deft.* should continue in occupation if he would pay a rent of 35s. per week, whereby a new tenancy was created. The increased rent was paid until Aug. 13, 1921, when *deft.* disputed his liability. In an action to recover the arrears of rent :—*Held* : (1) the requirements of 1920 Act, s. 3 (2), had not been complied with, & therefore the standard rent of 21s. per week alone was recoverable.

(2) As against a new tenant a landlord could

not, upon a re-letting, by a mere agreement increase the rent above the standard rent. Such increase could only become operative after the determination of an existing tenancy, & was then recoverable only if valid notice had been given under 1920 Act, s. 3 (2).—*SCHMIT v. CHRISTY*, [1922] 2 K. B. 60; 91 L. J. K. B. 629; 127 L. T. 305; 38 T. L. R. 627; 66 Sol. Jo. 539; 20 L. G. R. 434, D. C.

*Annotations* :—*As to* (2) *Consd. Michael v. Phillips*, [1924] 1 K. B. 16. *Generally, Mentd. Brakspear v. Barton*, [1924] 2 K. B. 88.

**7155. — Where lease made before Act.]**—The landlord of a flat which by reason of its ratable value was a dwelling-house within 1920 Act, had let the flat to a tenant before the passing of that Act for a term expiring on Mar. 25, 1920, at a rent of £107 18s. a year, which was the standard rent. On Feb. 17, 1920, the landlord's exors. granted to the tenant a lease of the flat for seven years from Mar. 25 at a rent of £160 a year. On July 2, 1920, 1920 Act was passed. The lessors claimed a quarter's rent under the lease. The lessee counterclaimed for payments made in excess of the standard rent :—*Held* : (1) the lessors could recover nothing above the standard rent & must repay what they had received in excess thereof, no notice in writing of their intention to increase the rent having been served on the lessee as prescribed by 1920 Act, s. 3 (2); (2) the service of such a notice was a condition precedent to the lessors' right to increase the rent, & it was immaterial that the lease purporting to increase the rent was made before the passing of the Act.

(3) The lease contained no covenant by the lessors to supply attendance or the use of furniture, but in fact the lessee had always had the services of a porter & the use of a lift for raising coal & lowering refuse :—*Held* : the flat was not let at a rent which included payment in respect of attendance within 1920 Act, s. 12 (2) (i).—*MICHAEL v. PHILLIPS*, [1924] 1 K. B. 16; 93 L. J. K. B. 21; 130 L. T. 142; 68 Sol. Jo. 103; 22 L. G. R. 1, C. A.

*Annotation* :—*Generally, Mentd. Brakspear v. Barton*, [1924] 2 K. B. 88.

**7156. Effect of omission—Standard rent only recoverable.]**—*SCHMIT v. CHRISTY*, No. 7154, *ante*.

**7157. — — — — —]**—*BRAKSPEAR (W. H.) & SONS, LTD. v. BARTON*, No. 7134, *ante*.

**(b) Validity of.**

*See, now*, 1923 Act, s. 6 (1).

**7158. Conditions precedent—Amount of increase agreed or determined by court.]**—Where the landlord of a dwelling-house, to which 1920 Act applies, gives notice of intention to increase the standard rent by the lesser sum mentioned in 1920 Act, s. 2 (1) (d) (ii), & the amount of the increase has neither been agreed between the parties nor determined by the county ct., the notice is neither in the form in the First Schedule to the Act nor in a form substantially to the same effect & is therefore not a valid notice under 1920 Act, s. 3 (2), & the increase is not due or recoverable.

The landlord of a dwelling house to which the Act applied claimed to increase the rent above the standard rent by 15 per cent. of the net rent under 1920 Act, s. 2 (1) (c), which was not objected to, & by a further 15 per cent. of the net rent under 1920 Act, s. 2 (1) (d) (ii). On Aug. 24, 1922, he served on the tenant a notice in writing of his intention so to increase the rent, & for non-payment of the increased rent, which he alleged to be due & payable on Dec. 25, 1922, he brought

an action in the High Ct. for arrears of rent, possession, & mesne profits since that date.

At the date of serving notice of intention to increase the rent the amount claimed under 1920 Act, s. 2 (1) (d) (ii), had neither been agreed between the parties nor determined by the county ct.:—*Held*: the notice was not a valid notice within 1920 Act, s. 3 (2) & the increased rent not being due or recoverable, the action failed.—*BOURNE v. LITTON*, [1924] 2 K. B. 10; 93 L. J. K. B. 553; 131 L. T. 169; 40 T. L. R. 390; 68 Sol. Jo. 613; 22 L. G. R. 270, C. A.

**7159. Notice served with or during currency of notice to quit.**—*HILL v. HASLER*, No. 7165, *post*.

**Whether notice to quit condition precedent.**—*See* Sub-sect. 3, D., *post*.

**7160. Invalid notice—Whether validated—By subsequent notice to quit.**—*PEIZER v. FEDERMAN*, No. 7164, *post*.

**7161. — By subsequent agreement between parties.**—*BOURNE v. LITTON*, No. 7158, *ante*.

**7162. — Effect of 1923 (Notices of Increase) Act, s. 1 (1).**—*LANDRIGAN v. SIMONS*, No. 7172, *post*.

**7163. — Power of county court judge to amend.**—*WILLIAMS v. BRITANNIC MERTHYR STEAM COAL CO.*, No. 7213, *post*.

#### (c) Form of Notice.

*See* 1920 Act, sched. 1; 1923 Act, s. 6 (2).

**7164. Must state dates of increases.**—A notice to increase rent under 1920 Act, must state correctly the dates from which the increases are payable; & therefore a notice to increase rent which is invalid because it is not preceded or accompanied by a valid notice to quit cannot be rendered valid by a subsequent valid notice to quit.—*PEIZER v. FEDERMAN* (1921), 38 T. L. R. 54; 66 Sol. Jo. 108, D. C.

*Annotation*.—*Refd.* *Newell v. Crayford Cottage Soc.*, [1922] 1 K. B. 656.

**7165. — Sufficiency of statement.**—(1) A notice to increase the rent of a dwelling-house to which 1920 Act applies, after the termination of an existing tenancy thereof, the notice being of the length & otherwise in the form prescribed by the Act, is not invalid under the provisions of s. 3 of the Act or otherwise by reason of the fact that it is served with or during the currency of the notice to quit by which the tenancy is determined & therefore before the termination of the tenancy, or that it is to take effect immediately after the termination of the tenancy. 1920 Act, s. 3 (1), provides that nothing in the Act shall be taken to authorise any increase of rent "except in respect of a period during which but for this Act the landlord would be entitled to obtain possession . . .":—*Held*: in that sub-sect. the words "be entitled to obtain possession" mean have a legal right to possession, & do not mean be able to enforce possession by an order of the ct.; & consequently, the period there specified is a period commencing on the date on which the landlord acquires a legal right to possession, as, for example, on the expiry of a valid notice to quit, & not on the later date on which, by having taken legal proceedings, he secures an order for possession from the ct.

(2) A notice of increase under the Act, which was dated Oct. 23, 1920, & served by post the

following day, stated that the increase on account of rates "will date from Nov. 24, 1920, being one clear week from the date of this notice," & that the increase on account of other matters "will date from Nov. 24, 1920, being four clear weeks from the date of this notice":—*Held*: that notice was not prevented by 1920 Act, s. 3 (2) or by reason of any ambiguity from being a valid notice of increase of rent as from Nov. 24, 1920, on account of both rates & other matters.—*HILL v. HASLER*, [1921] 3 K. B. 643; 91 L. J. K. B. 134; 126 L. T. 186; 19 L. G. R. 699, D. C.

*Annotations*.—*Refd.* *Shuter v. Hersh*, [1922] 1 K. B. 438. *Mentd.* *Newell v. Crayford Cottage Soc.*, [1922] 1 K. B. 656; *Kerr v. Bryde*, [1923] A. C. 16.

**7166. Effect of claim for more than permitted increase.**—A notice in writing of a landlord's intention to increase the rent of a dwelling-house to which 1920 Act applies, served by him upon the tenant, stating that the increase under 1920 Act, s. 2 (1) (c), is 15 per cent. of the net rent, when in the circumstances it can only be increased under that clause by 5 per cent. of the net rent, is not "a valid notice . . . in the form contained in the First Schedule to this Act, or in a form substantially to the same effect," within 1920 Act, s. 3 (2).—*PENFOLD v. NEWMAN*, [1922] 1 K. B. 645; 91 L. J. K. B. 528; 126 L. T. 697; 20 L. G. R. 697, D. C.

*Annotation*.—*Consd.* *Bourne v. Litton*, [1924] 2 K. B. 10.

**7167. Amendment—Jurisdiction of county court judge.**—*WILLIAMS v. BRITANNIC MERTHYR STEAM COAL CO.*, No. 7213, *post*.

#### D. Notice to Quit.

*See* 1920 Act, ss. 3 (1), 16 (3), & 1923 (Notices of Increase) Act, s. 1 (1).

**7168. As condition precedent to increase of rent.**—*PEIZER v. FEDERMAN*, No. 7164, *ante*.

**7169. — Tenancy terminable only by notice.**—Before the landlord of a house let on a weekly tenancy to which 1920 Act applies can claim to increase the rent to the extent authorised by that Act he must have given the tenant a notice to quit & that notice must have expired.—*NEWELL v. CRAYFORD COTTAGE SOCIETY*, [1922] 1 K. B. 656; 91 L. J. K. B. 626; 127 L. T. 11; 38 T. L. R. 355; 66 Sol. Jo. 472; 20 L. G. R. 359, C. A.

*Annotations*.—*Apprvd.* *Kerr v. Bryde*, [1923] A. C. 16. *Consd.* *Felce v. Hill* (1923), 92 L. J. K. B. 974; *Michael v. Phillips*, [1924] 1 K. B. 16. *Refd.* *Schmit v. Christy*, [1922] 2 K. B. 60; *Smith v. Lloyd* (1923), 92 L. J. K. B. 877.

**7170. — — —**—*SMITH v. LLOYD*, No. 7211, *post*.

**7171. — — —**—By 1920 Act, s. 3 (1), it is a condition precedent to the right of a landlord to a permitted increase of rent under the Act that he should have terminated the tenancy by serving on the tenant, in Scotland, a notice of removal, & in England, a notice to quit, in cases where a notice to quit is required for that purpose.—*KERR v. BRYDE*, [1923] A. C. 16; 92 L. J. P. C. 1; 128 L. T. 140; 87 J. P. 16; 39 T. L. R. 61; 67 Sol. Jo. 112; 21 L. G. R. 1, H. L.

*Annotations*.—*Refd.* *Felce v. Hill* (1923), 92 L. J. K. B. 974; *Smith v. Lloyd* (1923), 92 L. J. K. B. 877; *Wilkes v. Goodwin*, [1923] 2 K. B. 86; *Landrigan v. Simons*, [1924] 1 K. B. 509; *Michael v. Phillips*, [1924] 1 K. B. 16.

**7172. — Effect of 1923 (Notices of Increase) Act, s. 1 (1).**—In Jan. 1919, the landlord of premises, to which the 1920 Act applied, served on the tenant notice of increase of rent, but failed

#### PART XXVII. SECT. 3, SUB-SECT. 3.—C. (b).

**7161 i. Invalid notice—Whether validated—By subsequent agreement between**

*parties.*—The tenant claimed that the notice was invalid, because the figures to which he had agreed by subsequent agreement did not correspond with

the figures which were set out in the notice:—*Held*: the notice was not invalid.—*ELLIOTT v. ELLIS*, [1923] 2 L. R. 45.—*IR.*

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to serve notice to terminate the tenancy. The tenant paid rent at the increased rate until May, 1923, when she brought an action in the county ct. to recover the rent paid in excess between those dates. On June 5, 1923, the county ct. judge gave judgment in her favour for the amount claimed. On June 7, 1923, 1923 (Notices of Increase) Act came into force, whereupon the landlord appealed:—*Held*: (1) the Act was retrospective, & the question as to the validity of the notice having been raised in the county ct., the Act could be invoked in aid by the landlord on appeal; (2) the whole of the increases were validated by the Act & the landlord was entitled to judgment.—*LANDRIGAN v. SIMONS*, [1924] 1 K. B. 509; 93 L. J. K. B. 318; 130 L. T. 608; 40 T. L. R. 244; 68 Sol. Jo. 387; 22 L. G. R. 104, D. C.

**7173. — Statutory tenancy.]**—Where a tenant remains in possession under 1920 Act, after receiving notice to quit, there is no necessity for the landlord to give the tenant a fresh notice to quit before raising the rent to the extent permitted by the Act unless a new tenancy has been actually created, & the mere fact that the landlord accepts rent after giving the notice to quit cannot be taken as a waiver by him of the notice to quit so as to create a new tenancy.—*SHUTER v. HERSH*, [1922] 1 K. B. 438; 91 L. J. K. B. 263; 126 L. T. 346; 38 T. L. R. 127; 66 Sol. Jo. 158; 20 L. G. R. 148, D. C.

*Annotations:—*Consd. *Newell v. Crayford Cottage Soc.*, [1922] 1 K. B. 656. *Fold, Felce v. Hill* (1923), 92 L. J. K. B. 974; *Wolf v. Smith*, [1923] 2 Ch. 393. *Reid, Kerr v. Bryde*, [1923] A. C. 16; *Aston v. Smith*, [1924] 2 K. B. 143.

**7174. — —.]**—*FELCE v. HILL*, No. 7241, *post*.

**7175. As condition precedent to recovery of possession—Notice of increase of rent given before 1923 (Notices of Increase) Act—Whether fresh notice necessary.]**—In May, 1920, a notice of increase of rent was given by plff. to deft., & rent was subsequently paid thereunder by the latter, who remained in possession as statutory tenant. In 1924 plff. claimed possession of the premises, but did not at the time give any notice to quit.

By above Act, s. 1 (1), a notice of intention to increase the rent "shall have effect & shall be deemed always to have had effect as if it were or had been also a notice to terminate the existing tenancy":—*Held*: as the deft. had received what was to be deemed a notice to quit in May, 1920, & had remained in possession, no fresh notice to quit was necessary.—*ASTON v. SMITH*, [1924] 2 K. B. 143; 93 L. J. K. B. 733; 131 L. T. 565; 40 T. L. R. 576; 68 Sol. Jo. 706; 22 L. G. R. 607, D. C.

**7176. Waiver of notice—What amounts to—Whether acceptance of rent from statutory tenant.]**—*SHUTER v. HERSH*, No. 7173, *ante*.

*See Nos. 7231, 7232, post.*

**E. Suspension of Increase.**

*See* 1923 (Notices of Increase) Act, s. 3; 1923 Act, s. 5 (1).

**7177. Jurisdiction of High Court—Under 1920 Act, s. 2 (2) & (6).]**—The emergency legislation has allocated to the county ct. applications for suspension of increases of rent under above Act, s. 2 (2), & applications under that sub-sect. cannot

be entertained by the High Ct.—*X RAYS, LTD. v. ARMITAGE* (1922), 66 Sol. Jo. 351.

*Annotation:—Reid. Brakspear v. Barton*, [1924] 2 K. B. 88.

**F. Recovery of Increase.**

*See* 1920 Act, s. 3 (2).

**7178. Where permitted increase exceeded.]**—*KING v. YORK*, No. 7020, *ante*.

**7179. — Agreement with tenant.]**—*RAIKES v. OGLE*, No. 7137, *ante*.

**7180. Where notice of increase involved—Omission to give notice to quit—Effect of 1923 (Notices of Increase) Act, s. 1 (1).]**—*LANDRIGAN v. SIMONS*, No. 7172, *ante*.

**7181. — Amendment by county court judge.]**—*WILLIAMS v. BRITANNIC MERTHYR STEAM COAL CO.*, No. 7213, *post*.

**Where omission to give notice of increase.]**—*See Nos. 7135, 7154, ante.*

**SUB-SECT. 4.—APPORTIONMENT.**

**A. In General.**

*See* 1920 Act, s. 12 (3).

**7182. Jurisdiction of county court.]**—1920 Act, s. 12 (3), gives power to the county ct. to apportion the rent of a property in which a dwelling-house is comprised where the amount of the rent of the comprising property either on Aug. 3, 1914, or at the time of the letting of the part of it the standard rent of which is sought to be determined takes the comprising property outside the Rent Restriction Acts.

1920 Act, s. 12 (3), must be read as giving the county ct. power to apportion even when the result may be to show that appct.'s dwelling-house is not within the Rent Restriction Acts.—*PHILLIPS v. POTTER* (1925), 94 L. J. K. B. 819; 133 L. T. 256; 41 T. L. R. 460; 23 L. G. R. 383, D. C.

**7183. — When sole & independent question.]**—1920 Act, s. 12 (3), requires the county ct. to apportion the rent or ratable value of a dwelling-house in every case shown to fall within its provisions, whether the matter comes before it as a sole & independent question or otherwise.—*R. v. MARYLEBONE COUNTY COURT JUDGE*, [1923] 1 K. B. 365; 92 L. J. K. B. 367; *sub nom. R. v. SCULLY*, *Ex p. BOON*, 128 L. T. 364; 39 T. L. R. 169; 67 Sol. Jo. 299; 21 L. G. R. 139, D. C.

*Annotations:—*Apprvd. *Sutton v. Begley*, [1923] 2 K. B. 694. *Reid. Barrett v. Hardy* (Alnwick), [1925] 2 K. B. 220.

**7184. — Dwelling-house & business premises demised together.]**—*ELLEN v. GOLDSTEIN*, No. 7055, *ante*.

**7185. What court must consider.]**—1920 Act, s. 12 (3), does not enable the county ct. when apportioning the rent to take into account the fact that the landlord pays the rates, or that the tenant enjoys gas, water, telephone, or other amenities at the landlord's expense. In making the apportionment the county ct. can only consider the size, accessibility, aspect, & other physical advantages enjoyed by the tenant of the dwelling-house in respect of which the standard rent is to be ascertained, as compared with those of the rest of the property in which it is comprised.—*BAINBRIDGE v. CONGDON*, [1925] 2 K. B. 261; 94 L. J. K. B. 682; 133 L. T. 286; 41 T. L. R. 480; 69 Sol. Jo. 557; 23 L. G. R. 561, D. C.

**PART XXVII. SECT. 3, SUB-SECT. 3.—E.**

*g. Application by sanitary authority—Finality of decision of sheriff court.]*—*GLASGOW CORPN. v. MICKEL*, [1922] S. C. 228.—*SCOT*.

**7186. Evidence.—On application to judge.—After application dismissed by registrar.]—**Where the registrar of a county ct. has dismissed an application for apportionment of rent, & the matter is then taken before the judge, the judge must hear any evidence which the parties wish to put forward, & it is not enough for him merely to accept the registrar's finding.—*GREGSON v. PRIOR* (1925), 134 L. T. 125; 42 T. L. R. 7, D. C.

**7187. Effect of apportionment.—Whether statutory tenancy created.]—***FUMASOLI v. COMYN & FISH*, No. 7245, *post*.

**7188. — On right of tenant to recover excess payments.]—***KIMM v. COHEN*, No. 7210, *post*.

**Apportionment of ratable value.]—***See* No. 7090, *ante*.

### B. Right to Apportionment.

**7189. Where house reconstructed.—Conversion into flats.]—***WOODWARD v. SAMUELS*, No. 7128, *ante*.

**7190. — Identity of house destroyed.]—***SINCLAIR v. POWELL*, No. 7129, *ante*.

**7191. — Substantial alterations.]—**

(1) Where there has been a substantial alteration of a dwelling-house, as, for example, a reconstruction by way of conversion into a shop, offices, & a flat, no order for the apportionment of the rent of the flat can be made under 1920 Act, s. 12 (3).

(2) A flat may be self-contained within 1920 Act, s. 12 (9), which excludes such flats from the operation of the Act, notwithstanding that there is no partition dividing it from the rest of the premises, provided that it contains in itself all that is reasonably necessary for those who occupy such a flat as a residence.—*DARRALL v. WHITAKER* (1923), 92 L. J. K. B. 882; 129 L. T. 672; 39 T. L. R. 447; 67 Sol. Jo. 727; 21 L. G. R. 505, D. C.

*Annotation.*—As to (1) *Refd.* *Stockham v. Easton*, [1924] 1 K. B. 52.

**7192. — — —.]—**In Dec. 1920, the upper part of a dwelling-house in the metropolis, which was in Aug. 1914, let as a whole at a rent of £70 a year, was converted into a separate flat or tenement by means of structural & other alterations & let to a tenant at a rent of £150 a year. The tenant of the flat subsequently claimed apportionment & a return of the rent paid in excess. The flat, as the ct. found, was a dwelling-house within 1920 Act, & in order to ascertain the standard rent under s. 12 (1) (a), it was necessary to decide whether the flat was first let on Aug. 3, 1914, or in Dec. 1920:—*Held*: this question was one of fact which depended on the nature & extent of the structural alteration. It was not intended by 1920 Act, s. 12 (9), that apportionment should always be made unless the structural alteration amounted to complete reconstruction within that sub-sect. In considering whether apportionment should be made under 1920 Act, s. 12 (3), the county ct. judge should have regard to the physical identity of the dwelling-house in each case. To justify a finding that a part of a dwelling-house was first let when it was first let separately there must be a new & separate dwelling-house not merely in law by virtue of a new & separate letting, but also in fact, by virtue of substantial structural alteration.—*MARCHBANK v. CAMPBELL*, [1923] 1 K. B. 245; 92 L. J. K. B. 137; 128 L. T. 283; 39 T. L. R. 120; 67 Sol. Jo. 184; 21 L. G. R. 90, D. C.

*Annotations.*—*Consd.* *Sutton v. Begley*, [1923] 2 K. B. 694; *Stockham v. Easton*, [1924] 1 K. B. 52. *Refd.* *Barrett v. Hardy* (Alnwick), [1925] 2 K. B. 220; *Phillips v. Potter* (1925), 94 L. J. K. B. 819.

**7193. — Right of tenant of unaltered part.—Where benefit to tenant.]—**A dwelling-house which consisted of several floors was last let as a whole before Aug. 3, 1914. In 1920 the owner of the house made substantial structural alterations in it which rendered it suitable for occupation in separate parts, & in consequence of these alterations the identity of the house as a whole was destroyed. The first floor remained structurally unaltered, except that it was provided with a new lavatory basin & pan, but that floor was indirectly greatly benefited by the alterations made in the house as a whole. The owner then let the floors to different tenants. On an application by the tenant of the first floor under 1920 Act, s. 12 (3), for an apportionment of the rent of the house at the date when it was last let as a whole, for the purpose of determining the standard rent of the first floor:—*Held*: in these circumstances the first floor had been so altered as to have lost its identity, & the application for apportionment could not be entertained.

Undoubtedly the policy of the Act [1920 Act] was to encourage a landlord & not to hamper him in adding to the number of dwelling-houses (*LUSH, J.*).—*STOCKHAM v. EASTON*, [1924] 1 K. B. 52; 92 L. J. K. B. 926; 129 L. T. 702; 39 T. L. R. 472; 21 L. G. R. 652, D. C.

*Annotation.*—*Refd.* *Abrahart v. Webster*, [1925] 1 K. B. 563.

**7194. — — — Where no benefit of tenant.]—**A dwelling-house, to which 1920 Act applied, consisted of a basement & three upper floors. In 1921 the basement was let to a tenant at 11s. 9d. a week, & in 1923 the landlord converted the upper floors into two separate & self-contained flats. The basement was unaffected by the conversion & the tenant obtained no benefit therefrom. The standard rent of the whole of the premises was £60 per annum. The tenant of the basement applied for apportionment of his rent under 1920 Act, s. 12 (3), & the Registrar apportioned the rent of the basement at one-fifth of £60, namely, £12:—*Held*: (1) as the reconstruction did not cause the house to lose its identity as a dwelling-house nor affect the tenancy of the basement, the tenant was entitled to an apportionment.

(2) Under the Rent Restrictions Acts, there may be one or more "dwelling-houses" within a "dwelling-house" (*SCRUTTON, L.J.*).—*ABRAHART v. WEBSTER*, [1925] 1 K. B. 563; 93 L. J. K. B. 1119; 132 L. T. 276; 41 T. L. R. 44; 69 Sol. Jo. 141; 22 L. G. R. 754, C. A.

**— Ascertainment of standard rent.]—***See* Sect. 3, sub-sect. 2, B. (c), *ante*.

**7195. Where front part of house separately let.—Without structural alteration.]—**In Mar. 1921, a large dwelling-house was let on lease for five years at a rent of £100 a year, the lessees paying rates & taxes & doing internal repairs. The ratable value of the house in Aug. 1914, was £60 gross & £48 net. The lessees, being minded to occupy a part only of the house themselves, in June, 1921, sub-let to a tenant four rooms & certain appurtenances in the house for three years at £80 a year, the lessees paying rates & taxes & other outgoings. The tenant afterwards made an application to the county court under 1920 Act, s. 12 (3), for an order for the apportionment of the rent of the premises with a view to fixing the standard rent of the four rooms & appurtenances:—*Held*: (1) the four rooms & appurtenances let to the appt. in June, 1921, were not first let as such on that date, & therefore the rent at which they were

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let to the applicant was not the standard rent within 1920 Act, s. 12 (1) (a), which defines "standard rent" as the rent at which the dwelling-house was let on Aug. 3, 1914, or, in the case of a dwelling-house first let after that date, the rent at which it was first let; (2) as there had been no structural alteration amounting to a reconstruction of the premises by way of conversion into separate & self-contained flats within 1920 Act, s. 12 (9), & the identity of the premises had not been lost, appct. was entitled to an order for apportionment, & to have the standard rent fixed & his rent reduced to a proportion of the standard rent of the whole house; (3) the county ct. had jurisdiction to make an order of apportionment under 1920 Act, s. 12 (3), on an original application.—*SUTTON v. BEGLEY*, [1923] 2 K. B. 694; 92 L. J. K. B. 1086; 129 L. T. 773; 68 Sol. Jo. 82; 21 L. G. R. 679, C. A.

*Annotations:—As to (1) Consd. Joy v. Eppner*, [1925] 1 K. B. 362. *Reid. Phillips v. Potter* (1925), 94 L. J. K. B. 819. *As to (2) Reid. Barrett v. Hardy* (Alnwick), [1925] 2 K. B. 220.

**7196. — House not within the Act.]—**

On Aug. 3, 1914, a house in Weston-super-Mare was let as one house at a rent of £60. In May, 1919, the second floor of the house was let separately to resp. at a rent of £55, but no structural alterations were made in the premises. This floor was not separately rated. In 1922 resp. applied for an apportionment of the standard rent of the house. The county ct. judge held that 1920 Act, s. 12 (3), applied, & there must be an apportionment.—*Held*: the fact that in May, 1919, when the second floor was let to resp., the house was not subject to any Rent Restriction Act, was for this purpose an irrelevant circumstance, & the county ct. judge was entitled on the facts to make an apportionment.—*WOODHEAD v. PUTNAM*, [1923] 1 K. B. 252; 92 L. J. K. B. 137; 128 L. T. 281; 67 Sol. Jo. 228; 21 L. G. R. 85, D. C.

*Annotations:—Distd. Lelyveld v. Peppercorn*, [1924] 2 K. B. 638. *Consd. Barrett v. Hardy* (Alnwick), [1925] 2 K. B. 220. *Reid. Phillips v. Potter* (1925), 94 L. J. K. B. 819.

**7197. — House separately let before August, 1914.]—**Applt., who was the owner of a leasehold house in the Metropolis, had since before Aug. 3, 1914, continuously let the second & third floors of the house to separate tenants. He had also before that date let to a tenant two rooms on the first floor at a rent amounting to £26 a year. On Aug. 1, 1922, he let to resp. these two rooms together with two other rooms on the same floor at a rent of £58 10s. a year. The standard rent of the house as a whole was £70 a year. On an application by resp. under 1920 Act, s. 12 (3), the county ct. judge held that the sub-sect. applied, & made an apportionment of the rent of the house as a whole, apportioning to resp.'s rooms a rent of £25 a year.—*Held*: the county ct. judge was wrong in applying the sub-sect., & the standard rent of resp.'s rooms was that at which they had been first let in 1922, namely, £58 10s.—*LELYVELD v. PEPPERCORN*, [1924] 2 K. B. 638; 93 L. J. K. B. 1057; 131 L. T. 828; 40 T. L. R. 743; 22 L. G. R. 640, D. C.

*Annotation:—Distd. Barrett v. Hardy* (Alnwick), [1925] 2 K. B. 220.

**7198. Where whole house let to tenant—& part re-demised to lessor.]—***HORNSBY v. MAYNARD*, No. 7185, ante.

**SUB-SECT. 5.—FINES AND PREMIUMS.**

*See* 1920 Act, ss. 8 (1), 15 (2).

**7199. "Premium"—Purchase price of long lease.]—**In Jan. deft. offered for sale by public auction certain cottage properties upon the terms that the purchaser of each cottage lot should have the right to have granted to him a lease thereof for ninety-nine years from Feb. 22, 1916, at a nominal yearly rent varying from 15s. to £1, & according to a form of lease set forth in the particulars of sale. At the auction R., became the purchaser of one of the lots, a ninety-nine years' lease of a cottage, at the price or premium of £55, & at a rent of £1 per annum; & D. became the purchaser of another lot, a similar lease of a cottage then in his own occupation, at the price or premium of £57 10s. at the same yearly rent. The cottages were put up for sale by deft. in ignorance of the passing of Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), which received the Royal assent on Dec. 23, 1915. On becoming aware of the passing of the Act deft. declined to complete, & thereupon D. & R. commenced actions for specific performance of their contracts. No possession had been taken by either R. or D. under the contracts. It was clear that both the cottages were dwelling-houses to which the Act applied, & that the purchase-money, if paid, would be a "premium" within Increase of Rent & Mortgage Interest (War Restrictions) Act, s. 1 (2):—*Held*: (1) notwithstanding that the term to be granted was ninety-nine years, the leases would create tenancies within the Act, & the payments therefore of the sums for which R. & D. had purchased their cottages were premiums which the deft. was prohibited by s. 1 (2) from retaining; (2) the agreements to pay the premiums being illegal, & no possession having been taken under the contracts by either R. or D., deft. was entitled to be relieved altogether from the contracts upon repaying to R. & D. all moneys he had received under them.—*REES v. BUTE (MARQUIS), DAVIES v. BUTE (MARQUIS)*, [1916] 2 Ch. 64; 85 L. J. Ch. 421; 114 L. T. 1029; 32 T. L. R. 425; 60 Sol. Jo. 528.

*See, now*, 1920 Act, s. 8 (3).

**7200. — Must be "in addition to the rent" & payable to landlord.]—**Deft., who was a tenant for a term of three years from Mar. 1919, of a dwelling-house within the Act, was in May, 1920, desirous of giving up his tenancy, & in that month he agreed with pltf. that upon payment by the latter to him of a premium he would surrender his tenancy & the landlord would grant pltf. a new tenancy for three years at a slightly increased rent. The landlord did not know that pltf. had agreed to pay deft. a premium. Pltf. paid deft. the premium & the landlord granted pltf. a new tenancy for three years. After 1920 Act came into operation pltf. sued to recover back the premium:—*Held*: 1920 Act, s. 8 (1), was reasonably capable of two constructions; that, the sect. being a penal one, the ct. should give it the more lenient construction avoiding the imposition of a penalty; that, construed in this light, the prohibition in the sect. was limited to the person who required the payment of the premium "in addition to the rent" & "as a condition of the grant, renewal, or continuance" by him of the tenancy, namely, the landlord, & the pltf. was not entitled to recover.—*REMMINGTON v. LARCHIN*, [1921] 3 K. B. 404; 90 L. J. K. B. 1248; 125 L. T. 749;

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**h. "Premium"—Rights of landlord on sub-lease by tenant.]—**A pre-

mium exacted by a landlord from his tenant in return for his consent to the tenant's sub-letting to a sub-tenant is

not prohibited by 1920 Act, s. 8 (1).—*STRATHERN v. BEATON*, [1923] S. C. (J.) 59.—*SCOT*.

85 J. P. 221; 37 T. L. R. 839; 65 Sol. Jo. 662; 19 L. G. R. 528, C. A.

*Annotation*.—*Mentd.* Harrison v. Wythemoor Colliery Co., [1922] 2 K. B. 674.

**7201. — Whether use of word in lease conclusive.**—By a verbal agreement a landlord let a flat, the standard rent of which was 13s. 6d., to the tenant at a rent of 25s. per week, but, with the admitted intention of evading the Rent Restrictions Acts, the parties executed a lease of the flat for fourteen years, whereby the payment of a premium became lawful at the standard rent of 13s. 6d. per week, with a proviso that the tenant might terminate the tenancy by giving one week's notice to quit, & at the same time made a separate agreement in writing that the tenant should pay to the landlord a "premium" of 11s. 6d. weekly, this, with the above rent, aggregating the 25s. per week so verbally agreed. By reason of the provision as to notice to quit, the "premium" was terminable with the tenancy. In an action to recover one week's payment of 11s. 6d.:—*Held*: the transaction must be looked at as a whole & the two documents read together, & so dealt with, 11s. 6d. was part of the rent & not premium, & was, as such, irrecoverable.—*RUSH v. MATTHEWS*, [1926] 1 K. B. 492; 95 L. J. K. B. 409; 134 L. T. 571; 42 T. L. R. 287; 70 Sol. Jo. 425; 24 L. G. R. 201, C. A.

**7202. "Fine, premium, etc., other like sum"—Rent overpaid by tenant under mistake of law—Right to deduct from rent.**—The landlord of a dwelling-house, to which Increase of Rent & Mortgage Interest (War Reduction) Act, 1913, applied, in Mar. 1915, increased the tenant's rent by 6d. a week. The tenant paid the increased rent & in ignorance of the Act, continued to do so until Jan. 31, 1916. Having then become aware of the Act, he deducted from his subsequent payment of rent the total amount of the increase over the standard rent which he had paid between Nov. 25, 1915, & Jan. 31, 1916. In an action by the landlord to recover the amount so deducted:—*Held*: (1) the amount overpaid by the tenant was not a "fine, premium, or other like sum" which he was entitled to deduct from his rent under s. 1 (2); (2) although the Act provided that the increase beyond the standard rent was not recoverable by the landlord if the tenant had not paid it, yet the tenant having paid it under mistake of law, was not entitled to recover it from the landlord in any shape or form.—*SHARP BROTHERS & KNIGHT v. CHANT*, [1917] 1 K. B. 771; 86 L. J. K. B. 608; 116 L. T. 185; 33 T. L. R. 235; 61 Sol. Jo. 352, C. A.

*Annotations*.—As to (2) *Refd.* Rawlinson v. Alger (1921), 90 L. J. K. B. 497; *Lewis v. McKay*, *Algato v. Vugler*, *Clark v. Potter*, [1924] 2 K. B. 136.

*See, now*, 1920 Act, s. 14 (1), 1923 Act, s. 8 (2), (3).

**7203. — Discount under tied covenant—Discontinued on renewal of tenancy.**—*BRAKSPEAR (W. H.) & SONS, LTD. v. BARTON*, No. 7134, *ante*.

**7204. "Grant, renewal or continuance of tenancy"—Whether assignment included.**—An assignment of a lease is not within the prohibition in 1920 Act, s. 8 (1), of the payment of a premium "as the condition of a grant, renewal, or continuance of a tenancy."—*MASON, HERRING & BROOKS v. HARRIS*, [1921] 1 K. B. 653; 90 L. J. K. B. 993; 125 L. T. 180; 37 T. L. R. 334.

*Annotation*.—*Apprvd.* Remington v. Larchin, [1921] 3 K. B. 404.

**7205. — — — — —**—*REMMINGTON v. LARCHIN*, No. 7200, *ante*.

**7206. Effect of agreement to pay premium—**

**Right to rescission of contract—Where possession not taken.**—*REES v. BUTE (MARQUIS)*, *DAVIES v. BUTE (MARQUIS)*, No. 7199, *ante*.

#### SUB-SECT. 6.—RECOVERY OF AMOUNT OVERPAID.

##### A. In General.

*See* 1920 Act, ss. 14 (1), 19 (3), 1923 Act, s. 8 (2), (3).

**7207. Increase paid under mistake of law.**—*SHARP BROTHERS & KNIGHT v. CHANT*, No. 7202, *ante*.

*See, generally*, MISTAKE.

**7208. Effect of 1920 Act—Amounts irrecoverable at time of passing of the Act.**—1920 Act does not render recoverable overpayments of rent which were irrecoverable at the time of the passing of that statute.—*RAWLINSON v. ALGER* (1921), 90 L. J. K. B. 497; 124 L. T. 512; 19 L. G. R. 618, D. C.

**7209. Amount paid in excess of permitted increase.**—*COLLS v. PARNHAM*, No. 7060, *ante*.

**7210. — Before apportionment.**—An apportionment of rent under 1920 Act, s. 12 (3), entitles a tenant to recover from the landlord under s. 14 (1) of the Act rent paid before the date of the apportionment in excess of the increase permitted by the Act.—*KIMM v. COHEN* (1923), 40 T. L. R. 123; 68 Sol. Jo. 313, D. C.

**7211. Amount paid under invalid notice of increase.**—Pltf. was the tenant & deft. the landlord of a dwelling-house, the standard rent of which was £7 1s. 10d. per quarter. In May, 1918, deft. served on pltf. a notice of increase of rent, & in May, 1919, he served a second notice of increase of rent. Both notices were regular in form, & as regards amount, were warranted by increased rates paid by deft., but no notice to determine the tenancy was given at any material time. The increased rent demanded was paid by pltf. without protest. He subsequently brought an action under 1920 Act, s. 14, to recover from his landlord the amount overpaid:—*Held*: as the landlord had never served on the tenant a notice to determine the tenancy, the tenant was entitled to recover the amount overpaid.—*SMITH v. LLOYD* (1923), 92 L. J. K. B. 877; 130 L. T. 20; 67 Sol. Jo. 810, D. C.

**7212. — Effect of 1923 (Notices of Increase) Act, s. 1 (1).**—*LANDRIGAN v. SIMONS*, No. 7172, *ante*.

**7213. — What amount recoverable—Effect of 1923 Act, s. 8 (1).**—The landlords of a dwelling-house, to which the Rent Restrictions Acts, 1920 & 1923, applied, served notices of increase of rent, which were incorrect in certain particulars & were not accompanied by notice to quit. The county ct. judge, acting under 1923 Act, s. 6, amended the notices, & held that all money already paid thereunder by way of rent might be retained by the landlords. To this the tenant objected that by above sub-sect. no increase of rent payable by reason of such amendment was recoverable by the landlords "in respect of any rental period which ended more than six months before the date of the order," & that he was entitled under 1920 Act, s. 14 (1), to recover from the landlords' any excess rent paid prior to that period. He also objected that the county ct. judge had no power to amend a notice which was invalid owing to the absence of notice to quit:—*Held*: (1) above sub-sect. must be read together with 1923 Act, s. 6, & their joint effect was to limit the landlords' right in respect of rent due as the result of the

**Sect. 3.—Rent: Sub-sect. 6, A. & B.; sub-sect. 7. Sect. 4.]**

amendment of the notices to rent due for the six months prior to the date of the order of the county ct., & the tenant was therefore entitled under 1920 Act, s. 14 (1), to recover from the landlords any increase in rent paid in respect of a rental period ending before such six months, as being rent irrecoverable by the landlords under 1920 Act, s. 1; (2) the county ct. judge had power to amend the notices of increase under the 1923 Act, s. 6, although they were not accompanied by notices to quit.—*WILLIAMS v. BRITANNIC MERTHYR STEAM COAL CO.*, [1924] 2 K. B. 334; 93 L. J. K. B. 983; 131 L. T. 825; 40 T. L. R. 687; 68 Sol. Jo. 795; 22 L. G. R. 626, D. C.

**7214. Where no notice of increase given.]—MICHAEL v. PHILLIPS**, No. 7155, *ante*.

**7215. —.]—AZULAY v. MATTHEWS** (1924), 157 L. T. Jo. 365, D. C.

**B. Limitation of Right to Recover.**

See 1923 Act, s. 8 (1) & (2).

**7216. Application of limitation—Both to recovery by deduction & recovery by deduction.]—BAYLEY v. WALKER**, No. 7220, *post*.

**7217. "Within six months"—How calculated.]—Where a statute provides that certain proceedings can be taken only within six months from the passing of the Act, the day on which the Act was passed is excluded, & therefore, under 1923 Act, s. 8 (2), which came into operation on July 31, 1923, the last day for taking proceedings to recover back overpayments of rent under 1920 Act is not Jan. 30, but Jan. 31, 1924.—*TRUSS v. OLIVIER* (1924), 40 T. L. R. 588, D. C.**

**7218. Recovery by action—Whether in time—Proceedings begun within time limit—Judgment recovered after time limit.]—The tenants of dwelling-houses within the protection of 1923 Act made payments of rent to their landlords, before the passing of 1923 Acts in excess of the standard rents. In each case they brought proceedings within the period of six months, limited by 1923 Act, s. 8 (2), to recover the overpayments, but in each case the action was not tried until after the expiration of the period of six months:—*Held*: it was sufficient that the actions were brought within the period of six months, though judgment was not obtained until after the expiration of that period & the tenants were entitled to recover.—*LEWIS v. MCKAY*, *ALGATE v. VUGLER*, *CLARK v. POTTER*, [1924] 2 K. B. 136; 93 L. J. K. B. 840; 131 L. T. 504; 40 T. L. R. 579; 68 Sol. Jo. 739; 22 L. G. R. 476, D. C.**

**Annotations:—***Apprvd.* *Diment v. Roberts* (1924), 132 L. T. 235. *Apld.* *Bayley v. Walker*, [1925] 1 K. B. 447. *Reid.* *Pringle v. Hales*, [1925] 1 K. B. 573.

**7219. —.]—The effect of 1923 Act, s. 8 (2), whereby any rent or interest paid by a tenant or mtgor. in excess of the increases allowed by 1920 Act, shall be "recoverable at any time within six months" is that the tenant, to recover the excess, must take some kind of legal proceeding, as by issue of a writ or summons, within the prescribed period. It is not necessary that he should actually have obtained judgment before the six months have expired.—*DIMENT v. ROBERTS*, [1925] 1 K. B. 9; 93 L. J. K. B. 1038; 132 L. T. 235; 40 T. L. R. 861; 68 Sol. Jo. 842; 22 L. G. R. 742, C. A.**

**Annotations:—***Apld.* *Bayley v. Walker*, [1925] 1 K. B. 447. *Reid.* *Pringle v. Hales*, [1925] 1 K. B. 573.

**PART XXVII. SECT. 3, SUB-SECT. 6.—B.**

**k. Recovery by deduction—Sums**

*over-paid to landlord's predecessor—Whether right to recover from present landlord.]—The tenant is not entitled to deduct from the rent payable to his*

**7220. —.]—(1) The effect of 1920 Act, s. 14 (1), coupled with 1923 Act, s. 8 (2), is to impose a limitation on the general right of recovery, whether by action or deduction.**

**(2) It is sufficient that proceedings should have been commenced before the time limit expires, but (3) the fact that a tenant adopts the method of deduction & makes the first deduction before the expiry of the time-limit does not entitle him to continue deduction after it.—*BAYLEY v. WALKER*, [1925] 1 K. B. 447; 94 L. J. K. B. 430; 132 L. T. 489; 41 T. L. R. 187; 23 L. G. R. 180, D. C.**

**7221. —.]—Irregular plaint—Irregularity waived.]—On Jan. 30, 1924, a tenant of a dwelling-house within the Rent Restrictions Acts lodged two plaints in the West London county ct., the one under 1920 Act, s. 12 (3), for apportionment of rent, & the other under sect. 14 (1) of the same Act for certain sums paid by him in respect of rent which, as he alleged, was irrecoverable by his landlord. These sums were, by 1923 Act, s. 8 (2), recoverable on or before Jan. 31, 1924, but not afterwards. The claim for apportionment could regularly be brought in the West London, ct., but the claim for repayment could not be brought in that ct. without the leave of the judge or registrar on an application supported by an affidavit. No affidavit was sworn until Feb. 5, 1924. Notwithstanding this the plaint was entered, a plaint note under the seal of the ct. was given to pltf. & a summons was issued, all bearing the date of Jan. 30, 1924. By C. C. R., Ord. 7, r. 2, a summons to appear to a plaint shall be dated of the day on which the plaint was entered, & the date thereof shall be the commencement of the action:—*Held*: the irregular entry of the plaint & issue of the summons before the necessary leave had been obtained did not deprive the county ct. of jurisdiction to hear the action, but the irregularity could be waived by deft.; as deft. had appeared to the summons & raised a defence in no way challenging the jurisdiction of the ct., he had waived the irregularity; the action must therefore be taken to have commenced on Jan. 30, & pltf. was entitled to recover.—*PRINGLE v. HALES*, [1925] 1 K. B. 573; 94 L. J. K. B. 458; 132 L. T. 785, C. A.**

**7222. Recovery by deduction—Loss of right to deduct—On expiry of time limit.]—BAYLEY v. WALKER**, No. 7220, *ante*.

**7223. —.]—Calculation of time limit.]—GOKLEE v. BURGNER** (1925), 69 Sol. Jo. 311.

**Proceedings pending under repealed enactments.]—Compare No. 7272, *post*.**

**Proceedings arising under the Act.]—Compare Nos. 7332, 7343, *post*.**

**SUB-SECT. 7.—OTHER CASES.**

**7224. Leave to distrain—Discretion of court.]—A landlord made an application under the Courts (Emergency Powers) Acts, 1914 to 1917, & 1920 Act, for leave to levy a distress for rent. It was admitted that the tenant was not under inability to pay the amount by reason of circumstances directly or indirectly attributable to the recent war, but it was contended by the tenant that, having regard to 1920 Act, there was a *bona fide* dispute between himself & the landlord as to the**

*present landlord sums alleged to have been over-paid to that landlord's predecessor in title.—MURRAY v. WEBB* (1925), 69 L. T. 41.—**IR.**

amount due :—*Held* : the discretion to be exercised as to the making of an order giving leave to levy a distress was not limited to the question of the ability or inability of the tenant to pay the rent on account of circumstances attributable directly or indirectly to the war, but in an application under 1920 Act, s. 6, a tenant should be admitted to show, if he could, that there was a *bond fide* dispute as to the amount payable, & the discretion of the ct. should only be exercised after due inquiry had been made into the questions arising out of such an application.—*TOWNSEND v. CHARLTON*, [1922] 1 K. B. 700 ; 91 L. J. K. B. 714 ; 127 L. T. 96 ; 38 T. L. R. 397 ; 66 Sol. Jo. 389 ; 20 L. G. R. 382, D. C.

**7225. Liability of tenant for arrears—Right of appeal to High Court—Effect of 1923 (Notices of Increase) Act, s. 2 (4).**—1920 Act, s. 2 (6), does not restrict the right of appeal from a county ct. in an ordinary action for rent, but only in applications of an administrative character.—*STRICKLAND v. PALMER*, [1924] 2 K. B. 572 ; 93 L. J. K. B. 377 ; 130 L. T. 408 ; 40 T. L. R. 314 ; 68 Sol. Jo. 479 ; 22 L. G. R. 258, D. C. ; *on appeal*, [1924] 2 K. B. 579, C. A.

**Liability of tenant for double rent.**—*See* Nos. 6860, 6904, *ante*.

**Liability of tenant for sub-tenant.**—*See* No. 7229, *post*.

#### SECT. 4.—STATUTORY TENANCIES.

*See* 1920 Act, ss. 15 (1), 16 (3) ; 1923 Act, s. 9 (2).

**7226. Where tenant gives notice to quit—Liability for double rent—Under Distress for Rent Act, 1737 (c. 19), s. 18.**—*FLANNAGAN v. SHAW*, No. 6860, *ante*.

**7227. — Whether deprived of protection under the Act.**—*HUNT v. BLISS*, No. 7279, *post*.

**7228. — Nature of tenancy—Tenant at sufferance.**—*ARIZANS, LABOURERS & GENERAL DWELLINGS CO. v. WHITAKER*, No. 7259, *post*.

**7229. — Sub-tenant holding over—Whether tenant liable for rent—Or for use & occupation.**—A tenant gave his landlord due notice to quit, & also gave due notice to his sub-tenant of part of the premises to quit at the termination of the tenant's tenancy. The sub-tenant, being entitled under the provisions of the Increase of Rent, etc. (Restrictions), Acts to continue in occupation, refused to quit. The tenant duly gave up possession to the landlord of his part of the premises, but was, for the above reasons, unable to give vacant possession of the whole :—*Held* : as the tenant had done all he could do to give vacant possession, he was not liable to the landlord for use & occupation for the period during which the latter was kept out of possession.—*REYNOLDS v. BANNEKMAN*, [1922] 1 K. B. 719 ; 91 L. J. K. B. 651 ; 127 L. T. 300 ; 38 T. L. R. 509 ; 66 Sol. Jo. 504 ; 20 L. G. R. 439, D. C.

**7230. Where tenant served with notice to quit—Before passing of 1920 Act—Remaining in possession until Act passed.**—*REMON v. CITY OF LONDON REAL PROPERTY CO.*, No. 7032, *ante*.

**7231. — Effect of acceptance of rent by landlord—Whether waiver of notice.**—Where a tenant of a house, to which the Increase of Rent, etc. (War Restrictions), Acts apply, holds over after the expiry of a notice to quit & pays rent, the landlord is not to be taken by accepting it to assent to a renewal of the tenancy on the old terms, for he has no choice but to accept the rent ; he could not sue in trespass for mesne profits, for those Acts

provide that the tenant notwithstanding the notice to quit shall not be regarded as a trespasser so long as he pays the rent & performs the other conditions of the lease.—*DAVIES v. BRISTOW, PENRHOS COLLEGE v. BUTLER*, [1920] 3 K. B. 428 ; 90 L. J. K. B. 164 ; 123 L. T. 655 ; 36 T. L. R. 753, D. C.

*Annotations* :—*Folld. Town Properties Development Co. v. Winter* (1921), 37 T. L. R. 979 ; *Shuter v. Hersh*, [1922] 1 K. B. 438 ; *Felce v. Hill* (1923), 92 L. J. K. B. 974.

**7232. — Where a tenant occupies premises to which 1920 Act applies, holds over after the expiry of a notice by the landlord to quit, the acceptance of rent does not constitute a waiver of the landlord's rights under the notice to quit.**—*TOWN PROPERTIES DEVELOPMENT CO., LTD. v. WINTER* (1921), 37 T. L. R. 979.

**7233. — — — — —**—*SHUTER v. HERSH*, No. 7173, *ante*.

**7234. — — — — — Whether new tenancy created.**—*SHUTER v. HERSH*, No. 7173, *ante*.

**7235. — Employee holding over after employment determined—Whether new tenancy created.**—*LEVER BROTHERS, LTD. v. CATON*, No. 7318, *post*.

**7236. — Whether on terms of former tenancy.**—

The landlord of a dwelling-house subject to the Rent Restrictions Acts had covenanted to "keep the cottage dry & the outside in repair." The cottage was one hundred & fifty years old, without any damp courses, & in a bad state of repair, the cost of the repairs would be about £600, & the tenant's furniture was injured by the damp. The tenant, after receiving a valid notice to quit, remained in possession as a statutory tenant & requested the landlord to comply with his covenant, but the latter repudiated liability. In a claim by the tenant against the landlord for damages for breach of the covenant :—*Held* : the measure of damages was (a) the difference in value to the tenant of the house during the period from the date of the request to the assessment of damages between the house in its unrepaired condition & the house in the condition in which it would be if the landlord, on receipt of the notice to repair, had fulfilled his obligation ; & (b) the damage to the tenant's furniture during the aforesaid period caused by the landlord's default in repairing. Both items would be subject to the extent of the landlord's obligation, having regard to the age & structure of the premises, & in assessing the damages, *Lister v. Lane & Nesham*, No. 4700, *ante*, as explained in *Lurcott v. Wakeley & Wheeler*, No. 4757, *ante*, should be considered. The fact that it was inconvenient or unprofitable to the landlord to fulfil his obligation should not be considered.—*HEWITT v. ROWLANDS* (1924), 93 L. J. K. B. 1080 ; 131 L. T. 757, C. A.

**7237. — Right to sub-let—No restriction in original tenancy.**—A statutory tenant, who is not debarred from sub-letting by his original contract does not forfeit the protection afforded to him under the Rent Restrictions Acts by sub-letting part of the premises that he occupies & remaining himself in possession of the remainder.—*CAMPBELL v. LILL* (1926), 135 L. T. 26 ; 42 T. L. R. 397 ; 70 Sol. Jo. 621, D. C.

**7238. — — — — —**—*LESLIE & CO. v. CUMMINGS*, No. 7041, *ante*.

**7239. Where tenancy expired by effluxion of time—Whether on terms of former tenancy.**—*CROOK v. WHITBREAD*, No. 6904, *ante*.

**7240. — — — — —**—*EPSOM GRAND STAND ASSOCN., LTD. v. CLARKE*, No. 7296, *post*.

**7241. — — — — —**—Where the tenant of a dwelling-house holds over upon the expiration of his tenancy, not under any implied agreement for

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a new tenancy, but as a statutory tenant under 1920 Act, he is, but for the Act, a mere tenant at will, & the landlord is entitled to serve a notice increasing the rent payable during the statutory tenancy without the necessity of giving any notice to quit.—*FELCE v. HILL* (1923), 92 L. J. K. B. 974; 130 L. T. 76; 39 T. L. R. 673; 21 L. G. R. 640, C. A.

**7242.** — **Liability for double rent—Under Landlord & Tenant Act, 1730 (c. 28), s. 1.]**—*CROOK v. WHITBREAD*, No. 6904, *ante*.

**7243.** — **Whether entitled to notice of breach of covenant—Under Law of Property Act, 1925 (c. 20), s. 146.]**—Pltf. let a dwelling-house to deft. for five years. At the expiration of the term deft. remained in possession as statutory tenant. He subsequently became in arrear with rent & also committed a breach of covenant. Pltf. issued a summons for possession on these grounds. Subsequent to the summons but before trial deft. paid the rent & costs into ct. No notice of breach of covenant was served on deft. under Conveyancing Act, 1881 (c. 41), s. 14. The county ct. judge made an order for possession:—*Held*: as a statutory tenant pltf. could not claim under C. L. P. Act, 1852 (c. 76), s. 212, which enacts that proceedings shall cease on payment of rent & costs into ct., or under Conveyancing Act, 1881 (c. 41), s. 14, which enacts that as a condition precedent to re-entry notice specifying the breach must be served on deft., & as he was only entitled to remain as statutory tenant on condition of observing the conditions of the tenancy, which he had broken, the county ct. judge was entitled, in the exercise of his discretion, to make the order for possession.—*BREWER v. JACOBS*, [1923] 1 K. B. 528; 92 L. J. K. B. 359; 128 L. T. 687; 67 Sol. Jo. 458; 21 L. G. R. 230, D. C.

**7244.** — **Whether entitled to stay of proceedings—On payment of rent into court—Under Common Law Procedure Act, 1852 (c. 76), s. 212.]**—*BREWER v. JACOBS*, No. 7243, *ante*.

**7245.** **Whether created by apportionment of rent.]**—Pltf. was the owner of certain premises in Kentish Town. In 1920 he let these premises to C. for a term of seven years at £100 *per annum*. The tenant covenanted not to sublet or assign without the consent of the landlord, such consent not to be reasonably withheld. There was a proviso for re-entry in the case of rent being in arrear, but no proviso extending to assignment without leave. In Sept. 1922, the tenant applied for an apportionment of the rent of her premises; this rent was fixed at £35 2s. *per annum*, & accordingly reduced. In Mar. 1923, C. died, & D. became her exor. In Apr. 1923, application was made to the landlord for permission to assign the premises to F., & references forwarded. On Apr. 20, 1923, F. went into possession, subject to the landlord's consent being obtained. In June, 1923, the exor. assigned the lease to F. as the landlord refused to examine the references or consent to the assignment. The landlord brought an action for possession & mesne profits on the ground that C. had, by obtaining an appointment of her rent, converted her tenancy into a statutory tenancy, which was terminated by her death & was not assignable:—*Held*: the tenant, by obtaining an apportionment of the rent, did not avoid the lease or become a statutory tenant. The common law tenancy remained & became vested in the exor., & was therefore assignable.—*FUMASOLI v. COMYN & FISH* (1924), 132 L. T. 490; 23 L. G. R. 381, D. C.

**7246.** **Right of possession—Sufficient to support action for trespass—On unlawful entry of landlord.]**—*CRUISE v. TERRELL*, No. 7268, *post*.

**7247.** **Condition of right to protection—Payment of rent & performance of covenants.]**—*ARTIZANS, LABOURERS & GENERAL DWELLINGS CO. v. WHITAKER*, No. 7259, *post*.

**7248.** — *—*—*—*—*DAVIES v. BRISTOW, PENRHOS COLLEGE v. BUTLER*, No. 7231, *ante*.

**7249.** — *—*—*—*—*BREWER v. JACOBS*, No. 7243, *ante*.

**7250.** **Option of further lease—Whether a term of original tenancy—Necessity for waiver.]**—An option to take a further lease for a stated period at the termination of the existing lease is not a term of the original contract of tenancy within 1920 Act, s. 15. During the pendency of 1920 Act a landlord must show that such an option was either expressly waived or abandoned by the tenant.—*MCILROY (WILLIAM), LTD. v. CLEMENTS* (1923), 155 L. T. Jo. 362, C. A.

**7251.** **Position of sub-tenant—Where original tenancy determined—Application of 1920 Act, s. 15 (3).]**—*HYLTON (LORD) v. HEAL*, No. 7306, *post*.

**7252.** — *—*—*—*—*REYNOLDS v. BANNERMAN*, No. 7229, *ante*.

**7253.** — *—*—*—*—*CHAPMAN v. HUGHES*, No. 7304, *post*.

**7254.** **Whether assignable.]**—The right of a statutory tenant under 1920 Act, is merely a personal right to retain possession of the premises, & cannot be assigned to another person.—*KEEVES v. DEAN, NUNN v. PELLEGRINI*, [1924] 1 K. B. 685; 93 L. J. K. B. 203; 130 L. T. 593; 40 T. L. R. 211; 68 Sol. Jo. 321; 22 L. G. R. 127, C. A.

*Annotations:—Reid. Aston v. Smith*, [1924] 2 K. B. 143; *Hicks v. Scarsdale Brewery Co.*, [1924] W. N. 189; *Prout v. Hunter*, [1924] 2 K. B. 365; *Salter v. Lask, Lask v. Cohen*, [1925] 1 K. B. 584.

**7255.** **Husband of deceased woman statutory tenant—Whether entitled to maintain action of ejectment.]**—*SALTER v. LASK, LASK v. COHEN*, No. 7107, *ante*.

**SECT. 5.—RECOVERY OF POSSESSION.****SUB-SECT. 1.—IN GENERAL.**

*Sec. now, 1923 Act, s. 4, re-enacting 1920 Act, s. 5 (1).*

**7256.** **“Satisfactory grounds”—Under Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97)—House required for purchaser—Notice to quit given by landlord.]**—In Aug. 1918, the landlord of a house to which Rent Restriction Acts applied sold the house to a purchaser, vacant possession to be given on Sept. 24, 1918, & gave the existing tenant a valid notice to quit, which notice expired on Oct. 27, 1918. The tenant not complying with the notice, the landlord brought this action for possession. In Dec. 1918, the Acts of 1915 & 1918 being then in force, the county ct. judge found that pltf. desired to give vacant possession to a *bona fide* purchaser for residence therein & held that this was a satisfactory ground for making an order for possession. On appeal before the passing of the Act of 1919 the Div. Ct. held that the Act of 1918 prohibited the making of an order for possession with a view to occupation by a purchaser from a landlord. On appeal after the Act of 1919 came into force:—*Held*: (1) under above Act, s. 1 (3), as amended by Increase of Rent, etc. (Amendment) Act, 1918 (c. 7), s. 1, the general discretion conferred upon the ct. by the sub-sect. could not be exercised on

a ground inconsistent with one of the grounds expressly specified in the earlier part of the sub-sect., & therefore, there was no discretion to make an order for possession in favour of a landlord requiring possession for the residence of a purchaser; (2) the provisions of the Act of 1919, being retrospective, must be taken into consideration & the case remitted to the county ct. judge to decide whether the purchaser had rescinded the contract, whether he still required the premises for his own occupation, what alternative accommodation there was for the tenant, & whether, in view of the provisions of the Act of 1919, s. 5 (2), pltf. was entitled on the date of the further hearing to an order for possession.—*STOVIN v. FAIRBRASS* (1919), 88 L. J. K. B. 1004; 121 L. T. 172; 83 J. P. 241; 35 T. L. R. 659; 63 Sol. Jo. 682; 17 L. G. R. 583, C. A.

*Annotations*.—As to (1) *Distd.* *Green-Price v. Webb* (1919), 89 L. J. K. B. 216. *Appld.* *Price v. Pritchard* (1919), 89 L. J. K. B. 162. *Fold.* *Stephens v. Tatham* (1919), 83 J. P. Jo. 567; *Vernon Investment Assocn. v. Welch* (1919), 35 T. L. R. 511. *Refd.* *Hunt v. Bliss* (1919), 89 L. J. K. B. 174. As to (2) *Refd.* *Robinson v. R.*, [1921] 3 K. B. 183; *Landrigan v. Simons*, [1924] 1 K. B. 509.

Landlord contracting to sell where notice to quit given by tenant, see Sub-sect. 2, B. (c), *post*.

**7257. ——— Landlord required to live abroad for health—Impossibility of sale without vacant possession.**—*STEPHENS v. TATHAM* (1919), 83 J. P. Jo. 567.

**7258. ——— House required for new tenant.**—It is not a ground which the ct. is entitled to take into consideration & “deem satisfactory” for making an order for the recovery of a dwelling-house under Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 1 (3), by a landlord who has given notice to his tenant to deliver up possession, that the premises are reasonably required for the occupation of a new tenant, inasmuch as such new tenant is not one of the three classes of persons named in the sub-sect.—*PRICE v. PRITCHARD* (1919), 89 L. J. K. B. 162; 122 L. T. 488; 84 J. P. 49; 35 T. L. R. 672; 17 L. G. R. 636, D. C.

*Annotations*.—*Refd.* *Green-Price v. Webb* (1919), 89 L. J. K. B. 216; *Hunt v. Bliss* (1919), 89 L. J. K. B. 174.

**7259. ——— Where tenant gives notice.**—A tenant who covenants to yield up possession of premises at the determination of the term is protected by the Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915, s. 1 (3), even if he holds over after giving notice to quit, & thus becomes a tenant at sufferance, provided that he tenders the agreed rent & performs the other covenants of the tenancy. The ct. will not consider the giving of such a notice “a satisfactory ground” within the sect., if it was given in the belief that it was merely a provisional notice.—*ARTIZANS, LABOURERS & GENERAL DWELLINGS CO. v. WHITAKER*, [1919] 2 K. B. 301; 88 L. J. K. B. 859; 121 L. T. 243; 35 T. L. R. 521.

*Annotations*.—*Consd.* *Hunt v. Bliss* (1919), 89 L. J. K. B. 174. *Refd.* *Green-Price v. Webb* (1919), 89 L. J. K. B. 216; *Barton v. Fincham*, [1921] 2 K. B. 291; *Kimpson v. Markham*, [1921] 2 K. B. 157; *Remon v. City of London Real Property Co.*, [1921] 1 K. B. 49.

See, also, Nos. 7279, 7280, 7282, 7283, *post*.

**7260. Whether order “reasonable” — What court must consider.**—In breach of an express covenant in a lease under seal a tenant underlet part of a house without his landlord’s previous written consent, which consent could not be withheld in the event of a respectable & responsible tenant being introduced. On discovering the

breach the landlord forfeited the lease & claimed possession. The house was within 1920 Act. At the trial the tenant proved that he only took the lease in the *bonâ fide* belief induced by the landlord’s house agents during the negotiations that they had obtained the landlord’s consent to his underletting part of the house from time to time, which consent they knew was a *sine qua non* to his taking the lease. On learning at the trial that the landlord had given no consent to actual underletting, but had only given the tenant permission to have some one to live with him, the tenant at once offered to give vacant possession in nine months’ time, or sooner if he could obtain other accommodation, & not to underlet again without the landlord’s consent, & in the meantime to pay over one-half of the under-tenant’s rent. The landlord refused these offers & demanded immediate possession.—*Held*: the circumstances under which the lease was taken were necessarily & directly relevant to the question whether it was “reasonable” to make an order for possession under 1920 Act, s. 5, which gave the ct. full judicial discretion in the matter; & having regard to the fact that the tenant only took the lease in the belief, induced by the landlord’s house agents, that the landlord had expressly consented to partial underletting, & taking into consideration the tenant’s offers, & the absence of any suggestion of structural alteration, or against the respectability or responsibility of the under-tenant, or of any real injury to the landlord, it would not be “reasonable” to order possession.—*UPJOHN v. MACFARLANE*, [1922] 2 Ch. 250; 91 L. J. Ch. 465; 127 L. T. 210; *varied* by consent, [1922] 2 Ch. 267, C. A.

**7261. ———**—In considering whether it is reasonable to make an order for possession under 1920 Act, s. 5 (1) (d), as amended by 1923 Act, s. 4, the county ct. judge ought to take into consideration every circumstance that may affect the interests of the landlord or of the tenant in the premises, including the financial hardship which may be inflicted upon the tenant if an order for possession is made.—*WILLIAMSON v. PALLANT*, [1924] 2 K. B. 173; 93 L. J. K. B. 726; 131 L. T. 474; 22 L. G. R. 416, D. C.  
*Annotation*.—*Fold.* *Shrimpton v. Rabbits* (1924), 131 L. T. 478.

**7262. ———**—In considering whether it is reasonable to make an order or to give judgment [under 1920 Act, s. 5 (1), as amended by 1923 Act, s. 4], the county ct. judge must take into account all the circumstances affecting the holding of the premises by the tenant & as they relate to the landlord who wants to recover possession.—*SHRIMPTON v. RABBITS* (1924), 131 L. T. 478; 40 T. L. R. 541; 68 Sol. Jo. 685, D. C.

**7263. Whether possession given of part of premises—Part already in possession.**—A landlord seeking to recover possession at the expiration of a tenancy by effluxion of time or notice to quit is not bound to include in his claim the whole of the demised premises, but may confine his claim to part only of the premises in a proper case, for example, where he has already resumed possession of the other part.—*SALTER v. LASK*, [1924] 1 K. B. 754; 93 L. J. K. B. 685; 130 L. T. 323; 68 Sol. Jo. 420; 22 L. G. R. 296, C. A.

Business premises & dwelling house let together.—See No. 7055, *ante*.

**7264. Termination of tenancy—By disclaimer of official receiver or trustee in bankruptcy.**—In

**Sect. 5.—Recovery of possession: Sub-sects. 1 & 2, A. & B. (a), (b) & (c).]**

1916 a "dwelling-house" within the meaning of the Increase of Rent Acts was by agreement in writing let by pltf. to deft. on a quarterly tenancy from June 24, 1916, subject to a quarter's notice, at a yearly rent of £80, payable quarterly. The rent was afterwards increased to £85. In 1920 deft. was adjudicated bkpt. & the official receiver disclaimed the tenancy, whereupon pltf., after 1920 Act, came into force, brought this action for recovery of possession of the demised premises on the ground that the tenancy had expired by reason of the disclaimer:—*Held*: pltf. was entitled to possession.—*REEVES v. DAVIES*, [1921] 2 K. B. 486; 90 L. J. K. B. 675; 125 L. T. 354; 37 T. L. R. 431, C. A.

*Annotations*:—*Distd. Parkinson v. Noel*, [1923] 1 K. B. 117. *Refd. Mellows v. Low*, [1923] 1 K. B. 522.

**7265.** ————]—A statutory tenancy under 1920 Act is "property" of the tenant within Bkpcy. Act, 1914 (c. 59), s. 167.

Pltfs., having let to deft. a dwelling-house to which 1920 Act, applied, deft. retained possession of it after the expiration of the term under the provisions of that Act. Deft. was afterwards adjudicated bkpt. & the trustee in bkpcy. disclaimed any interest in the house. In an action by pltfs. against deft. for possession of the house & mesne profits:—*Held*: the statutory tenancy to which deft. became entitled under 1920 Act was "property" within Bkpcy. Act, 1924 (c. 59), s. 167, & passed under s. 53 to his trustee in bkpcy., & on disclaimer thereof by the trustee that interest in the premises ceased to exist & was no longer available for the benefit of deft., & consequently that pltfs. were entitled to judgment.—*PARKINSON v. NOEL*, [1923] 1 K. B. 117; 92 L. J. K. B. 361; 128 L. T. 538; 67 Sol. Jo. 184; 21 L. G. R. 130.

*Annotations*:—*Consd. Keoves v. Dean, Nunn v. Pellegrini* (1923), 130 L. T. 593. *Refd. Mellows v. Low*, [1923] 1 K. B. 522.

**7266.** Premises to which former Acts did not apply—Holding over until passing of 1920 Act.]—*REMON v. CITY OF LONDON REAL PROPERTY CO.*, No. 7032, *ante*.

*Compare* No. 7273, *post*.

**7267.** Right of re-entry—Where tenant holds over under the Acts.]—*REMON v. CITY OF LONDON REAL PROPERTY CO.*, No. 7032, *ante*.

**7268.** ————]—Where court would make order for possession.]—A tenancy for a fixed term, determinable without notice by effluxion of time, is within 1920 Act. A tenant who holds on after the determination of the term becomes a statutory tenant, & the landlord is not entitled to exercise his common law right of re-entry, although the circumstances are such that the ct. would & does, on his application make an order for possession. If he does re-enter, he is liable in damages for trespass, but unless there are aggravating circumstances, the damages must be limited to the actual damages proved.—*CRUISE v. TERRELL*, [1922] 1 K. B. 664; 91 L. J. K. B. 499; 126 L. T. 750; 38 T. L. R. 379; 66 Sol. Jo. 365; 20 L. G. R. 418, C. A.

*Annotation*:—*Refd. Keoves v. Dean, Nunn v. Pellegrini*, [1924] 1 K. B. 685.

*See, also*, No. 7332, *post*.

**Effect of death of tenant—Right of administrator or executor to protection of the Acts.]—***See* Nos. 7097, 7105, 7107, *ante*.

**7269.** Right of statutory tenant to order against sub-tenant.]—*SALTER v. LASK, LASK v. COHEN*, No. 7107, *ante*.

**SUB-SECT. 2.—CONDITIONS PRECEDENT.**

**A. In General.**

**7270.** At what time conditions ascertained—Change of conditions after notice to quit.]—For the purpose of applying Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 1 (3), the time to be considered is the time when the ct. is asked to make an order for recovery of possession. Where between the notice to quit & the service of a writ to recover possession of a dwelling-house, the person for whose employees pltf. requires the house has ceased to be a tenant of pltf. but has purchased the land of which he was previously the tenant, the ct. is entitled to consider that the fact that such person reasonably requires the house for the accommodation of his employees is a "satisfactory ground" within the sub-sect. for making an order for possession.—*HARCOURT v. LOWE* (1919), 35 T. L. R. 255.

*Annotations*:—*Refd. Artizans, Labourers & General Dwellings Co. v. Whitaker*, [1919] 2 K. B. 301; *Hunt v. Bliss* (1919), 122 L. T. 351; *Kimpson v. Markham*, [1921] 2 K. B. 157; *Price v. Pritchard* (1919), 89 L. J. K. B. 162.

**If court considers claim reasonable.]—***See* Nos. 7260–7262, *ante*.

**B. Particular Conditions.**

**(a) Non-Payment of Rent or Breach of Covenant.**

*See, now*, 1923 Act, s. 4, re-enacting 1920 Act, s. 5 (1) (a).

**7271.** Non-payment of rent—Effect of tender in arrear.]—Where the tenant of a dwelling-house within Increase of Rent & Mortgage Interest, War Restrictions, Act, 1915 (c. 97), has not paid the rent due under his tenancy agreement, but upon being served with a writ for the recovery of possession of the premises, tenders the rent in arrear, such tender does not preclude the landlord from obtaining an order for recovery of possession.—*BEAVIS v. CARMAN* (1920), 36 T. L. R. 396; 84 J. P. Jo. 197.

**7272.** ————]—Application of Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 1 (3)—"So long as tenant continues to pay rent."—(1) Where the tenant of a dwelling-house within above Act, is in arrear with his rent the provision of Increase of Rent, etc. (Amendment) Act, 1919 (c. 90), s. 1 (1), that no order for recovery of possession shall be made "so long as the tenant continues (*inter alia*) to pay rent at the agreed rate," is not satisfied by an undertaking that he will pay the arrears on a date subsequent to the hearing of the application for the order.

(2) When 1920 Act has come into operation between the date of the refusal of a county ct. judge to order possession & the hearing of an appeal, the Div. Ct. may, if 1920 Act contains a new & material provision, send the case back to the county ct. judge, in order that he may deal with it on the basis of such new provision.

(3) It has been contended for pltf. that the words "any proceedings pending in any ct.," in 1920 Act [s. 19 (3)] mean any proceedings pending in any ct. of first instance & that the appeal could not, therefore be deemed to have commenced under the Act. But it appears that the phrase "in any ct." is intended to give the tenant the benefit of that Act if he is a party to any proceedings in any ct. (*LAWRENCE, J.*)—*BENARO v. HORSELEY* (1920), 36 T. L. R. 859; 64 Sol. Jo. 727, D. C.

*Annotation*:—*As to* (1) *Consd. Upjohn v. Macfarlane*, [1922] 2 Ch. 256.

**7273.** ————]—Effect of 1920 Act—House not within earlier Acts.]—The tenant of a dwelling-house which was not within the Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97),

but which came within 1920 Act, passed on July 2, 1920, was in arrear with his rent & the landlord gave the tenant a valid notice to quit, which expired on June 21, 1920. In an action by the landlord for possession:—*Held*: under 1920 Act, s. 5 (1), the ct. had a discretion, & there would be an order for possession with costs, but the order would be discharged if within three weeks the tenant paid the arrears of rent & mesne profits.—*REEKS v. SHELLEY* (1920), 36 T. L. R. 868.

*Compare* No. 7032, *ante*.

**7274.** — Effect of payment into court.—By statutory tenant.—Whether proceedings stayed.—*Brewer v. Jacobs*, No. 7243, *ante*.

**7275.** Breach of covenant.—Whether statutory tenant entitled to notice.—Under Law of Property Act, 1925 (c. 20), s. 146.—*Brewer v. Jacobs*, No. 7243, *ante*.

*See, generally*, Part XXIV., Sect. 1, sub-sect. 4, D., *ante*.

— Underletting part of house without written permission.—Whether “reasonable” to order possession.—Where *bonâ fide* misunderstanding.—*See* No. 7260, *ante*.

— Position of sub-tenant.—*See* Nos. 7303–7305, *post*.

#### (b) Conduct of Tenant.

*See, now*, 1923 Act, s. 4, re-enacting 1920 Act, s. 5 (1) (b).

**7276.** Conduct a nuisance or annoyance to adjoining occupiers.—What amounts to.—Not interference by tenant of part of premises.—With workmen making alterations to remainder.—*NEVILLE v. HARDY*, No. 7312, *post*, as reported, 150 L. T. Jo. 342.

**7277.** Premises used for immoral or illegal purpose.—More than one instance must be proved.—*WALLER v. THOMAS*, No. 7092, *ante*.

**7278.** — What amounts to.—Receiving stolen goods.—The landlords of a dwelling-house within 1923 Act gave their tenant notice to quit. Before the date of the notice the tenant had been convicted under Larceny Act, 1916 (c. 50), s. 33, of receiving at the demised premises certain property of the landlords well knowing the same to have been stolen. Notwithstanding that user of premises forms no essential part of this crime:—*Held*: the tenant, having made use of the premises in order to commit the crime of which he had been convicted, had been “convicted of using the premises for an illegal purpose” within 1923 Act, s. 4.

To bring a tenant within the sect. it is not necessary that the user of the premises for an illegal purpose should be continuous or frequent.—*SCHNEIDERS (S.) & SONS, LTD. v. ABRAHAM*, [1925] 1 K. B. 301; 94 L. J. K. B. 408; 132 L. T. 721; 41 T. L. R. 24, C. A.

#### (c) Landlord Contracting to Sell, etc. on Tenant Giving Notice to Quit.

*See, now*, 1923 Act, s. 4, re-enacting 1920 Act, s. 5 (1), (c).

**7279.** Contract for sale.—Where landlord under no legal liability.—Whether “satisfactory” ground.—Under Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97).—In Mar. 1919, the tenant of a dwelling-house gave a valid quarter's notice to quit. The landlord thereupon entered into a contract with a third party to sell the premises, the contract being conditional on the landlord being able to give possession on Lady Day, 1919. When the landlord required possession,

the tenant refused to give up the premises, & the landlord in consequence was prevented from carrying out his contract of sale. He brought an action against the tenant for recovery of possession:—*Held*: as plff. had not been exposed to an action for damages for breach of the conditional contract by deft.'s refusal to quit according to his notice, the circumstances did not form a “satisfactory ground” on which the ct. could exercise its discretion under above Act, s. 1 (2), & make an order for the recovery of possession of the premises.—*HUNT v. BLISS* (1919), 89 L. J. K. B. 174; 122 L. T. 351; 84 J. P. 37; 36 T. L. R. 74; 64 Sol. Jo. 116; 18 L. G. R. 45, D. C.

*Annotations*:—*Fold*. *Davies v. Bristow*, Penrhos College v. Butler, [1920] 3 K. B. 428. *Refd*. *Ellen v. Goldstein* (1920), 89 L. J. Ch. 586.

**7280.** — — — — — The landlord of a house to which the above enactment applied, wishing to sell the house with vacant possession, made an agreement in writing with his tenant that in consideration of a present payment the tenant should give notice to quit & should peaceably yield up possession on a certain day. The landlord made the payment & the tenant gave the notice to quit, but when the day arrived the tenant refused to give up possession. The landlord brought an action for possession. No evidence was given that he had, otherwise than as aforesaid, contracted to sell or let the house or taken any other steps as a result of which he would be seriously prejudiced if he could not obtain possession:—*Held*: the jurisdiction of the ct. to make an order for possession is restricted by 1920 Act, s. 5 (1); if the conditions upon which alone an order can be made are not fulfilled, an order cannot be made *in invitum* notwithstanding any agreement of the parties to the contrary; & consequently the landlord could not recover.—*BARTON v. FINCHAM*, [1921] 2 K. B. 291; 90 L. J. K. B. 451; 124 L. T. 495; 85 J. P. 145; 37 T. L. R. 386; 65 Sol. Jo. 326; 19 L. G. R. 185, C. A.

*Annotations*:—*Consd*. *Rossiter v. Langley*, [1925] 1 K. B. 741; *Russell v. Lipovitch* (1925), 94 L. J. K. B. 355. *Refd*. *Glossop v. Ashley* (1921), 90 L. J. K. B. 1237; *Reeves v. Davies*, [1921] 2 K. B. 486.

**7281.** — — — — — Where notice not formal.—*GILBERT v. JORDAN* (1920), 81 J. P. Jo. 359.

**7282.** Contract to let.—Induced by tenant.—“Satisfactory” ground.—Under Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97).—A tenant of a dwelling-house, let at £45 a year, gave notice to the landlord's agent to determine his tenancy, & recommended a new tenant. In consequence of his recommendation the landlord entered into an agreement with the person suggested for a tenancy of the premises. The original tenant, however, at the expiration of his notice, changed his mind, & refused to give up possession. He relied on above Act, sect. 1 (3), & contended that the ground on which the application for possession was based was not “some other ground which may be deemed satisfactory by the ct.”:—*Held*: the ground on which the claim for possession was made, namely, that the landlord wished to be protected against the consequence of a breach of contract induced by the tenant, was a satisfactory & reasonable ground within the sub-sect., & there would, therefore, be an order for delivery of possession.—*GREEN-PRICE v. WEBB* (1919), 89 L. J. K. B. 216; 122 L. T. 491; 84 J. P. 89; 36 T. L. R. 29; 64 Sol. Jo. 19.

*Annotation*:—*Distd*. *Hunt v. Bliss* (1919), 89 L. J. K. B. 174.

Where sub-tenant holds over.—After tenant gives notice to quit.—*See* No. 7306, *post*.

**Sect. 5.—Recovery of possession: Sub-sect. 2, B. (d), (e), (f), (g) & (h); sub-sect. 3.]**

**(d) Occupation Required by Landlord or his Family, etc.**

*See, now, 1924 Act, s. 1; 1923 Act, s. 4, re-enacting 1920 Act, s. 5 (1), (d) & (f).*

**7283. Premises required for own occupation.—**Where landlord has purchased house since September 30, 1917—Under Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97).]

—The fact that a person who has purchased a house since Sept. 30, 1917, is excluded from the term "landlord" by Increase of Rent, etc. (Amendment) Act, 1918 (c. 7), s. 1, prevents the ct. from applying in favour of such a person the discretion conferred by above Act, s. 1 (3), on "some other ground" in addition to the specific grounds mentioned in the sect.—*VERNON INVESTMENT ASSOCN. v. WELCH* (1919), 35 T. L. R. 511; 63 Sol. Jo. 643.

*Annotation:—Redf. Price v. Pritchard* (1919), 89 L. J. K. B. 162.

**7284. — At date of hearing of action.]—***NEVILLE v. HARDY*, No. 7312, *post*.

**7285. — Part of house already occupied.]—***SALTER v. LASK*, No. 7263, *ante*.

**7286. — Necessity for proof of alternative accommodation.]—**Increase of Rent, etc. (Amendment) Act, 1919 (c. 90), s. 1 (1), (c), does not preclude the justices from making an order for possession in a case in which there is no affirmative evidence of alternative accommodation for the tenant.—*SMITH v. BRIDGEN* (1920), 84 J. P. 101; 36 T. L. R. 360; 64 Sol. Jo. 376; 18 L. G. R. 265, D. C.

**7287. — Landlord temporarily residing elsewhere.—**Through refusal of tenant to give possession.]—*NEVILLE v. HARDY*, No. 7312, *post*.

**7288. — Landlord who has served in Forces.]—**In 1914 a house was let by the owner to deft. under a lease expiring in Sept. 1920. Pltf. served with the Forces from 1914 to 1919. In Mar. 1920, pltf.'s father purchased the house. After the expiry of the lease deft. remained in possession as tenant. In Jan. 1921, pltf.'s father conveyed the house to pltf., & pltf. then took proceedings against deft. to recover possession under 1920 Act, s. 5 (1) (f), in order that pltf. & his father & mother might all live together in the house. Reasonable accommodation in the house was offered to deft.:—*Held*: pltf. was the landlord within 1920 Act, s. 5 (1) (f), & as he wanted the house for his personal occupation, & not merely in order that his father might obtain possession for his own occupation, pltf. was entitled to an order for possession.—*KENTISH v. SNEATH* (1921), 37 T. L. R. 586; 65 Sol. Jo. 455, D. C.

**7289. — Right of widow to possession.]—**The landlord of certain premises, who had become landlord after service in H.M. Forces, gave notice to quit to a tenant in order that he might occupy the premises himself. After his death, possession not having previously been obtained, his widow, who was also his extrin., took proceedings in the county ct. to obtain possession of the premises. The county ct. judge made an order giving her possession:—*Held*: the fact that she had not served with H.M. Forces appeared to be conclusive of the matter, & the appeal must be

allowed.—*SQUIER v. HORE* (1921), 38 T. L. R. 38; 66 Sol. Jo. (W. R.) 15, D. C.

**7290. — Sufficiency of accommodation offered to tenant—What court may consider.]—***CHIVERTON v. EDE*, No. 7320, *post*.

**7291. —**Deft., who was the tenant of a seven-roomed house, occupied five of the rooms herself & sub-let the remaining two rooms furnished. Pltf., who urgently required some rooms in which to reside together with her mother & niece, bought the house in Sept. 1924, & asked deft. to give her possession of the two rooms she sub-let furnished, & offered to allow deft. to retain possession of the five rooms she occupied in the house. Deft., however, refused to give pltf. possession of the two rooms. Pltf. thereupon served upon deft. a notice to quit the whole of the premises, & subsequently commenced proceedings in the county ct. under 1923 Act, s. 4 (1), (d), claiming possession of the premises, alleging that she required them for occupation for a residence for herself, & that she had offered deft. reasonable alternative accommodation. At the trial pltf. said that she was prepared to take the two rooms. The county ct. judge made an order for possession of the two rooms which deft. sub-let furnished on condition that the rent payable by deft. was reduced. Deft. appealed:—*Held*: (1) in the circumstances, inasmuch as deft. had refused to give pltf. possession of the two rooms, pltf. had proved that she reasonably required the whole premises for occupation as a residence for herself within 1923 Act, s. 4 (1), (d); (2) the offer by pltf. to allow deft. to retain the five rooms she occupied in the house was an offer of alternative accommodation reasonably suitable to the needs of the tenant, even although the alternative accommodation was in the same house, & therefore pltf. was entitled to an order for possession of the whole premises, subject to her allowing deft. to occupy at a reduced rent the five rooms which she already occupied.—*THOMPSON v. ROLLS*, [1926] 2 K. B. 426; 135 L. T. 446; 42 T. L. R. 582; 70 Sol. Jo. 775, D. C.

**7292. "Person in employ of landlord"—Test of employment.]—***WALL v. GIBBS*, [1920] W. N. 187, D. C.

**7293. — Actual employment at time of order necessary.]—**By Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 1 (3), it is provided that no order for the recovery of possession of a dwelling-house to which the Act applies or for the ejectment of a tenant therefrom shall be made so long as the tenant continues to pay his rent & performs the other conditions of the tenancy, except on the ground (*inter alia*) that the premises were reasonably required by the landlord for the occupation of himself or some other person in his employ:—*Held*: the words "person in his employ" mean a "person already in his employ" that is, actually in the landlord's employ at the time when the order of ejectment is made, whether such person was or was not in his employ at the time when the notice to vacate the premises was given.—*R. v. RODGERS, Ex p. HODSON* (1918), 118 L. T. 718; 82 J. P. 144, D. C.

*Annotations:—Consd. Spencer v. Fox* (1922), 127 L. T. 365. *Redf. Price v. Pritchard* (1919), 89 L. J. K. B. 162; *Stovin v. Fairbrass* (1919), 88 L. J. K. B. 1004.

**PART XXVII. SECT. 5, SUB-SECT. 2.**  
—B. (d).

**7293 i. "Person in employ of landlord"—Actual employment at time of**

*order necessary.]—GREAT NORTHERN Ry. Co. v. BEST* (1921), 55 I. L. T. 57.—*IR.*

*m. Whether premises required for own occupation—Question of fact for*

*justices.]—*The question whether premises are reasonably required by the landlord for his own use is a question of fact for the justices.—*SAMMON v. CAWLEY* (1919), 53 I. L. T. 224.—*IR.*

**7294. — Mere engagement insufficient.]**

—The words of 1920 Act, s. 5 (1) (d), imply that the person for whom the house is required must not only have been engaged for a whole-time employment, but he must actually be working for the landlord on the date of the application & the issue of the warrant for possession.—*SPENCER v. FOX* (1922), 91 L. J. K. B. 929; 127 L. T. 365; 86 J. P. 154; 20 L. G. R. 752, D. C.

**7295. — Whether exclusive employment necessary.]—***WALL v. GIBBS*, [1920] W. N. 187, D. C.

**7296. Proof that premises required—Onus of proof.]—**(1) Where premises are occupied as a dwelling-house, the fact that a part of them is also used for some other purposes does not prevent them from being a "dwelling-house" within Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), s. 1 (3).

(2) Where the tenancy of a dwelling-house to which the Act applies has expired by effluxion of time the rent which the tenant is to continue to pay & the conditions which he is to continue to perform under sect. 1 (3) are the same rent & conditions as during the tenancy, & if the landlord claims to recover possession of such dwelling-house the onus is on him to show that the premises are reasonably required by him for the purpose mentioned in the sub-sect.—*EPSOM GRAND STAND ASSOC., LTD. v. CLARKE* (1919), 35 T. L. R. 525; 63 Sol. Jo. 642, C. A.

*Annotations:—*As to (1) *Apld.* *Callaghan v. Bristowe* (1920), 89 L. J. K. B. 817. *Fold.* *Ellen v. Goldstein* (1920), 89 L. J. Ch. 586; *Richmond v. Dewar & Cadogan Hotel Co.* (1921), 38 T. L. R. 151; *Waller v. Thomas*, [1921] 1 K. B. 541; *Colls v. Parnham*, [1922] 1 K. B. 325. *Consd.* *Brakspear v. Barton*, [1924] 2 K. B. 88. *Refd.* *Glossop v. Ashley*, [1921] 2 K. B. 451; *Roberts v. Poplar Assmt. Com.*, [1922] 1 K. B. 25. *As to (2)* *Refd.* *Stovin v. Fairbrass* (1919), 88 L. J. K. B. 1004; *Rusoff v. Lipovitch*, [1925] 1 K. B. 628. *Generally, Refd.* *Glossop v. Ashley*, [1922] 1 K. B. 1.

**7297. — Sufficiency—Certificate of county agricultural committee.]—***SMITH v. PRIMAVESI*, [1921] W. N. 291, D. C.

**Whether "reasonable" to order possession.]—**See Nos. 7261, 7262, *ante*.

**What constitutes "satisfactory grounds"—Premises required for other classes of persons.]—**See Nos. 7256-7258, *ante*.

**(e) Premises Required by Local Authority or for Statutory Undertaking.**

See, now, 1923 Act, s. 4, re-enacting 1920 Act, s. 5 (1) (e).

**7298. What is "scheme of reconstruction"—Application to private project.]—**1920 Act, s. 13 (1) (c), read with s. 5 (1), provided that no order or judgment for the recovery of possession of premises falling within the purview of the Act shall be made or given unless "the premises are *bonâ fide* required for the purpose of a scheme of reconstruction or improvement which appears to the ct. to be desirable in the public interest":—*Held*: the words "scheme of reconstruction or improvement" refer to some public scheme, as, for example, the widening of a road, or the clearing of an insanitary area, & do not cover a private project for the substitution of one kind of business premises for another.—*MITCHELL v. TOWNEND & Co.*, [1921] 2 K. B. 91; 90 L. J. K. B. 601; 124 L. T. 480; 85 J. P. 106; 37 T. L. R. 298; 19 L. G. R. 203, D. C.

**Under Housing Act, 1923 (c. 24)—Whether alternative accommodation must be shown.]—**See No. 7321, *post*.

**(f) Claim by Former Tenant after War Service.**

See 1923 Act, s. 4, re-enacting 1920 Act, s. 5 (1) (g).

**7299. Right of action against landlord in possession.]—***Pltf.* was before Aug. 8, 1917, the occupier of a cottage as a weekly tenant. On that date he gave up occupation in consequence of being called upon to serve in the army. He was demobilised in May, 1919. In the meantime *def.*, who was the owner of the cottage of which *pltf.* was formerly the tenant, had gone into occupation thereof. *Pltf.* applied to the county ct. for an order for the recovery of possession of the cottage. The county ct. judge made an order for possession. On appeal:—*Held*: the action failed, inasmuch as 1920 Act was not an enabling Act, & did not confer upon a tenant a right of action which he had not before the passing of the Act. The object & scope of 1920 Act was to restrict the right of landlords to raise rents or to recover the possession of dwelling-houses in certain specified cases.—*GOODWIN v. RHODES*, [1921] 2 K. B. 182; 90 L. J. K. B. 533; 125 L. T. 182; 37 T. L. R. 315; 19 L. G. R. 261, D. C.

**7300. Whether confined to claim by tenant sub-letting.]—**1920 Act, s. 5 (1) (g), which excepts from the prohibition against an order for possession the case where "the dwelling-house is required for occupation as a residence by a former tenant thereof who gave up occupation in consequence of his service in any of H.M. Forces during the war," is to be read as meaning that the house is required by the landlord for the occupation of a former tenant, & it is not necessary for the party claiming possession to prove that he was himself the former tenant & sub-let the house on joining the Forces.—*MESSINGER v. HUTTON* (1921), 37 T. L. R. 464, D. C.

**(g) Assignment or Sub-Letting of Premises.**

See 1923 Act, s. 4, re-enacting 1920 Act, s. 5 (1) (b).

Assignment generally, see pp. 368 *et seq.*, *ante*.

**7301. Sub-lease by statutory tenant—Whether ground for granting possession.]—***CAMPBELL v. LILL*, No. 7237, *ante*.

**7302. —***LESLIE & Co. v. CUMMINGS*, No. 7041, *ante*.

**(h) License of Licensed Premises Forfeited or Not Renewed.**

See, now, 1923 Act, s. 4, re-enacting 1920 Act, s. 5 (1) (i).

See, generally, INTOXICATING LIQUORS, Vol. XXX., pp. 30 *et seq.*, 36.

**SUB-SECT. 3.—AS AGAINST SUB-TENANT.**

See 1923 Act, s. 4, re-enacting 1920 Act, s. 5 (5); & 1920 Act, s. 15 (3).

**7303. Where tenant disentitled to protection—Sub-tenancy wrongfully created—Breach of covenant not to underlet.]—**Where a tenant, by reason of a breach of covenant not to underlet without the lessor's consent, is disentitled to the protection of the Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 97), the undertenant to whom the premises have been let in breach of the covenant is also disentitled to the protection of the Act.—*DICK v. JACQUES* (1920), 36 T. L. R. 773.

**Sect. 5.—Recovery of possession: Sub-sects. 3 & 4.]**

**7304. — Breach of covenant not to use for any business.]—**A dwelling-house to which 1920 Act applied was held from pltf. under an agreement by which the tenant was not to permit it to be used for any business without the landlord's written consent. The tenant, without such consent, let part of the house to a sub-tenant for a piano business. Subsequently the tenant's holding was determined by consent, & the sub-tenant remained in occupation of the part sub-let to him. In an action by the landlord against the sub-tenant to recover possession:—*Held*: the word "tenancy" in 1920 Act, s. 5 (1) (a) was not to be confined to the statutory tenancy between pltf. & deft. but also covered the original contractual tenancy, & as the original tenant had broken the terms of his contract of tenancy, pltf. was entitled to recover possession from deft. —**CHAPMAN v. HUGHES** (1923), 129 L. T. 223; 39 T. L. R. 260; 67 Sol. Jo. 518; 21 L. G. R. 350.

*Annotation*:—**Distd. Ward v. Larkins** (1923), 130 L. T. 184.

**7305. — ]—**Where a tenant has incurred a forfeiture of his lease, an order for possession against the sub-tenant would not be justified having regard to 1920 Act, s. 5 (5) & s. 15 (3), unless the sub-tenancy had been wrongfully created, i.e., by an act in breach of covenant to which the sub-tenant was privy.—**WARD v. LARKINS** (1923), 130 L. T. 184; 67 Sol. Jo. 657.

**7306. — Notice to quit by tenant—Application of 1920 Act, s. 5 (1) (c).—**(1) The tenant from year to year of a dwelling-house, to which the above Act applied, duly gave the landlord notice to quit. During the currency of the notice the tenant with the consent of the landlord sub-let the house for the unexpired residue of the tenancy from year to year to a sub-tenant, & the landlord granted a lease of it to a new tenant for a term to commence on the date of the expiration of the tenancy from year to year. The sub-tenant claimed to be a "tenant" within above sub-sect. & as he had not given any notice to quit he refused to give up possession of the house on the date above specified. The landlord accordingly brought an action against him under that clause for recovery of possession of the house, in which action the above facts were found & also the fact that the landlord would be seriously prejudiced if he could not obtain possession:—*Held*: the sub-tenant was not a "tenant" within that sub-sect., & although he had not given notice to quit, the landlord was entitled to an order for possession against him under the sub-sect.

I think that the term "tenant" as used in the [above] Act is *prima facie* a generic term including the original tenant, a person deriving title under him, a sub-tenant, or any one else who comes within the definition, but that it is only used in that wide sense where the context does not otherwise require. It seems to me that in above sub-sect. the context requires that the term should be used in a narrower sense . . . & that "tenant" as there used must mean the original tenant of the landlord (**ROWLATT, J.**).

(2) In my view [sect 5 (5)] only means that where there is a sub-tenant lawfully & *de facto* in possession of the house, the landlord who desires to recover possession cannot avail himself as against the sub-tenant of any order or judgment

which he may have recovered against the tenant, but must commence separate proceedings against the sub-tenant (**ROWLATT, J.**).

(3) I think that [sect. 15 (3)] merely means that where the interest of the original tenant has been lawfully determined, then any sub-tenant, assuming that he is entitled to retain possession under the provisions of the Act, shall, notwithstanding that the title under which he derived his interest has come to an end, continue to be tenant, the terms on which he retains possession being the same as those on which he would have held from the tenant if the tenancy had continued (**ROWLATT, J.**).—**HYLTON (LORD) v. HEAL**, [1921] 2 K. B. 438; 90 L. J. K. B. 606; 125 L. T. 178; 37 T. L. R. 288; 65 Sol. Jo. 311; 19 L. G. R. 196, D. C.

*Annotations*:—*Generally, Reidd. Glossop v. Ashley*, [1921] 2 K. B. 451; *Standingford v. Bruce* (1925), 42 T. L. R. 122.

*See, also, Nos. 7040, 7101, ante.*

**7307. Where tenant has quitted without notice.]—**The protection given to a sub-tenant by 1920 Act, s. 15 (3), where the interest of the tenant is determined, is not taken away by the fact of the tenant's having quitted the premises without notice, since the words "the tenant has given notice to quit" in 1920 Act, s. 5 (1) (c), do not include a vacation of the premises without notice.—**STANDINGFORD v. BRUCE**, [1926] 1 K. B. 466; 95 L. J. K. B. 223; 134 L. T. 282; 42 T. L. R. 122; 70 Sol. Jo. 346, D. C.

**7308. Whole of premises sub-let—Part as dwelling-house—Part for business purposes.]—****GIDDEN v. MILLS**, No. 7063, *ante*.

**7309. Where order or judgment recovered against tenant—Application of 1920 Act, s. 5 (5).—****HYLTON (LORD) v. HEAL**, No. 7306, *ante*.

**7310. —.]—****SALTER v. LASK, LASK v. COHEN**, No. 7107, *ante*.

**SUB-SECT. 4.—ALTERNATIVE ACCOMMODATION.**

*See* 1923 Act, s. 4, re-enacting 1920 Act, s. 5 (1) (d), (e) & (f); 1924 Act, s. 1.

**7311. Proof of alternative accommodation—On whom onus lies.]—**In an action for the recovery of possession of a dwelling-house, where the tenant claimed the protection of the Increase of Rent, etc. (Restrictions) Acts, & alleged that there was no alternative accommodation available, it was held that it was the tenant's duty to do his best to find alternative accommodation, & that the onus was on him to prove the negative, rather than on the landlord to prove the affirmative.—**BAZALGETTE v. HAMPSON** (1920), 89 L. J. K. B. 476; 122 L. T. 683; 84 J. P. 136; 36 T. L. R. 240.

**7312. —.]—**(1) In an action for recovery of possession of a dwelling-house to which 1920 Act applies, on the ground that the dwelling-house is reasonably required by the landlord as a residence for himself, the ct. must be satisfied at the hearing of the action that the dwelling-house is then reasonably required for that purpose.

(2) The fact that the landlord owing to the refusal of the tenant to give possession has had to obtain other premises where he is temporarily residing at the time of the hearing of the action, is no reason for holding that the dwelling-house is not then reasonably required by the landlord as a residence for himself.

**PART XXVII. SECT. 5, SUB-SECT. 4.**

**7311 i. Proof of alternative accommodation—On whom onus lies.]—****BARRETT v. MARSHALL** (1920), 54 I. L. T. 214.—**IR.**

(3) Under 1920 Act, s. 5 (1) (d), the *onus* is upon the landlord seeking possession to satisfy the ct. by positive evidence at the hearing of the action that "alternative accommodation, reasonably equivalent as regards rent & suitability in all respects," is then available.

(4) What amounts to nuisance or annoyance to adjoining occupier under 1920 Act, s. 5 (1) (b) (see No. 7276, *ante*).—NEVILLE v. HARDY, [1921] 1 Ch. 404; 90 L. J. Ch. 158; 124 L. T. 327; 37 T. L. R. 129; 65 Sol. Jo. 135.

*Annotation*:—As to (3) *Folld. Kimpson v. Markham*, [1921] 2 K. B. 157.

**7313.** Whether alternative accommodation must be shown—Possession claimed for non-payment of rent.]—WALLER v. THOMAS, No. 7092, *ante*.

**7314.** — Possession claimed for breach of covenant.]—WALLER v. THOMAS, No. 7092, *ante*.

**7315.** — Possession claimed on account of tenant's conduct.]—WALLER v. THOMAS, No. 7092, *ante*.

**7316.** — Where landlord has contracted to sell or let with vacant possession.]—WALLER v. THOMAS, No. 7092, *ante*.

**7317.** — Premises required for landlord's occupation.]—SMITH v. BRIDGEN, No. 7286, *ante*.

*See, now*, 1924 Act, s. 1.

**7318.** — Tenant in employment of landlord—Possession retained after termination of employment.]—Where the tenant of a dwelling-house has been in the employment of his landlord & the dwelling-house has been let to him in consequence of that employment & he has ceased to be in that employment but has continued as tenant at an increased rent, & the landlord has subsequently given him notice to quit, the landlord, under 1920 Act, s. 5 (1) (d) (i), is not bound, on taking proceedings for recovery of possession, to show the existence of alternative accommodation.—LEVER BROTHERS, LTD. v. CATON (1921), 37 T. L. R. 664, D. C.

**7319.** — — Whether occupation in consequence of employment—Knowledge of tenant.]—What do these words of the Act ["let to him in consequence of that employment"] mean? In my view they mean, not that the landlord only knows, but that both the landlord & the tenant know, that the premises were let to the tenant in consequence of his employment (LUSH, J.).—QUEEN'S CLUB GARDENS ESTATES, LTD. v. BIGNELL, as reported in [1924] 1 K. B. 117.

*Annotations*:—*Folld. Braby v. Bedwell*, [1926] 1 K. B. 456. *Mentd. Aston v. Smith*, [1924] 2 K. B. 143; *Precious v. Reddie*, [1924] 2 K. B. 149.

**7320.** — — —.]—By 1920 Act, s. 5 (1) (i), the existence of alternative accommodation shall not be a condition of an order for the possession of a dwelling-house where the tenant was in the employment of the landlord, & the dwelling-house was let to him "in consequence of that employment," & he has ceased to be in that employment:—*Held*: it must be shown not only that the landlords let but also that the tenant took the premises in consequence of the employment.—BRABY (FREDERICK) & CO. v. BEDWELL, [1926] 1 K. B. 456; 95 L. J. K. B. 412; 134

L. T. 320; 42 T. L. R. 141; 70 Sol. Jo. 325, D. C.

**7321.** — Local authority acting in pursuance of improvement scheme—Under Housing Act, 1923 (c. 24).]—The Rent Restriction Acts impose no obligation upon a local authority which is seeking to recover possession of a dwelling-house coming within the scope of the Acts of showing that alternative accommodation is available for the tenant, where the premises are required for the purposes of an improvement scheme under the Housing, Town Planning, etc., Acts.—PARRY v. HARDING, [1925] 1 K. B. 111; 94 L. J. K. B. 37; 132 L. T. 390; 88 J. P. 194; 41 T. L. R. 41; 69 Sol. Jo. 162; 22 L. G. R. 773, D. C.

**7322.** What constitutes alternative accommodation—Alternative dwelling accommodation—Tenant of dwelling-house & shop.]—Deft. was the tenant of premises comprising a dwelling-house & shop & pltf. was the landlord. The tenancy was determined by notice to quit, but deft. did not give up possession relying on Increase of Rent, etc. (Amendment) Act, 1919 (c. 90), s. 1 (1) (c), & contended that there was no alternative accommodation available. Alternative dwelling-house accommodation was offered her by pltf., but no alternative shop accommodation. The county ct. judge held that it was not reasonable to offer deft. alternative house accommodation only, & gave judgment in her favour:—*Held*: Increase of Rent, etc. (War Restrictions) Acts dealt with dwelling-houses only, & therefore, it was unnecessary for pltf. to offer deft. more than alternative house, as opposed to shop, accommodation, but that the county ct. judge, in considering the alternative house accommodation, may take into account the position of the house offered.

In construing these emergency statutes regard must, of course, as in other statutes, first be had to the plain meaning of the statutes themselves as a matter of construction, but we think that, restricting as they do the ordinary rights of individuals arising from their mutual contracts & relationships, the Acts should not be needlessly extended beyond the particular mischief which they are designed to avoid or to remedy (BRAY, J.).—WILCOCK v. BOOTH (1920), 89 L. J. K. B. 864; 122 L. T. 678; 84 J. P. 76; 36 T. L. R. 213; 64 Sol. Jo. 292; 18 L. G. R. 221, D. C.

*Annotation*:—*Refd. Ellen v. Goldstein* (1920), 89 L. J. Ch. 586.

**7323.** — Wife judicially separated—Accommodation in husband's house.] The owner of a house, who required it for her own occupation, gave the tenant notice to quit. The tenant did not himself occupy the house, but his wife, from whom he was living apart under an order for judicial separation, resided there with her children. The tenant resided at a farm of his own where sufficient accommodation was available for his wife & family, but she refused to go there in view of the separation order. No other accommodation was shown to be available. In an action in the county ct. an order was made for recovery of possession:—*Held*: there was no evidence upon

**7317 i.** Whether alternative accommodation must be shown—Premises required for landlord's occupation.]—Where premises are used both for business & residential purposes they are to be treated as a dwelling-house within 1921 Act. If they are *bond fide* required by the landlord primarily as a residence, although also for business purposes, & they are protected by sect. 5 (iv) of the Act regarding the date of commencement of tenancy

the question of alternative accommodation is not to be considered.—McQUILLAN v. CLINTON (1921), 55 L. T. 143.—IR.

**7322 i.** What constitutes alternative accommodation—Alternative dwelling accommodation—Tenant of dwelling-house & shop.]—A house without a shop attached thereto is not "alternative accommodation, reasonably equivalent as regards rent & suitability

in all respects" for a house with a shop attached thereto.—IRVINE v. NELSON (1922), 56 L. T. 107.—IR.

n. — "Rent & suitability." — GREAT NORTHERN RY. CO. v. BEST (1921), 55 L. T. 57.—IR.

o. Must be immediately available—When order made.]—Where pltf. sought to recover possession of a

**Sect. 5.—Recovery of possession: Sub-sects. 4 & 5, A., B. & C. Sect. 6.]**

which the county ct. judge could find that there was available alternative accommodation for the tenant, because if the wife had gone to live with her husband it would have amounted to a cancellation of the order for judicial separation, & the order for possession should not have been made.—*CRUTCHLEY v. WHITE* (1920), 89 L. J. K. B. 815; 84 J. P. 145; 36 T. L. R. 249, D. C.

*Annotation:—Reid. Flint v. Ead* (1921), 91 L. J. K. B. 132.

**7324. — Tenant having another place of residence.]—**Where deft., in proceedings for the recovery of possession of a dwelling-house, has also another place of residence, that other place of residence does not necessarily constitute "alternative accommodation" within 1920 Act, s. 5 (1).—*FLINT v. EAD* (1921), 91 L. J. K. B. 132; 125 L. T. 857; 37 T. L. R. 708; 19 L. G. R. 502, D. C.

**7325. — Rooms already occupied by tenant.]—***THOMPSON v. ROLLS*, No. 7291, *ante*.

**7326. Must be immediately available—When order made.]—***LEES v. DULEY*, [1921] W. N. 283, D. C.

**7327. — —.]—**The words "is available" in 1920 Act, s. 5 (1) (d), mean that the ct. must be satisfied of the existence of alternative accommodation at the time of making the order or giving judgment for possession.—*KIMPSON v. MARKHAM*, [1921] 2 K. B. 157; 90 L. J. K. B. 393; 124 L. T. 790; 37 T. L. R. 342; 19 L. G. R. 346, D. C.

**7328. What may be considered—Position of house offered.]—***WILCOCK v. BOOTH*, No. 7322, *ante*.

**7329. — Tenant's family & lodgers.]—**The landlord of a dwelling-house, who had purchased it after service in H.M. Forces during the war, brought an action in the county ct. under 1920 Act, s. 5 (1) (f), against the tenant for recovery of possession of the house for his personal occupation & offered the tenant accommodation in the same house. The tenant, a widow, was herself in occupation of the house with members of her family & two lodgers. She had fully furnished the house with her own furniture, & had for some years continuously let furnished lodgings on which she was in part dependent for her livelihood:—*Held*: the ct., in considering pursuant to 1920 Act, s. 5 (1) (b), whether the accommodation offered to the tenant was reasonably sufficient in the circumstances, was entitled to have regard not only to the tenant herself & the members of her family, but also to her lodgers.—*CHIVERTON v. EDE*, [1921] 2 K. B. 30; 90 L. J. K. B. 491; 124 L. T. 765; 37 T. L. R. 242; 65 Sol. Jo. 260; 19 L. G. R. 217, D. C.

**7330. — Tenant's occupation not continuous.]—**In considering the question of alternative accommodation under 1920 Act, s. 5 (1) (d), the ct. may have regard to the fact that the tenant's occupation is not continuous.—*CRUISE v. TERRELL* (1921), 37 T. L. R. 936; *on appeal*, [1922] 1 K. B. 664, C. A.

*Annotation:—Reid. Keoves v. Dean, Nunn v. Pellegrini*, [1924] 1 K. B. 685.

**SUB-SECT. 5.—ACTION FOR RECOVERY.**

**A. In General.**

*See* 1920 Act, ss. 17 (2), 19 (3).

**7331. Proceedings pending under previous Act—**

dwelling-house under 1920 Act, s. 6 (1) (d), & indicated as alternative accommodation certain vacant premises in every respect suitable except that the landlord refused to accept

the defts. as her tenants:—*Held*: the alternative accommodation was not available within the sect.—*TOPPING v. HUGHES* (1924), 58 L. T. 156.—*IR.*

**What proceedings included.]—***BENABO v. HORSELEY*, No. 7272, *ante*.

**7332. Proceeding "arising under the Act"—Action against statutory tenant.]—**In an action by a weekly tenant for the recovery of possession of his rooms which had been taken possession of by deft., his landlady, on the allegation that he had given her notice to quit, the ct. held, on the evidence, that the notice to quit was insufficient, & the entry by deft. improper. Judgment was given for pltf. with forty shillings damages.

A year before this action deft. had given pltf. notice to quit, but he had remained on as tenant & deft. had received rent for twelve months from the expiration of this notice to quit:—*Held*: pltf. was in the position of a statutory tenant & this action was a proceeding arising under 1920 Act; & inasmuch as the action might have been brought in the county ct. pursuant to 1920 Act, s. 17 (2), & 1920 Act, s. 16 (3) was inapplicable having regard to the decision in *Shuler v. Hersh*, No. 7173, *ante*, pltf. was not entitled to the costs of the action in the High Ct.—*WOLFF v. SMITH*, [1923] 2 Ch. 393; 92 L. J. Ch. 635; 130 L. T. 154; 67 Sol. Jo. 766.

*Annotations:—Apld. Gunter v. Davis*, [1925] 1 K. B. 124. *Reid. Rusoff v. Lipovitch* (1925), 94 L. J. K. B. 355.

**7333. — —.]—***RUSOFF v. LIPOVITCH*, No. 7343, *post*.

**7334. Right to judgment under R. S. C., Ord. 14—Action for possession for non-payment of rent—Where defendant relies on 1920 Act, s. 5 (1).]**

(1) Where, in an action in the High Ct. by a landlord to recover from his tenant possession of a dwelling-house which is subject to the provisions of above Act deft. relies on the provisions of the statute, as, for example, under above sub-sect. that no rent is lawfully due or that the ct. will not consider it reasonable to make an order for possession, an application under above Ord. for summary judgment is misconceived, & deft. is entitled to have leave to defend the action.

(2) *Semble*: pltf., who brings an action in the High Ct. for the recovery of possession of a dwelling-house to which the statute applies, is not entitled to recover any costs, even if successful.—*GILL v. LUCK* (1923), 93 L. J. K. B. 60; 130 L. T. 331; 40 T. L. R. 38; 68 Sol. Jo. 100; 22 L. G. R. 292, C. A.

*Annotations:—As to (1) Apld. Rusoff v. Lipovitch*, [1925] 1 K. B. 628. *As to (2) N.F. Gunter v. Davis*, [1925] 1 K. B. 124.

*See, generally, PRACTICE.*

**7335. Conditions precedent to action—Whether notice under Law of Property Act, 1925 (c. 20), s. 146.]—***BREWER v. JACOBS*, No. 7243, *ante*.

*See, generally, Part XXIV., Sect. 1, sub-sect. 4, D. (a), ante.*

**7336. Effect of payment into court—Whether proceedings stayed.]—***BREWER v. JACOBS*, No. 7243, *ante*.

*See, generally, Part XXV., Sect. 4, ante.*

**B. Jurisdiction of Courts.**

*See, now, 1923 Act, s. 4, re-enacting 1920 Act, s. 5 (1) (2) & (3); s. 17 (2).*

**7337. To grant order for possession—Dwelling-house & business demised together—Whether possession of business premises can be given.]—***ELLEN v. GOLDSTEIN*, No. 7055, *ante*.

*Compare Nos. 7263, 7312; ante.*

**PART XXVII. SECT. 5, SUB-SECT. 5. —B.**

*p. To grant stay of execution—Where rent in arrear.]—URKWICKIE v. GUTKIN* (1920), 55 L. T. 39.—*IR.*

**7338.** — Whether conditions precedent must be fulfilled—Effect of agreement between parties.]—*BARTON v. FINCHAM*, No. 7280, *ante*.

**7339.** Power to vary or rescind order—Where premises not within former Acts—Effect of 1920 Act.]—By 1920 Act, s. 5 (3), where any order or judgment has been made or given before the passing of that Act, but not executed, & in the opinion of the ct., the order or judgment would not have been made or given if that Act had been in force at the time when such order or judgment was made or given “the ct. may, on the application of the tenant, rescind or vary” the order or judgment. The word “may” in the sub-sect. means “may” & not “shall” & the effect of the sub-sect. is to give the county ct. judge, who is otherwise *functus officio*, a discretion to revise his judgment in the light of the new Act, but he is not bound to apply the new Act.—*TAYLOR v. FAIRES* (1920), 90 L. J. K. B. 391; 124 L. T. 732; 37 T. L. R. 55; 65 Sol. Jo. 116; 19 L. G. R. 56, D. C.

**7340.** — Consent order—Made under former Acts.]—*WELLESLEY v. WHITE*, No. 7086, *ante*.

**7341.** — —.]—The county ct. judge has the same jurisdiction, under 1920 Act, s. 5 (2) to vary a consent order for possession as he has in the case of such an order made *in invitum*.—*ROSSITER v. LANGLEY*, [1925] 1 K. B. 741; 94 L. J. K. B. 400; 133 L. T. 42; 41 T. L. R. 304; 23 L. G. R. 269, D. C.

**7342.** To grant stay of execution—Where rent in arrear—Under Increase of Rent & Mortgage Interest (War Restrictions) Act, 1915 (c. 9).]—*KELLY v. WHITE*, *PENN GASKELL v. ROBERTS*, [1920] W. N. 220, D. C.

*Annotation*:—*Consd. Upjohn v. Macfarlane*, [1922] 2 Ch. 256.

— Under 1920 Act.]—*See* No. 7273 *ante*.

**7343.** Jurisdiction of county court—Where annual rent exceeds £100.]—An action by a landlord to recover from a tenant possession of a house to which 1920 Act applies is a claim or proceeding “arising out of this Act” within the meaning of s. 17 (2), & the county ct. has jurisdiction to entertain the action, notwithstanding that the rent payable by the tenant is in excess of £100.—*RUSOFF v. LIPOVITCH*, [1925] 1 K. B. 628; 94 L. J. K. B. 355; 132 L. T. 789; 41 T. L. R. 278; 23 L. G. R. 230, C. A.

*See* COUNTY COURTS, Vol. XIII., pp. 469 *et seq.*

**Action brought in High Court—Though county court has jurisdiction.]—See** Nos. 7332, 7334, *ante*, No. 7346, *post*.

#### C. Costs.

*See* 1920 Act, s. 17 (2).

**7344.** Action in High Court—Which might have been brought in county court—Where 1920 Act, s. 16 (3), not applicable.]—*WOLFF v. SMITH*, No. 7332, *ante*.

**7345.** — —.]—*GILL v. LUCK*, No. 7334, *ante*.

**7346.** — —.]—*LEE v. ROBERTS* (1925), 60 L. Jo. 574, C. A.

**7347.** Claim against trespasser—Premises within the Acts—Whether claim “arising out of” the Acts.]—Pltf. obtained judgment against deft., who was a trespasser, for possession of premises which by reason of their rental were within 1920 Act:—*Held*: although the premises were within the Act, the claim for possession against a trespasser was not one “arising out of this Act”

within s. 17 (2), & consequently, pltf. was entitled to costs.—*GUNTER v. DAVIS*, [1925] 1 K. B. 124; 94 L. J. K. B. 352; 132 L. T. 538; 69 Sol. Jo. 841.

*Annotation*:—*Refd. Rusoff v. Lipovitch*, [1925] 1 K. B. 628.

**7348.** Duty of judge to consider—Where defendant relies on the Acts.]—Pltf. brought an action in the county ct. to recover possession of a house which she had purchased for her own occupation & of which notwithstanding notice to quit duly served on deft., the tenant, deft. refused to give pltf. possession. The county ct. judge refused to make an order for possession on the ground that upon the evidence he was not satisfied that alternative accommodation was available for deft. within Increase of Rent, etc. (Amendment) Act, 1919 (c. 90), s. 1 (1) (c), & made no order as to costs. A bill of costs was served upon pltf.'s solrs., being deft.'s costs in the county ct. indorsed with a two days' notice of taxation before the registrar. Correspondence followed, which resulted in the registrar sending to pltf.'s solrs. a note made by the county ct. judge the material part of which was, “I made no specific order as to costs, but I did not intend to deprive deft. of any costs to which he might be entitled as the successful party.” The costs were taxed & had since been paid:—*Held*: the registrar had rightly taxed the costs, inasmuch as they were the costs of an action within County Courts Act, 1888 (c. 43), s. 113, & were not governed by Increase of Rent & Mortgage Interest (War Restrictions) Rules, 1916, r. 17 (1). They therefore followed the event, as the county ct. judge made no specific order as to them.

Where deft. relies on the Rent Restrictions Acts as a defence to an action for recovery of possession of premises, the judge should consider expressly the question of costs, & not leave them to fall automatically on one party.—*BENSUSAN v. BUSTARD*, [1920] 3 K. B. 654; 89 L. J. K. B. 1117; 124 L. T. 278; 85 J. P. 15; 36 T. L. R. 811; 64 Sol. Jo. 669, D. C.

*Annotations*:—*Fold. Gunter v. Davis*, [1925] 1 K. B. 124. *Refd. Rusoff v. Lipovitch* (1924), 69 Sol. Jo. 276.

#### SECT. 6.—DECONTROL.

*See* 1923 Act, s. 2.

**7349.** By recovery of possession by landlord—Who is landlord—Mortgagor by sub-demise—At peppercorn rent.]—*JENKINSON v. WRIGHT*, No. 7030, *ante*.

**7350.** — — — Lessor holding under long lease.]—*JENKINSON v. WRIGHT*, No. 7030, *ante*.

**7351.** — — — Lessor holding at ground rent—Less than two-thirds of ratable value.]—*FINEY v. GUGGOLTZ*, No. 7037, *ante*.

*See, also*, No. 7092, *ante*.

**7352.** — — — Exclusion of tenant—Of premises within Acts.]—*CATTO v. CURRY*, No. 7091, *ante*.

**7353.** — — — What amounts to possession—Whether question of law or fact.]—*HALL v. ROGERS*, No. 7049, *ante*.

**7354.** — — —.]—*JEWISH MATERNITY HOME (TRUSTEES) v. GARFINKLE*, No. 7051, *ante*.

**7355.** — — — Actual distinguished from notional possession.]—*HALL v. ROGERS*, No. 7049, *ante*.

#### PART XXVII. SECT. 5, SUB-SECT. 5.—C.

**7345 i.** Action in High Court—Which might have been brought in county court.]—*HODGENS v. FUREY*, [1925] 2 I. R. 69.—*IR*.

Sect. 6.—Decontrol.]

7356. ——— Premises vacated—Key handed to & retained by landlord.]—JEWISH MATERNITY HOME (TRUSTEES) *v.* GARFINKLE, No. 7051, *ante*.

7357. ——— Possession of part—Premises comprising several dwelling-houses.]—DUNBAR *v.* SMITH, No. 7047, *ante*.

7358. ——— By tenant.]—CATTO *v.* CURRY, No. 7091, *ante*.

7359. By recovery of possession by tenant—Of rooms sub-let.]—CATTO *v.* CURRY, No. 7091, *ante*.

—— Mesne tenant—Whether a landlord.]—*See* Nos. 7036, 7037, *ante*.

7360. By premises ceasing to be used as dwelling-house.]—HYMAN *v.* STEWARD, No. 7052, *ante*.

7361. By loss of identity—By reconstruction—Part converted into flats—Whether whole decontrolled.]—ABRAHART *v.* WEBSTER, No. 7194, *ante*.

——.]—*See, also*, Nos. 7040, 7041, *ante*.

By termination of statutory tenancy.]—*See* No. 7237, *ante*.

## LAPSED LEGACY.

*See* EXECUTORS AND ADMINISTRATORS ; WILLS.

## LARCENY.

*See* CRIMINAL LAW AND PROCEDURE.

## LATIN INFORMATION.

*See* CROWN PRACTICE.

## LAW OFFICERS.

*See* CHARITIES ; CONSTITUTIONAL LAW ; CROWN PRACTICE ; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

## LAW SOCIETY.

*See* SOLICITORS.

## LEAVE AND LICENCE.

*See* EASEMENTS AND PROFITS À PRENDRE ; FISHERIES ; GAME ; LANDLORD AND TENANT ; NEGLIGENCE ; REAL PROPERTY AND CHATTELS REAL ; TRESPASS.

## LEGACIES.

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## LEGACY DUTY.

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## LEGISLATIVE POWER.

*See* CONSTITUTIONAL LAW ; DEPENDENCIES ; PARLIAMENT.

## LEGITIMACY AND LEGITIMATION.

*See* BASTARDY ; CONFLICT OF LAWS.

## LETTERS.

*See* CONTRACT ; EVIDENCE ; POST OFFICE.

## LETTERS PATENT.

*See* CONSTITUTIONAL LAW ; PATENTS AND INVENTIONS ; PEERAGES AND DIGNITIES.

END OF VOL. XXXI.



